

23-90005-jm
January 24, 2024
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re
CHARGE OF JUDICIAL MISCONDUCT Docket No. 23-90005-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

On January 30, 2023, and May 16, 2023, the Complainant filed a complaint and supplemental papers 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 May 2022, the Complainant, representing himself, filed an employment discrimination lawsuit against a municipal agency. On October 12, 2022, the defendants’ attorney filed a letter requesting an extension of time to move to dismiss. The letter stated, among other things, that the Complainant did not

consent to the extension and “ha[d] not provided a specific reason for refusing to consent.” The Judge granted the extension the following day.

Four days later—i.e., October 17—two of the Complainant’s filings were docketed, though they were dated October 12 and October 13. In the first, dated October 12 (i.e., before the Judge had ruled on the extension request), the Complainant objected to the defendants’ extension request, arguing that the case had been unnecessarily prolonged, which had “taken a toll on my family both emotionally and financially.” In the second, dated October 13, the Complainant expressed his disagreement with the defendants’ representation to the Judge that the Complainant had not provided a reason for refusing to consent, and reiterated that the case was inflicting an “emotional and financial” burden on his family.

There is nothing on the docket indicating that the Judge responded to these two submissions. The Complainant then, in November and December 2022, filed a request for default and a letter “requesting a judicial intervention and a review of the case based on the actions of the defendants’ attorney.” The letter contended that the defendants’ attorney had committed “perjury” in October by representing that the Complainant had not given a reason for

refusing to consent, and requested that the Judge “consider retracting” her decision to grant an extension. The Judge then entered an order relevant to the briefing schedule and stated that “[a]ll other requests for judicial intervention and certificate of default are denied at this time.”

In January 2023, the Complainant filed this misconduct complaint, alleging, in essence, that defense counsel lied to the Judge when he submitted his extension request; that the Complainant had exposed the lie; and that the Judge had chosen to ignore defense counsel’s “blatant acts of perjury.” The Complainant alleges that the Judge’s “disregard of the defendant’s perjurious actions fails to uphold the integrity of the United States court system and also denies [him] the right to file a default judgment on the case since the defendant did not submit a motion to dismiss by the deadline set by the court.” The May 2023 supplemental filing largely reiterates the original complaint; the Complainant states again that defense counsel made a “false statement” when he represented that the Complainant had not provided a reason for refusing to consent.

DISCUSSION

The complaint is dismissed.

The misconduct complaint essentially seeks to challenge the Judge's decision to grant an extension request and to not retract that extension once the Complainant had put forth evidence of defense counsel's purported misrepresentations. A claim that a judge should or should not have granted an extension is a claim that the Judge got it wrong, not that she engaged in misconduct. Accordingly, the claims are 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 decisions related to the extension request, he may do so, to the extent the law allows, only through normal appellate procedures.

The claim that the Judge should have taken action against defense counsel for counsel's purported perjury is also dismissed as merits-related. A decision

whether to impose sanctions or refer a matter for prosecution or investigation is an official judicial action that will not be second-guessed in a judicial misconduct proceeding absent a supported and credible allegation of improper motive. *See* Rule 4 cmt. (“Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related.”). The Complainant presents no credible and supported allegation of improper motive.

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