

23-90054-jm
February 9, 2024
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re
CHARGE OF JUDICIAL MISCONDUCT Docket No. 23-90054-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

In August 2023, the Complainant filed a complaint with the Clerk’s Office of the United States Court of Appeals for the Second Circuit pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364 (the “Act”), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the “Rules”), charging a district judge (the “Judge”) of this Circuit with misconduct.

BACKGROUND

In February 2016, a prison inmate, proceeding pro se, filed a civil rights lawsuit that was assigned to the Judge. In March of that year, the Judge granted the plaintiff’s motion to proceed *in forma pauperis*, dismissed the complaint for failure to state a claim, and entered judgment accordingly. The judgment did not specify whether the dismissal was with or without prejudice. The court of

appeals then, in December 2016, dismissed the plaintiff's appeal as lacking an arguable basis in law or in fact, but, in the same order, remanded to the district court with instructions to modify the judgment to specify that a portion of the complaint was dismissed without prejudice.

After remand, the plaintiff moved to vacate the prior judgment, and the Judge thereafter directed the district court clerk's office to enter an amended judgment specifying that certain claims were dismissed without prejudice. An amended judgment was entered accordingly.

About 6 years later, in 2023, the plaintiff filed a letter on the district court's docket requesting information about the status of his 2017 motion to vacate – specifically, whether “there was any disposition” of the motion. In response, the Judge entered a text order clarifying that the district court had “responded to Plaintiff's motion by posting the Amended Clerk's Judgment clarifying that Plaintiff's constitutional claims were dismissed without prejudice.”

The Complainant – who has the same last name as the plaintiff in the underlying lawsuit, but who does not specify what, if any, relationship they have – then filed this misconduct complaint against the Judge. It alleges that the Judge “never rendered a judgment” on the plaintiff's motion to vacate, and that

“such delay is of an egregious character that . . . constitutes a dereliction of duty.” The complaint then contains legal argument, seeking to establish that the amended judgment described above did not adequately address the motion to vacate.

DISCUSSION

The complaint is dismissed.

The complaint could be construed in one of two ways: it either alleges that the Judge has unduly delayed ruling on the 2017 motion to vacate, or that the 2017 amended judgment was erroneous because it did not adequately or appropriately address the arguments raised in the motion to vacate. Either way, the allegations are dismissed as “directly related to the merits of a decision or procedural ruling.” 28 U.S.C. § 352(b)(1)(A)(ii). To the extent the allegation pertains to delay, the rules and guidance implementing the Act make clear that allegations concerning delay are ordinarily not the proper subject of a judicial misconduct complaint, and should be dismissed under 28 U.S.C. § 352(b)(1)(A)(ii) as merits-related “unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.” Rule 4(b)(2); *see also* Rule 4 cmt. (“[A] complaint of delay in a

single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge, *i.e.*, assigning a low priority to deciding the particular case.”). The Complainant does not allege improper motive, nor does she allege habitual delay in a significant number of unrelated cases.

To the extent the complaint alleges that the 2017 amended judgment was erroneous because it did not adequately address the motion to vacate, the allegation is that the Judge got it wrong, not that he engaged in misconduct. *See* Rule 4(b)(1) (“Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling.”); 11(c)(1)(B). Purely merits-related allegations are excluded from the Act to “preserve[] the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge’s decision or procedural ruling.” Rule 4 cmt. The amended judgment may be challenged, to the extent the law allows, only through normal appellate procedures.

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.