

The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of

Judicial Council Complaint No. DC-14-90017

**A Charge of Judicial
Misconduct or Disability**

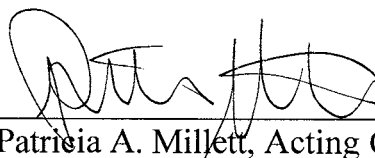
Before: MILLETT, Acting Chief Judge of the Circuit

ORDER

Upon consideration of the complaint herein and the supplement thereto, filed against a judge of the United States District Court for the District of Columbia, it is

ORDERED that the complaint be dismissed for the reasons stated in the attached Memorandum.

The Clerk is directed to send copies of this Order and accompanying Memorandum to the complainants, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. *See* 28 U.S.C. § 352(b); JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 11(g)(2).



Patricia A. Millett, Acting Chief Judge

Date: 09/22/14

MEMORANDUM

The complainants allege that a judge of the United States District Court for the District of Columbia engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. The allegation arises out of a case that the complainants filed in the District Court that was assigned to the subject judge. For the following reasons, the allegation does not warrant action against the judge.

The complainants are an attorney who has filed on behalf of himself and his clients in a district court lawsuit pending before the subject judge. Shortly after they filed their complaint, the plaintiffs filed a motion to transfer their case to another judge on the ground that plaintiffs' counsel was engaged in "ongoing litigation" involving separate allegations of misconduct against the judge. Treating the motion as one for recusal, the judge denied the motion, concluding that "a judge is not required to recuse him or herself merely because a party files suit against him."

Following the subject judge's denial of the motion to transfer, the complainants filed this misconduct complaint, contending that the denial of the motion to transfer violated ethical canons. Soon thereafter, the complainants filed a motion with the same district court judge expressly seeking her disqualification. Before she ruled on that motion, the complainants filed a petition for a writ of mandamus with the Court of Appeals, asking it to compel the judge to remove herself from the case. The district court judge then denied the motion to disqualify. The Court of Appeals denied the petition for mandamus, concluding that "petitioners' affidavits provide no reasonable basis for questioning the district court's impartiality."

The misconduct complaint at issue here contends that the district court judge's denial of the motion to transfer the case was unethical because "plaintiffs' counsel is embroiled in pending litigation" before the judge that "creates an actual conflict of interest and, at a minimum, the appearance of a conflict of interest." The "pending litigation" to which the complainants refer stems from two other, unrelated district court cases also assigned to the subject judge. The complainant counsel was a plaintiff in one of those cases and counsel of record in the other. The complainant counsel sought to recuse the subject judge in both of those lawsuits. The judge denied the motion, and the Court of Appeals denied the complainant's ensuing petition for writ of mandamus and petitions for rehearing and rehearing en banc. The complainant then filed a petition for a writ of certiorari with the Supreme Court of the United States, which remains pending.

As in this case, the complainant counsel also filed a judicial misconduct complaint (the "2011 complaint") against the district court judge for failing to recuse herself in those two cases. The then-Chief Judge of the Circuit dismissed the 2011 complaint, and the Circuit Judicial Council denied the complainant's petition for review. The complainant counsel responded by filing a lawsuit in federal court against the subject judge, the then-Chief Judge who had dismissed his judicial misconduct complaint, the Circuit Judicial Council that had denied the petition for review, and the Circuit Executive's Office, alleging that those defendants had violated his constitutional rights and had failed to properly perform their ministerial and administrative duties with respect to the 2011 complaint. The suit was assigned to a different district judge, who dismissed it for lack of subject matter jurisdiction. The Circuit affirmed on appeal. The

complainant counsel filed petitions for rehearing and rehearing en banc that were denied.

In April 2014, this judicial misconduct complaint was filed. The complainants allege that the subject judge “intentionally and egregiously miscites fact and law to justify her unethical intransigence to transfer the case to another judge given that plaintiffs’ counsel is embroiled in pending litigation with her and this creates an actual conflict of interest and, at a minimum, the appearance of a conflict of interest.” Those claims must be dismissed.

First, allegations that a judge failed to recuse are subject to dismissal because they pertain to the merits of a district court’s substantive ruling in litigation. *See* JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 3(h)(3)(A) (“An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits related.”). Merits-based challenges to judicial conduct like those asserted by complaints here must be pressed through the direct appellate process.

Second, the only exception permitting consideration of such a merits-based challenge is if the judge “failed to recuse for an improper purpose” or wrongful motive. *In re Judicial Misconduct*, 605 F.3d 1060, 1062 (9th Cir. 2010). That exception does not apply here because complainants have failed to provide *any* reasonable, objective evidence of such improper purpose. The only allegation pressed by complainants is the existence of separate litigation involving the subject district court judge. As numerous cases have recognized, the existence of such separate litigation is insufficient. *See In re Taylor*, 417 F.3d 649, 652 (7th Cir. 2005); *In re Hipp, Inc.*, 5 F.3d 109, 116 (5th Cir.

1993); *United States v. Watson*, 1 F.3d 733, 735 (8th Cir. 1993); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977), *cert. denied*, 435 U.S. 954 (1978).

Beyond that, claimants have not identified any extrajudicial actions by the district court judge that could plausibly demonstrate pervasive bias or prejudice against claimants in the litigation. Indeed, the complainants have failed to present any evidence that the judge failed to recuse for an improper purpose; the complainants simply disagree with the judge's decision not to recuse. The proper remedy for that merits-based ruling in district court litigation is to seek relief from the U.S. Court of Appeals for the D.C. Circuit, not to initiate a misconduct proceeding. Thus, because the allegations are "directly related to the merits of a decision or procedural ruling" and there is no plausible evidence of improper motive, the allegations of misconduct must be dismissed. *See* JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 11(c)(1)(B).¹

¹ Pursuant to 28 U.S.C. § 352(c) and JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL -DISABILITY PROCEEDINGS 18(a), the complainants may file a petition for review by the Judicial Council for the District of Columbia Circuit. Any petition must be filed in the Office of the Clerk of the Court of Appeals within 35 days of the date of the Clerk's letter transmitting the dismissal Order and this Memorandum. *Id.* R. 18(b).