

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-19-90069

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

MEMORANDUM OPINION

(Filed: January 2, 2020)

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 is a pro se civil plaintiff in a proceeding before the Subject Judge. In the course of that proceeding, Complainant served a subpoena *duces tecum* on a third party state agency. Because an employee of the agency advised Complainant that

compliance with the subpoena would require submission of a form and fee, Complainant moved in the District Court to compel compliance. The agency responded to the motion with a letter advising that there was a miscommunication that could likely be resolved without court intervention. The Magistrate Judge¹ then set the matter for a telephone conference.

Prior to the date of the conference, Complainant filed a motion for sanctions against the agency for failing to comply with the subpoena. In a text-only order, the Subject Judge denied without prejudice Complainant's motion to compel and motion for sanctions. In that order, the Subject Judge stated that the sanctions motion was "inexcusable" in light of the efforts that were underway to resolve the discovery dispute, and cautioned Complainant that "further unnecessary litigation conduct will not be tolerated by this Court."

Thereafter, the Magistrate Judge held the telephone conference and entered an order directing the agency to advise in writing whether it would comply with the subpoena. Counsel for the agency responded that it would comply. Although its compliance was tardy due to internal issues, it appears that the agency has since provided Complainant with the documents sought in the subpoena.

In this complaint of judicial misconduct, Complainant alleges that the Subject Judge improperly denied his motions and "wrongfully accused [him] of causing 'undue burden on already stretched judicial resources.'" Complainant further alleges that the

¹ The Magistrate Judge is not named as a Subject Judge of the complaint of misconduct.

Subject Judge's order is "extremely hostile, threatening, and menacing" and was issued "without knowing all the facts concerning the motions." Complainant claims that the order demonstrates that the Subject Judge "is in fact prejudiced against the pro se plaintiff for unknown reasons and because of the particular part[ies] that he is suing."

It is apparent that Complainant's allegations are, at least in part, an effort to collaterally challenge the Subject Judge's order denying his motions to compel and for sanctions. Such allegations do not constitute cognizable misconduct under the Judicial Conduct and Disability Act. "Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse." Rule 4(b)(1), *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 non-cognizable allegations are subject to dismissal. *See* 28 U.S.C. § 352(b)(1)(A)(ii); Rules 4(b)(1), 11(c)(1)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

To the extent Complainant's allegations are not based solely on his disagreement with the merits of the Subject Judge's order, they are unsubstantiated. Complainant offers no evidence that the Subject Judge harbors a bias against him. The language of the Subject Judge's text-only order does not demonstrate that the Subject Judge acted in a

“hostile, threatening, and menacing manner” as Complainant alleges. Moreover, although the Subject Judge employed stern words in the order, “expressions of impatience, dissatisfaction, annoyance, and even anger” 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’s text-only order does not satisfy this standard. Its language does not display antagonism or favoritism, and it does not rise to the level of demonstrably egregious and hostile treatment constituting judicial misconduct under Rule 4(a)(2)(B), *Rules for Judicial-Conduct and Judicial-Disability Proceedings*. Because the record reveals no evidence to support the claim that the Subject Judge harbors a bias against him, Complainant’s remaining allegations are subject to dismissal as frivolous and 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)(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)(ii) and (iii).

s/ D. Brooks Smith
Chief Judge

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-19-90069

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

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

ORDER

(Filed: January 2, 2020)

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)(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: January 2, 2020