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MAY 01 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**JUDICIAL COUNCIL
OF THE NINTH CIRCUIT**

**IN RE COMPLAINT OF
JUDICIAL MISCONDUCT**

No. 07-89133

MEMORANDUM AND ORDER

KOZINSKI, Chief Judge:

A complaint of misconduct has been filed against a district judge of this circuit. Complainant, a pro se litigant, filed a civil rights case in district court. His second amended complaint was ordered filed by the subject judge on a Notice of Document Discrepancies form. The docket does not indicate whether a proof of service was filed concurrently. A few days later, the judge granted the defendants' pre-existing motion for a more definite statement and ordered complainant to file an amended complaint with 30 days. It does not appear from the docket that complainant filed a new complaint. At a scheduling conference three months later, the judge ordered him to serve the second amended complaint. Two defendants then filed a motion to dismiss the claims in the second amended complaint that pertained to them. The judge granted the motion. The remaining defendants filed an answer and the case proceeded until the defendants filed a

motion for terminating sanctions due to discovery violations. The judge granted the motion and dismissed all claims with prejudice. After the complaint was dismissed, the subject judge rejected, because the case was closed, two documents that complainant attempted to file. The judge also denied a motion to reopen. Complainant appealed. The appeal was dismissed for failure to prosecute after complainant failed to pay the filing fee.

Complainant alleges that the judge's two dismissal orders were improper because complainant never filed his "second amended summons with proof of service." He may also allege that the defendants could not file motions to dismiss before the second amended complaint was served. Complainant appears to allege that the judge should not have rejected his documents on the ground that the case was closed. He alleges that the judge, by not "signing" his motion to reopen, "is withholding evidence." Because all of these charges are directly related to the merits of a judge's rulings in the underlying case, they must be dismissed. 28 U.S.C. § 352(b)(1)(A)(ii); Rule 4(c)(1) of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability (Misconduct Rules). A complaint of judicial misconduct is not a proper vehicle for challenging a judge's rulings. See In re Charge of Judicial Misconduct, 685 F.2d 1226, 1227 (9th Cir. Jud. Council 1982).

Although complainant does not name any circuit judges in this complaint, he raises two issues concerning his appeal. First, he states that he never received the “letter” from the court of appeals requiring him to pay filing fees. The docket indicates that a two-judge panel denied complainant’s motion to proceed in forma pauperis and ordered that he pay the filing fee for the appeal. To the extent he alleges that the order was sent to an incorrect address, the allegation is dismissed because this complaint procedure applies only to federal judges and any mistake involving mailing addresses would not involve action by a judge. Misconduct Rules 1(d). Furthermore, the court of appeals followed its normal practice of using the same address that appears on the district court’s docket. Although complainant may have intended for the court to use a different address found on the notice of appeal, he did not notify either court of his desire to change his mailing address.

Second, he complains that an order—presumably the deputy clerk’s order dismissing his appeal for failure to prosecute—was not issued by two circuit judges. To the extent he alleges that it was improper for a clerk to issue the order, the allegation is dismissed because it does not constitute misconduct. Misconduct Rule 4(c)(2)(A); see 28 U.S.C. § 351(a). A deputy clerk/motions attorney is authorized to issue an order dismissing an appeal when an appellant fails to

prosecute the appeal. Ninth Cir. R. 42-1; Ninth Cir. Gen. Order 6.3.

DISMISSED.