

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. Nos. 03-17-90096 and 03-17-90097

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IN RE: COMPLAINTS OF JUDICIAL MISCONDUCT  
OR DISABILITY

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ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

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MEMORANDUM OPINION

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(Filed: March 12, 2018)

PRESENT: SMITH, *Chief Judge*.

This complaint was filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge and a United States Magistrate Judge (“Subject Judge I” and “Subject Judge II”). For the reasons discussed below, the complaint will be dismissed.

The Judicial Conduct and Disability Act provides a remedy if a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). A chief judge may dismiss a complaint if, after review, he or she finds it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is frivolous or lacks sufficient evidence to raise an inference of misconduct. 28 U.S.C. §§ 352(b)(1)(A)(i)-(iii).

Complainant was counsel of record for his brother-in-law, a plaintiff in a civil action pending before Subject Judge I and Subject Judge II. Subject Judge I issued an order terminating Complainant as plaintiff's counsel after Complainant filed a notice of withdrawal and Complainant's co-counsel (the attorney who had sponsored Complainant's admission pro hac vice) also withdrew. Approximately one week before Complainant filed a motion to withdraw, Subject Judge I issued an order to show cause why Complainant should not be held in contempt or otherwise sanctioned for failing to appear at two status conferences. Plaintiff's civil action remains pending and plaintiff is proceeding pro se at this time.

In the present complaint of judicial misconduct, Complainant alleges that the Subject Judges are "plaintiff hostile" and contends their handling of the underlying civil action was "unfair" and reflects a "long, consistent pattern of bias and partiality." Complainant alleges that the Subject Judges are biased against plaintiffs because of their prior work history. Complainant's primary support for his allegations of bias, however, is his disagreement with the Subject Judges' decisions and procedural rulings in his brother-in-law's case. For example, he complains that: (1) the Subject Judges waived deadlines for defendants and failed to "properly grant default judgment"; (2) the Subject Judges mishandled a putative violation of attorney client privilege committed by plaintiff's new counsel (who has also since withdrawn his appearance); (3) Subject Judge I "ignored" the amicus petition Complainant filed after he no longer represented the plaintiff; and

(4) Complainant alleges, moreover, that Subject Judge I “unfairly” assumed Complainant was at fault when he failed to attend a status conference and issued a show cause order.

To the extent Complainant seeks to collaterally attack any of the Subject Judges’ decisions or orders, Complainant’s allegations are subject to dismissal as merits-related.

“An allegation that calls into question the correctness of a judge’s ruling, ... , without more, is merits-related.” Rule 3(h)(3)(A), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Merits-related allegations do not constitute cognizable misconduct under the Judicial Conduct and Disability Act. See 28 U.S.C.

§ 352(b)(1)(A)(ii); Rules 3(h)(3)(A), 11(c)(1)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. The “misconduct procedure [under the Act] is not designed as a substitute for, or supplement to, appeals or motions for reconsideration. Nor is it designed to provide an avenue for collateral attacks or other challenges to judges’ rulings.” *In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability*, 517 F.3d 558, 561 (U.S. Jud. Conf. 2008). Accordingly, Complainant’s merits-related allegations are subject to dismissal.

In any event, there is no evidence of bias and partiality. Complainant complains that he was “chided” by the Subject Judges when he tried to present accurate information and that Subject Judge II became “visibly angry” when Complainant used the term “despicable” to describe defendant and defense counsel. Even assuming *arguendo* that Complainant’s allegations are true, these alleged actions do not constitute judicial

misconduct under the circumstances presented here. Expressions of impatience or even anger during a judge’s efforts at courtroom administration do not rise to the level of judicial misconduct. *See Liteky v. U.S.*, 510 U.S. 540, 555-556 (1994) (discussing the recusal standard and providing “Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at courtroom administration – even a stern and short-tempered judge’s ordinary efforts at courtroom administration – remain immune.”) (emphasis in original).<sup>1</sup> Furthermore, the record has been reviewed and there is no evidence of judicial misconduct. Indeed, the civil action is no longer referred to Subject Judge II and has been assigned to another magistrate judge. Complainant’s allegations are subject to dismissal as frivolous and unsupported by any evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(C), (D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Based on the foregoing, this complaint will be dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), (ii), and (iii).

s/ D. Brooks Smith  
Chief Judge

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<sup>1</sup> Complainant’s allegations regarding defense counsel are subject to dismissal because non-judges are not covered by the Judicial Conduct and Disability Act. *See* 28 U.S.C. §§ 351, 352(b)(1)(A)(i); Rule 4, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

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ORDER

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(Filed: March 12, 2018)

PRESENT: SMITH, *Chief Judge*.

On the basis of the foregoing opinion entered on this date, it is ORDERED AND ADJUDGED that the written complaint brought pursuant to 28 U.S.C. § 351 is hereby dismissed under 28 U.S.C. § 352(b)(1)(A)(i), (ii), and (iii).

This order constitutes a final order under 28 U.S.C. § 352(c). Complainant is notified in accordance with Rules 11(g)(3) and 18, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, of the right to appeal this decision by the following procedure:

Rule 18(a) Petition. A complainant or subject judge may petition the Judicial Council of the Third Circuit for review.

Rule 18(b) Time. A petition for review must be filed in the Office of the Circuit Executive within **42 days** after the date of the chief judge's order.

18(b) Form. The petition should be in letter form, addressed to the Circuit Executive, and in an envelope marked "Misconduct Petition" or "Disability

Petition.” The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with “I hereby petition the judicial council for review of . . .” and state the reasons why the petition should be granted. It must be signed. There is no need to enclose a copy of the original complaint.

The full text of the *Rules for Judicial-Conduct and Judicial-Disability*

*Proceedings* is available from the Office of the Circuit Executive and on the Court of

Appeals’ internet site, [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov).

s/ D. Brooks Smith

Chief Judge

Dated: March 12, 2018