

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT  
FEB 20 2019

**CONFIDENTIAL**

**BEFORE THE CHIEF JUDGE  
OF THE ELEVENTH JUDICIAL CIRCUIT**

David J. Smith  
Clerk

**Judicial Complaint No. 11-18-90138**

**IN THE MATTER OF A COMPLAINT FILED BY \_\_\_\_\_**

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IN RE: The Complaint of \_\_\_\_\_ against \_\_\_\_\_, U.S. Magistrate Judge for the U.S. District Court for the \_\_\_\_\_ District of \_\_\_\_\_, under the Judicial Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C. §§ 351-364.

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**ORDER**

\_\_\_\_\_ (“Complainant”) has filed this Complaint against United States Magistrate Judge \_\_\_\_\_ (the “Subject Judge”), pursuant to Chapter 16 of Title 28 U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (“JCDR”).<sup>1</sup>

As an initial matter, after Complainant filed her Complaint, she filed two supplemental statements. The filing of the supplemental statements is permitted. See 11th Cir. JCDR 6.7.

Background

The record shows that in December 2017 Complainant filed an “Emergency Motion for Declaratory Judgment/Injunctive Relief/Temporary Restraining Order” in which she, among other things: (1) stated she was a transgender person diagnosed with Gender Dysphoria; (2) alleged that certain individuals were hindering her receipt of adequate medical care at her place of incarceration; and (3) and sought to enjoin the defendants to allow her to have surgery.

In February 2018 the Subject Judge issued a report recommending that Complainant’s emergency motion be denied with prejudice, finding in part that she failed to show a substantial likelihood that she would prevail on the merits and that there was not a substantial threat she would suffer irreparable injury if the injunction was not granted. In the report, the Subject Judge discussed this Court’s decision in Kothmann v.

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<sup>1</sup> Because Complainant states she has lived as a woman since 2008, this order uses female pronouns to refer to her.

Rosario, 558 Fed. App'x 907 (11th Cir. 2014) (unpublished), noting that the decision was issued "during the Rule 12(b)(6) stage," and stating that in that case this Court:

was not willing to decide whether hormone treatment in fact was medically necessary to treat prisoner[s'] GID [Gender Identity Disorder<sup>2</sup>] or what other kinds of treatment could adequately address GID. The medical officer's refusal to provide any treatment to the prisoner for GID was sufficient to state a facially plausible Eighth Amendment claim because the prisoner alleged facts sufficient to show that hormone treatment was recognized, accepted, and medically necessary treatment for GID yet the medical officer knowingly refused prisoner's requests for the treatment.

The Subject Judge stated, "It then makes sense that if \_\_\_\_\_ would not decide whether hormone treatment was medically necessary, then this Court should follow and not decide whether surgical intervention is medically necessary in the instant matter and in response to a motion for injunctive relief."<sup>3</sup>

Complainant filed objections to the report and recommendation, and other motions seeking various types of relief. In April 2018 the district judge entered an order: (1) adopting the Subject Judge's report in part; (2) agreeing that Complainant had not shown irreparable harm and a likelihood of success on the merits; (3) denying the emergency motion without prejudice; and (4) allowing Complainant to file a complaint within 21 days of the date of the order. Later that month, Complainant filed a motion for extension of time to comply with the court's order, and the Subject Judge denied the motion, finding that Complainant had not established good cause. In late May 2018 the district judge issued an order dismissing the case without prejudice, noting that Complainant had failed to file a complaint within the time allowed.

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<sup>2</sup> This Court noted that the Diagnostic and Statistical Manual of Mental Disorders has replaced the term "Gender Identity Disorder" with "Gender Dysphoria." Kothmann, 558 Fed. App'x at 908 n.2.

<sup>3</sup> In Kothmann, this Court stated:

At this Rule 12(b)(6) stage, we do not decide whether hormone treatment in fact was medically necessary to treat Kothmann's GID or whether Rosario knew in fact that hormone treatment was medically necessary for Kothmann. Nor do we address what other kinds of treatment could adequately address Kothmann's GID or whether Rosario actually provided other adequate treatment to Kothmann. Our review is limited to the four corners of the complaint, and the complaint alleges sufficient facts to survive Rosario's motion to dismiss.

Kothmann, 558 Fed. App'x at 911.

The record also shows that in June 2018 Complainant filed a prisoner civil rights action against various defendants, generally alleging that they had hindered her receipt of adequate medical care for her Gender Dysphoria. Complainant also filed a motion for leave to proceed in forma pauperis (IFP) and an emergency motion for a temporary restraining order (TRO) and other injunctive relief. In July 2018 Complainant filed an emergency motion to expedite a hearing on her request for injunctive relief. The next month, Complainant filed an “Emergency Petition For Recusal . . .” in which she alleged the Subject Judge: (1) harbored a “personal animus, bias and/or prejudice” against her; (2) showed a pattern of treating her “disparately and discriminatorily”; (3) took the position that transgender individuals diagnosed with Gender Dysphoria were not entitled to adequate prescribed medical treatment; (4) purposely delayed taking action in the case; and (5) “purposely and intentionally misquoted and/or misstated” this Court’s Kothmann decision.

In October 2018 the Subject Judge denied Complainant’s motion to expedite and granted her IFP motion. Later that month, the Subject Judge issued a report recommending that: (1) Complainant’s claims be dismissed for failure to state a claim on which relief could be granted; (2) her emergency action for a TRO be denied; and (3) the case be closed. In the report, the Subject Judge again discussed this Court’s Kothmann decision, stating in part that this Court “was not willing to decide whether hormone treatment in fact was medically necessary to treat prisoner[s]’ GID or what other kinds of treatment could adequately address GID.”

After that, Complainant filed objections to the Subject Judge’s report, a motion to supplement the record, and an emergency motion to expedite a hearing in the case. In December 2018 the Subject Judge issued orders denying the motion to expedite and motion to supplement the record. The Subject Judge also issued an order denying the motion to recuse, finding that there was nothing in the record to suggest that he had discriminated against Complainant or was otherwise biased. In January 2019 the case was reassigned to another magistrate judge.

The record also shows that in September 2018 Complainant filed in this Court a petition for writ of mandamus, alleging that there had been unreasonable delay in her civil action and seeking the Subject Judge’s recusal. In November 2018 this Court dismissed the mandamus petition as frivolous.

### Complaint

In her Complaint of Judicial Misconduct or Disability, Complainant alleges that the Subject Judge: (1) “harbor[s] personal animus, bias and/or prejudice against” her; (2) has shown a pattern of treating her “disparately and discriminatorily;” and (3) “refuse[d] to remain impartial in proceedings before the District Court.” She asserts that the Subject Judge’s “bias has caused him to take a position that Transgender persons diagnosed and

being treated for the serious medical condition of GENDER DYSPHORIA [are] not entitled to adequate prescribed medical treatment.” She further asserts that the Subject Judge’s bias caused him to purposely delay conducting proceedings in her cases in an effort to assist the defendants in denying her adequate medical care.

Complainant states that the Subject Judge “purposely and intentionally misquoted and/or misstated” this Court’s reasoning in Kothmann “to aid his personal animus, bias and/or prejudice against Complainant.” She asserts that the Subject Judge “falsely claimed” that this Court was “not willing to decide” whether hormone treatment was medically necessary to treat the prisoner’s GID. Instead, Complainant notes that this Court stated “we do not decide whether hormone treatment in fact was medically necessary . . . . Our review is limited to the four corners of the complaint . . . .” Complainant asserts, “This is a clear distinction than what [the Subject Judge] alleged in his report.” She contends the Subject Judge’s statements “clearly show his personal animus, bias and/or prejudice” and “reflect a deep-seated favoritism or antagonism that would make fair judgment impossible.”

Complainant takes issue with the Subject Judge’s delay in ruling on various motions she filed. She contends that the Subject Judge did not rule on her emergency motions due to his animus, bias, and/or prejudice, and she submits “[a]s proof” that the Subject Judge ruled on multiple emergency motions that were filed after she filed a certain emergency motion. Complainant states that the Subject Judge has “persistently and without reason refused to adjudicate the case properly before him” and has “effectively frozen the litigation and thwarted the possibility of an appealable final order.” In closing, Complainant alleges the Subject Judge engaged in misconduct by treating her in a demonstrably egregious and hostile manner, engaging in partisan political activity or making inappropriately partisan statements, and delaying decisions in the case due to an improper motive.

### Supplements

Complainant attached a page from one of the Subject Judge’s reports to her first supplement. In the second supplement, she alleges the Subject Judge recommended dismissal of Complainant’s claims in retaliation for her filing a Complaint of Judicial Misconduct or Disability against him. Complainant also reiterates her allegations that the Subject Judge harbors a personal animus, bias, and/or prejudice against her and treated her disparately and discriminatorily. Finally, Complainant asserts that the Subject Judge “has repeatedly shown a pattern of incompetence, misconduct and neglect of duty,” and she believes that he should be removed as a magistrate judge.

## Discussion

Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable misconduct does not include “an allegation that is directly related to the merits of a decision or procedural ruling.” The Rule provides that “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” *Id.* The “Commentary on Rule 3” states in part:

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural ruling.” This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related.

To the extent Complainant’s allegations concern the substance of the Subject Judge’s official actions, findings, orders, reports, and recommendations in the cases, the allegations are directly related to the merits of the Subject Judge’s decisions or procedural rulings. Complainant’s remaining claims are based on allegations lacking sufficient evidence to raise an inference that the Subject Judge was biased or prejudiced against Complainant or transgender individuals, discriminated against Complainant, was not impartial, intentionally misstated the reasoning of this Court’s opinion, treated Complainant in a demonstrably egregious and hostile manner, engaged in partisan political activity or made inappropriately partisan statements, retaliated against Complainant, or otherwise engaged in misconduct.

The allegations of this Complaint are “directly related to the merits of a decision or procedural ruling,” JCDR 11(c)(1)(B), and the Complaint “is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists,” JCDR 11(c)(1)(D). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.



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Chief Judge