

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

KEAN FOR CONGRESS COMMITTEE,)	
)	
Plaintiff,)	
)	Civ. No. 04-00007 (JDB)
v.)	
)	OBJECTION TO RELATED CASE
FEDERAL ELECTION COMMISSION,)	DESIGNATION
)	
Defendant.)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
OBJECTION TO RELATED CASE DESIGNATION**

Pursuant to Local Rule 40.5(b)(2), the Federal Election Commission (“the Commission”) objects to the representation by plaintiff Kean for Congress Committee (“Kean Committee” or “the Committee”) that this suit is a “related case” to Kean For Congress Committee v. FEC, No. 1:01-cv-1979-JDB, which the Committee voluntarily dismissed two years ago, before the Court even had a chance to consider threshold jurisdictional issues. In that earlier suit (“Delay Case”), the Committee had alleged that the Commission was unreasonably delaying acting on an administrative complaint the Committee had filed. In contrast, in the current suit (“Dismissal Case”), the Committee challenges the merits of the Commission’s subsequent final decision to dismiss the administrative complaint.

“The party who seeks to avoid random assignment bears the burden of showing that the cases are related.” Dale v. Executive Office of the President, 121 F. Supp.2d 35, 37 (D.D.C. 2000). Accord, e.g., Judicial Watch, Inc. v. Rossotti, 2002 WL 31100839, at *1 (D.D.C. 2002). As we explain below, the Kean Committee cannot meet this burden because the two cases do not “relat[e] to the same subject matter,” LCvR 40.5(a)(4), and assigning them to the same judge

would not promote judicial economy. The Commission therefore submits that Local Rule 40.5(a)(4) mandates that the current suit be randomly reassigned.

Factual Background

On May 31, 2000, less than a week before the Republican primary election in New Jersey's Seventh Congressional District, the Kean Committee — the principal campaign committee of Thomas H. Kean, Jr., a candidate in that election — filed an administrative complaint with the Commission. Dismissal Case First Amended Complaint ¶ 17.¹ The complaint requested the Commission to take action against the Council for Responsible Government, a Virginia corporation, and its “Accountability Project” (collectively “CRG”), which allegedly financed and mailed advertisements in May 2000 advocating the defeat of Mr. Kean in the primary election. *Id.* at ¶¶ 2, 14, 22. The administrative complaint further alleged that CRG, in doing so, violated various provisions of the Federal Election Campaign Act of 1971, as amended (“the Act”), codified at 2 U.S.C. 431-455. Dismissal Case First Amended Complaint ¶¶ 2, 18.

On September 18, 2001, the Kean Committee filed a complaint in this Court in which it alleged that the Commission was taking unreasonably long to act on the Committee's administrative complaint. *See* 2 U.S.C. 437g(a)(8)(A) (“Any party aggrieved ... by a failure of the Commission to act on ... [the party's administrative] complaint during the 120-day period beginning on the date the [administrative] complaint is filed, may file a petition” with this Court.); Delay Case Complaint ¶¶ 1, 2, 8-10, 15. The Committee sought a judicial declaration

¹ Because the Kean Committee did not attach a copy of its administrative complaint to its complaint in this Court, we discuss the substance of the administrative complaint by referring to those paragraphs of the amended court complaint that describe the administrative complaint.

that the Commission's delay in taking action on the complaint was contrary to law and an order directing the Commission to conform to the declaration. Id. at ¶ 15.

On November 26, 2001, the Commission moved to dismiss the case for lack of subject-matter jurisdiction because the plaintiff lacked standing. On February 4, 2002, the day the Committee was due to respond, it voluntarily dismissed the suit instead. See Delay Case Docket Sheet, Items 2-5; Fed. R. Civ. P. 41(a)(1)(i).

On November 4, 2003, the Commission considered the merits of the Kean Committee's administrative complaint but was equally divided, 3-3, on whether to find there was "reason to believe" that the Act had been violated. Lacking the necessary four votes to proceed to the next administrative stage, the Commission then voted unanimously to dismiss the administrative complaint and close the file in the matter. Dismissal Case First Amended Complaint ¶¶ 3, 6, 24, 27.

On January 5, 2004, the Kean Committee filed its complaint in the current case, seeking judicial review of the merits of the Commission's dismissal of the administrative complaint. See 2 U.S.C. 437g(a)(8)(A) ("Any party aggrieved by an order of the Commission dismissing a complaint filed by such party ... may file a petition" with this Court). At that time, the Committee also designated this case as related to the long dismissed Delay Case under Local Rule 40.5(a)(4). On March 4, 2004, the Committee filed its first amended complaint, which seeks a declaration that the Commission acted contrary to law in dismissing the administrative complaint and an order directing the Commission to conform to the declaration. See 2 U.S.C. 437g(a)(8)(C); Dismissal Case First Amended Complaint plea for relief ¶¶ a), b).

Legal Background

“Local Civil Rule 40.3 sets forth this court’s default rule for assigning cases.” Dale, 121 F. Supp.2d at 37. Under that rule, new cases “shall be assigned to judges of this court selected at random.” LCvR 40.3. The “fundamental rationale” for this rule “is to ensure greater public confidence in the integrity of the judicial process. The rule guarantees fair and equal distribution of cases to all judges, avoids public perception or appearance of favoritism in assignments, and reduces opportunities for judge-shopping.” Tripp v. Executive Office of the President, 196 F.R.D. 201, 202 (D.D.C. 2000). Local Rule 40.5 “constitute[s] an exception to the normal judicial policy of random assignment of cases.” Keepseagle v. Glickman, 194 F.R.D. 1, 3 (D.D.C. 2000) (emphasis removed; internal quotation marks and citation omitted). The exception permits a new case to be assigned to the same judge who was assigned a previously filed case when the two cases share certain features that make the cases sufficiently related that the assignment of both to the same judge serves “judicial economy.” See Tripp, 196 F.R.D. at 202 (It is “wasteful of time and resources for two judges to be handling cases that are ... related”); Burt Lake Band of Ottawa v. Norton, 2001 WL 1701669, *1 (D.D.C. 2001) (“[i]n the interest of judicial economy”). “[C]ases ... shall be deemed related where a case is dismissed, with prejudice or without, and a second case is filed involving the same parties and relating to the same subject matter.” LCvR 40.5(a)(4).

Argument

The Act provides a cause of action for claims that the Commission failed to act on an administrative complaint and another cause of action for claims that the Commission acted contrary to law in dismissing an administrative complaint. See 2 U.S.C. 437g(a)(8). Not only do the two types of suits not “relat[e] to the same subject matter,” LCvR 40.5(a)(4), but a dismissal

case cannot be brought until after the Commission has taken final action on the administrative complaint.

A dismissal suit under 2 U.S.C. 437g(a)(8) challenges the legal reasoning or factual conclusions that led the Commission to take that action. See, e.g., Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986) (judicial review of dismissal of administrative complaint, where Commission voted against initiating investigation of allegations). Accordingly, the subject matter of the Kean Committee's Dismissal Case is the Commission's legal evaluation of the substance of the Committee's allegations and the Commission's consequent dismissal of the Committee's administrative complaint. See Dismissal Case First Amended Complaint ¶¶ 7, 27-29. In contrast, the subject matter of a delay suit is the Commission's own processing of an administrative complaint. If the Kean Committee's Delay Case had gone forward, the focus of the case would have been whether, considering the Commission's actions to date and its available resources, the Commission was being unreasonably slow in following the prescribed administrative procedures. See, e.g., FEC v. Rose, 806 F.2d 1081, 1091-92 (D.C. Cir. 1986) (discussing factors relevant to delay claim). As a matter of law, the relief that a court can grant in a delay case is limited to a declaration that the Commission has "fail[ed] to act" and an order directing the Commission to conform with the declaration within 30 days. 2 U.S.C. 437g(a)(8)(C). Such a declaration does not address the merits of the allegations against the administrative respondents because the substantive question of whether the Act was violated is not at issue.

Since "a subsequent case may be 'related' only where it involves the same subject matter as the original case," Judicial Watch, 2002 WL 31100839, at *1, and the Kean Committee's Dismissal Case does not involve the same subject matter as its Delay Case, the ordinary rule of

random assignment applies.² Cf. Mississippi Ass'n of Coops. v. Farmers Home Admin., 139 F.R.D. 542, 543-44 (D.D.C. 1991) (refusing to permit amendment of complaint in FOIA action because the proposed new claims, although based on information in the FOIA documents, were “so unrelated to the original cause of action as to have no substantive connection to the FOIA claims and would radically alter the nature and scope of the case” and would not qualify as a related case under Court’s Local Rules if brought as a separate action).

In addition, assigning the Dismissal Case to the same judge who was assigned the Delay Case would not promote judicial economy, and random assignment of the Dismissal Case would not waste judicial resources. The common description of a case voluntarily dismissed without prejudice as “a nullity” aptly characterizes the Kean Committee’s short-lived Delay Case. See, e.g., Williams v. Clarke, 82 F.3d 270, 273 (8th Cir. 1996). The Committee voluntarily dismissed the Delay Case before the Commission had answered the complaint and before the parties had submitted briefs on whether the Commission had failed to act on the administrative complaint. Because the Committee dismissed its complaint in the Delay Case in lieu of responding to the motion challenging the Committee’s Article III standing, the Court did not even have the opportunity to consider that threshold jurisdictional question. Thus, even if the subject matters of the two cases overlapped in small part, Judge Bates never reached any of those subjects.

² The Local Rules also provide criteria for treating two cases as related where the earlier case is “still pending on the merits in the District Court.” LCvR 40.5(a)(3). This exception is inapplicable here. By definition, a delay case and a dismissal case should not be pending at the same time, because, as we earlier noted, a dismissal case cannot be brought until the Commission has concluded its consideration of the administrative complaint. Thus, the agency action that is the jurisdictional prerequisite for filing a dismissal suit simultaneously moots any remaining dispute about a delay in reaching that action. These two types of suits cannot, therefore, be related within the meaning of Local Rule 40.5(a)(3), nor, as we have demonstrated, do they “relat[e] to the same subject matter” under Local Rule 40.5(a)(4).

In sum, the subject matters of the Delay Case and the Dismissal Case are not the same, and assigning the latter case to the same judge to whom the former case was assigned would not serve judicial economy, the purpose of the related case rule. Therefore, this Court's Local Rules appear to require that the Dismissal Case be returned to the Calendar Committee for random reassignment.

Respectfully submitted,

Lawrence H. Norton
General Counsel

Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

David Kolker
Assistant General Counsel
(D.C. Bar # 394558)

Vivien Clair
Attorney

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (FAX)

March 15, 2004