

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
JAN 04 2017
FIFTH CIRCUIT
LYLE W. CAYCE, CLERK

Complaint Number: 05-17-90013

MEMORANDUM

In February 1999, complainant, a civil litigant, filed a judicial misconduct complaint against the subject United States District Judge. Complainant's allegations were dismissed as merits-related and frivolous under former 28 U.S.C. §§ 372(c)(3)(A)(ii) and (iii) – now 28 U.S.C. §§ 352(b)(1)(A)(ii) and (iii). He petitioned for review, and an Appellate Review Panel of the Judicial Council affirmed the dismissal of the complaint.

Complainant has now submitted a 26-page “petition” to the Judicial Council requesting an investigation into the subject judge's conduct. To the extent that complainant is attempting to supplement or reopen the 1999 complaint, the statute provides for no further review of an unfavorable decision and the request is DENIED. To the extent that complainant's petition is a new judicial misconduct complaint against the subject judge, it has been considered fully and is DISMISSED as set forth below.

The subject judge presided over four cases that complainant filed in 1995 and 1998 against his former employer and related entities. (Case No. 1, aff'd, 5th Cir. Case No. A; Case No. 2; and Case Nos. 3 and 4, aff'd, 5th Cir. Case No. B)¹. In connection with Case Nos. 3 and 4, complainant filed a petition for writ of mandamus in the Fifth Circuit, requesting that the subject judge be required to recuse herself, which was denied (5th Cir. Case No. D).

¹ In connection with Case Nos. 3 and 4, Complainant also filed an appeal from the subject judge's denial of his motion to recuse, which was dismissed for lack of jurisdiction. 5th Cir. Case No. C.

The core of complainant's complaint is that the subject judge "[e]ngaged in a pattern of conduct inconsistent with her constitutional duty to faithfully execute the laws" in that she improperly failed to disclose her affiliation with complainant's former employer (assignments from an entity related to the former employer and service as a director of an organization sharing a location with the former employer), that she was biased against complainant because of the affiliation, and that she should have recused from his cases.² To the extent complainant's allegations are repetitive of those raised and dismissed in the 1999 complaint, they are frivolous and subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

In connection with the subject judge's decisions not to recuse sua sponte or in response to complainant's motions for her recusal, complainant claims that she violated Canon 3(C) of the Code of Judicial Conduct and 28 U.S.C. § 455, including by entering judgment in favor of the former employer when she was on the board of the organization sharing a location with the former employer; that her failure to disclose her association with the former employer deprived complainant "of his constitutional right to a due-process hearing on the merits before an impartial tribunal" because he did not have "the opportunity to bring this fact to the attention of the Appellate and U.S. Supreme Courts" such that his chances for success in those courts were impacted negatively; and that the subject judge should have recused from complainant's cases after accepting a paid assignment from an entity related to the former employer. To the extent these allegations are repetitive of the 1999 complaint, in that they attack the subject judge's decisions on disclosure and recusal that were addressed in that complaint, they are frivolous and subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii). To the extent the allegations are new, in that they attack the subject judge's decisions on disclosure and recusal that were not addressed in the 1999 complaint, they relate directly to the merits of the judge's decisions and are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii).

² Complainant's attempt to conflate the organization and the defendants in his lawsuits was rejected by the orders entered in the 1999 complaint.


In connection with other decisions made by the subject judge in complainant's lawsuits, he alleges that her denial of his motion for a restraining order and injunction against the former employer had the effect of allowing the former employer "the opportunity to deprive an established scientist of his profession;" that in dismissing Case No. 2 on Complainant's motion, the subject judge "[o]bstructed justice by complying with [the former employer] to deny Plaintiff a paid-up health benefit to which he was medically eligible (cancer) and entitled;" that the subject judge "[o]bstructed justice and abused her judicial authority by suppressing crucial, material evidence refuting [the former employer's] claims for justifying its actions against Plaintiff;" and that the judge "articulated decisions that she later reversed by rulings that favored Defendant." These allegations are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii) because they are directly related to the merits of the subject judge's decisions. Further, the allegation related to the dismissal of Case No. 2 is frivolous and subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) because the case was dismissed on complainant's own motion.

With regard to the subject judge's response to complainant's petition for mandamus, he complains that it "displays an underlying animosity" toward him; that her "assessment of [complainant's] psychological state of mind is subjective and prejudicial;" that "she had already formed an opinion in" Case Nos. 3 and 4 before trial or the completion of discovery; that it showed a "predisposition and bent of mind" and "pervasive bias" against him; and that the subject judge was attempting "to dissuade [complainant's] attorneys from pursuing the recusal issue." These claims are frivolous and/or lack sufficient evidence to raise an inference that misconduct has occurred and are therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii). *See also* Liteky v. U.S., 510 U.S. 540, 555-56 (1994) ("opinions formed by the judge on the basis of facts introduced or events occurring the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible" and a judge's "expressions of impatience, dissatisfaction, annoyance, and even anger" do not establish bias or partiality).

Finally, complainant speculates that the subject judge “had an interest in the outcome of the proceedings;” alleges that she “[m]aintained extrajudicial contact with” and received “extrajudicial information” from the former employer while presiding over his cases; and claims that she “filed a false and deceptive public record” (by altering her biography in a resource which publishes judicial profiles). These assertions lack sufficient evidence to raise an inference that misconduct has occurred, and are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Judicial misconduct proceedings are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

An order dismissing the complaint is entered simultaneously herewith.


Carl E. Stewart
Chief Judge

December 28, 2016

U. S. COURT OF APPEALS
FILED

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FIFTH CIRCUIT
LYLE W. CAYCE, CLERK

BEFORE THE JUDICIAL COUNCIL
OF THE FIFTH CIRCUIT

No. 05-17-90013

Petition for Review by [REDACTED]
of the Final Order Filed December 28, 2016
Dismissing Judicial Misconduct Complaint Against
[REDACTED]

Under the Judicial Improvements Act of 2002.

ORDER

An Appellate Review Panel of the Judicial Council for the Fifth Circuit has reviewed the above-captioned petition for review, and all the members of the Panel have voted to affirm the order of Chief Judge Stewart, filed December 28, 2016, dismissing the Complaint of [REDACTED] against [REDACTED] under the Judicial Improvements Act of 2002.

The Order is therefore

AFFIRMED.

February 23, 2017
Date

Priscilla R. Owen
Priscilla R. Owen
United States Circuit Judge
For the Judicial Council of the Fifth Circuit