JUDICIAL COUNCIL

OF THE NINTH CIRCUIT

FILED
FEB 25 2008
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN RE COMPLAINT OF JUDICIAL MISCONDUCT	No. 07-89099 **MEMORANDUM AND ORDER**

KOZINSKI, Chief Judge:

A complaint of misconduct has been filed against three circuit judges, a district judge and a magistrate judge of this circuit. Complainant, a prisoner, has brought a civil rights lawsuit against several prison officials. That case is currently assigned to the district judge and referred to the magistrate judge; it has been appealed to the three circuit judges. Earlier in the proceedings, the magistrate judge issued an order denying leave to file a second amended complaint that stated, incorrectly, that complainant had failed to submit a proposed second amended complaint. The magistrate judge then issued a new order noting the error and granting leave to file a second amended complaint. That order also directed defendants to inform the court whether they wanted to maintain a pending motion for summary judgment that they had filed regarding the first amended complaint. In a letter to the court that was served on complainant, defendants elected to maintain the motion and also requested that the court conduct a preliminary

screening for exhaustion on new claims in the second amended complaint. The magistrate judge then issued a Report and Recommendation recommending a grant of partial summary judgment for defendants and dismissal of the new claims for failure to exhaust administrative remedies. The district judge adopted the recommendations and ordered the case to proceed on the remaining claims. Because the caption of the order mistakenly read "Order Dismissing Action," the Clerk of Court erroneously entered judgment on all claims, closing the case. The magistrate judge then issued an order vacating the Clerk's erroneous entry of judgment. The case remains pending.

Complainant alleges that the district judge and magistrate judge conspired with the attorney for the defendants to deprive complainant of his rights in violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO). He alleges that the magistrate judge's two orders that corrected earlier mistakes were deceptive "cover up letter[s]" constituting mail fraud. He alleges that the magistrate judge and the defendants' attorney devised a scheme to dispose improperly of his second amended complaint without making the defendants file a Rule 12(b)(6) motion to dismiss. He alleges that the district judge's order adopting the magistrate judge's recommendations regarding the second amended complaint also constitutes mail fraud because it deceived the circuit judges and

caused them to dismiss complainant's appeal of the order. But complainant hasn't included any objectively verifiable proof (for example, names of witnesses, recorded documents or transcripts) supporting these allegations. Because there isn't sufficient evidence to raise an inference that misconduct occurred, these charges are dismissed. 28 U.S.C. § 352(b)(1)(A)(iii); Misconduct Rule 4(c)(3).

Complainant also alleges that the magistrate judge and the defendants' attorney conspired with prison officials to transfer him so that he would be unable to file a timely appeal. He asserts that a prison official told him the transfer was a "special request." But complainant hasn't offered any objectively verifiable proof that the magistrate judge had anything to do with the transfer. Because there isn't sufficient evidence to raise an inference that misconduct occurred, this charge is dismissed. 28 U.S.C. § 352(b)(1)(A)(iii); Misconduct Rule 4(c)(3).

Complainant also alleges that the magistrate judge's recommendations regarding his second amended complaint were contrary to the law. Complainant alleges that the three circuit judges erroneously dismissed his appeal from the district judge's order regarding the second amended complaint. These allegations relate directly to the merits of the judges' rulings, so they must be dismissed. 28 U.S.C. § 352(b)(1)(A)(ii); Misconduct Rule 4(c)(1). The procedures for judicial misconduct are not a proper venue for challenging a judge's rulings. See In re

Charge of Judicial Misconduct, 685 F.2d 1226, 1227 (9th Cir. Jud. Council 1982).

Complainant also alleges that the magistrate judge exceeded his authority by preparing and issuing orders adopting his recommendations that purport to be signed by a district judge, depriving complainant of the de novo review of a district judge. He asserts that this allegation is bolstered by the use of the same "litany" in orders from two different district judges adopting this magistrate judge's recommendations. He also alleges that the district judge didn't review the magistrate judge's decisions de novo, but instead allowed the magistrate judge to prepare and issue orders using the district judge's electronic signature. These allegations lack objectively verifiable proof. Judges often use similar or identical language in orders that concern similar legal or factual matters. The use of similar language in the district judges' orders doesn't raise any inference that misconduct occurred. Because there isn't sufficient evidence to raise an inference that misconduct occurred, these charges are dismissed. 28 U.S.C. § 352(b)(1)(A)(iii); Misconduct Rule 4(c)(3).

Complainant also alleges that the magistrate judge's order vacating the Clerk of Court's entry of judgment exceeded the magistrate judge's powers because it vacated the order of a district judge. This allegation lacks a factual foundation because the magistrate judge's order vacated the Clerk's erroneous

entry of judgment, not the district judge's order. Because this charge lacks a factual foundation, it is dismissed. 28 U.S.C. § 352(b)(1)(B).

Complainant also alleges that the circuit judges' denial of his motion to have his case considered by the panel that disposed of his earlier appeal, and their failure to address his motion for reconsideration of their decision, indicate "something darker" than "coincidence." But the judges did rule on his motion, and denied it, and there is nothing unusual about having a later appeal handled by a different panel than an earlier appeal. This happens quite often for entirely legitimate reasons. This charge lacks a factual foundation, so it is dismissed. 28 U.S.C. § 352(b)(1)(B).

DISMISSED.