

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-19-90017

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: May 20, 2019)

PRESENT: SMITH, *Chief Judge*.

This complaint is filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, against a United States District Judge (the “Subject Judge”). 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 alleges that he is the fiancé of a defendant who appeared before the Subject Judge for a supervised release revocation hearing. After a status conference, the Subject Judge ordered the defendant detained. The following week, the Subject Judge

revoked the defendant's supervised release and imposed a three-month prison sentence to be followed by a three-month stay in a halfway house. Among the terms of the judgment is a provision prohibiting contact between the defendant and Complainant. The defendant filed a pro se appeal; the appeal is pending.

According to Complainant, immediately before the defendant's status conference, the Subject Judge engaged in a brief meeting with probation officers and the prosecution outside of the presence of defense counsel. Complainant "believe[s he] was a main topic of the ex parte communications based on the Court's animosity towards [him] during the hearing." Among other things, Complainant alleges that, during the meeting, probation officers shared with the Subject Judge an email sent by Complainant to the probation officers, in which Complainant reacted with anger to the officers' having come to his home to look for the defendant.¹ The email stated, among other things, "[y]ou have a lot of nerve showing up at my house. Even if [the defendant] was home I would not allow you to come inside." Complainant alleges that he subsequently retracted the email and apologized, but that the probation officers did not advise the Subject Judge of this information.

In addition, Complainant speculates that the Subject Judge must have decided to detain the defendant during the ex parte meeting, prior to the defendant's status hearing, because U.S. Marshals were present in the courtroom during the hearing. Complainant

¹ Complainant appended a copy of this email to his complaint. It shows that Complainant copied the defendant, defense counsel, and the prosecutor on his email to the probation officers. The subsequent retraction and apology email also was sent to those recipients.

also alleges that, during the hearing, the Subject Judge conducted a “character assassination” and engaged in a “verbal assault” against him. Complainant alleges that the Subject Judge’s ultimate decision to detain the defendant was improper and contends that “the underlying proceeding was a ruse.” Complainant also included voluminous attachments to the complaint. The attachments largely concern Complainant’s claim that his fiancé was “the victim of sexual abuse and misconduct” by her doctor through the supervised release program.²

Pursuant to Rule 11(b), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*,³ the Subject Judge was asked to respond to Complainant’s allegations and to provide a transcript of the status conference. The Subject Judge submitted a response and the transcript, and the complaint is now ripe for disposition.

The majority of Complainant’s allegations reflect his disagreement with the Subject Judge’s decisions and rulings, including the decision to detain the defendant and to prohibit contact between Complainant and the defendant. These allegations are merits-

² Complainant apparently attempted to move to intervene in his fiancé’s criminal proceeding for the purpose of presenting the abuse allegations to the Subject Judge, although the motion was not docketed. Complainant alleges, however, that he reported the allegations to state authorities, who “took it very seriously” and may have closed the doctor’s medical practice and/or filed criminal charges against him. It is noted that any allegations concerning behavior by the doctor are beyond the scope of this proceeding because only federal judges are 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*.

³ The *Rules for Judicial-Conduct and Judicial-Disability Proceedings* were amended effective March 12, 2019. Because this complaint was filed prior to the effective date of the amended rules, the amended rules do not apply to this complaint.

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 allegations are therefore subject to dismissal.

Indeed, defendant’s appeal remains pending, and this administrative proceeding does not provide an alternative forum in which to consider the merits of that appeal. 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, nothing in this opinion should be construed as commenting upon the merits of the defendant’s appeal.

Complainant alleges that the Subject Judge conducted a “character assassination” during the status hearing. After a careful review of the hearing transcript, the record does not support a conclusion that the Subject Judge treated Complainant in a “demonstrably egregious and hostile manner” rising to the level of judicial misconduct. *See* Rule 3(h)(1)(D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. The Subject Judge, as well as both the prosecution and defense, discussed very serious concerns about Complainant’s relationship with the defendant. Among other things, there were

allegations that Complainant's interactions with the defendant led to instances in which she violated the terms of her probation, and there were concerns about the possibility of whether, if released, Complainant and the defendant would reside together. While it is understandable that Complainant was personally offended by this discussion, it cannot be overlooked that these topics were relevant to the purpose of the hearing: to address the defendant's ability to comply with the terms of her probation. Moreover, "expressions of impatience, dissatisfaction, annoyance, and even anger" arising during ordinary efforts at courtroom administration do not establish bias or partiality, unless they reveal such a high degree of antagonism or favoritism as to make fair judgment impossible. *See Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also United States v. Wecht*, 484 F.3d 194, 220 (3d Cir. 2007) (same). The Subject Judge did not make any statements during the hearing that display antagonism, favoritism, or any similar behavior that could constitute judicial misconduct.

As to the alleged *ex parte* discussion, the Subject Judge's response acknowledges that the defendant's probation officer provided her with a copy of Complainant's email in advance of the status hearing. The Subject Judge observes that both the prosecution and defense were copied on that email, and so were presumably already aware of its contents, and that the email was shortly thereafter discussed in detail on the record during the defendant's status hearing, in defense counsel's presence. There is therefore no basis for concluding that the probation officer's provision of the email constitutes an improper *ex*

parte communication constituting judicial misconduct. *See* Rule 3(h)(1)(C), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Moreover, Complainant’s allegations presume that the alleged meeting constituted “improper discussions with parties or counsel for one side in a case” as described in Rule 3(h)(1)(C), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Under appropriate circumstances, however, a judge is authorized to initiate, permit, or consider ex parte communication “for scheduling, administrative, or emergency purposes,” so long as the communication “does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result. . . .” Canon 3(A)(4)(b), Code of Conduct for United States Judges.⁴ Here, the alleged discussion concerned a threatening message sent by a non-party to the criminal proceeding. Indeed, during the status hearing, the Subject Judge stated on the record that she viewed the message as both threatening and obstructive, and advised that she would be referring it to the U.S. Attorney’s Office for further action.

Next, Complainant alleges that the Subject Judge decided to detain the defendant in advance of the hearing. The record does not support this allegation. Rather, it is apparent that, based upon information provided by the probation officers, the Subject Judge became concerned about Complainant’s interactions with the defendant, and so stated on the

⁴ The Code of Conduct for United States Judges is designed to provide guidance to judges, but is not a set of disciplinary rules. “Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules.” Commentary on Rule 3, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

record at the outset that “[she would] hear the parties but [she was] inclined to detain [the defendant].” This statement makes clear that the Subject Judge had not pre-determined the outcome. To the extent this is not a merits-related challenge to the Subject Judge’s detention decision, these allegations are subject to dismissal as unsupported by evidence that would raise an inference that misconduct has occurred. 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Based on the foregoing, the 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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ORDER

(Filed: May 20, 2019)

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.

s/ D. Brooks Smith

Chief Judge

Dated: May 20, 2019