

23-90020-jm
January 24, 2024
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re
CHARGE OF JUDICIAL MISCONDUCT Docket No. 23-90020-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

In March 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 November 2022, the Complainant, proceeding pro se, filed an employment discrimination complaint against his former employer and three individuals, as well as motions to proceed *in forma pauperis* (“IFP”) and for appointment of counsel. The Judge granted the IFP motion, and, in January 2023, dismissed the complaint sua sponte but granted the Complainant leave to file an

amended complaint within 30 days. The Judge then dismissed the amended complaint for lack of subject matter jurisdiction and for failure to state a claim, denied the motion for appointment of counsel as moot, and entered judgment accordingly. The Judge then denied the Complainant's motion to alter or amend the judgment.

The misconduct complaint recounts the procedural history described above and alleges that the Judge is "incompetent" because she dismissed the complaint for lack of subject matter jurisdiction despite the Complainant's invocation of federal causes of action. While not perfectly clear, the Complainant appears to allege not only that the Judge erred, but that she acted willfully; that is, that she knew that the court had subject matter jurisdiction but nonetheless dismissed the case. The Complainant states, for example, that the Judge "willfully disregarded my federal case"; that "when a federal judge admits that she cannot hear a case based on federal causes of action, that means she is incompetent"; and that the Judge's dismissal of his case "proves the judiciary is so hostile, judges are willing to render themselves incompetent as not to hear a pro se case."

DISCUSSION

The complaint is dismissed.

The gravamen of the complaint is that the Judge erred by dismissing the complaint for lack of subject matter jurisdiction. This is a claim that the Judge got it wrong, not that she engaged in misconduct. Accordingly, the claim is dismissed as “directly related to the merits of a decision or procedural ruling.” 28 U.S.C. § 352(b)(1)(A)(ii); Rule 4(b)(1) (“Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse.”); 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. If the Complainant wishes to challenge the Judge’s dismissal of his complaint, he may do so, to the extent the law allows, only through normal appellate procedures.

If the Complainant alleges willful misconduct or hostility—i.e., that the Judge willfully disregarded the law and/or treated the Complainant in a hostile manner by dismissing his complaint—the claim is derivative of the merits, but to

the extent it is separate it is dismissed as “lacking sufficient evidence to raise an inference that misconduct has occurred.” Rule 11(c)(1)(D). A decision for or against a litigant, without more, does not constitute hostile treatment. And a claim that a judge willfully disregarded the law must identify clear and convincing evidence of willfulness, that is, clear and convincing evidence of a “judge’s arbitrary and intentional departure from prevailing law based on the judge’s disagreement with, or willful indifference to, that law.” *In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability*, 517 F.3d 558, 562 (U.S. Jud. Conf. 2008); *see also id.* (stating that a “series of erroneous rulings” must be “virtually habitual”). Even if the Judge’s decision here to dismiss the complaint were incorrect, it would not, without more, constitute evidence of willful disregard of the law.

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