

The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of

Judicial Council Complaint No. DC-14-90035
No. DC-14-90036
No. DC-14-90037
No. DC-14-90038
No. DC-14-90039
No. DC-14-90040

A CHARGE OF JUDICIAL
MISCONDUCT OR DISABILITY

Before: TATEL, *Acting Chief Judge of the Circuit**

ORDER

Upon consideration of the complaint herein, filed against judges of the United States Court of Appeals for the District of Columbia Circuit, it is

ORDERED that the complaint be dismissed for the reasons stated in the attached Memorandum. See 28 U.S.C. § 352(b)(1)(A)(ii), (iii); JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 11(c)(1)(B), (D).

The Clerk is directed to send copies of this Order and accompanying Memorandum to the complainant, the subject judges, 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).



David S. Tatel, Acting Chief Judge
District of Columbia Circuit

Date: 7/30/15

* Pursuant to JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 25(f), the Judicial Council has voted to allow Judge Tatel to consider this complaint.

MEMORANDUM

Complainant has filed a Judicial Complaint, docketed as Nos. DC-14-90035 through -90040, against six judges¹ of the United States Court of Appeals for the District of Columbia Circuit. The complainant's allegations arise from the subject judges' involvement in the disposition of a prior complaint that this complainant filed against one of the subject judges. For the following reasons, complainant's allegations do not warrant action against the subject judges.

Complainant filed an appeal from a decision of the United States Tax Court. Judges 35, 36, and 37 affirmed the Tax Court decision in an unpublished judgment. Complainant filed a petition for rehearing and for rehearing en banc, which was denied. Complainant then filed a judicial complaint against Judge 35, who was the presiding judge of the panel in his Tax Court appeal. Complainant alleged that Judge 35 took "external considerations" into account in deciding the Tax Court appeal. Judge 36, as Acting Chief Judge of the Circuit, dismissed the complaint, concluding that the allegations were "purely speculative and [did] not remotely constitute evidence of misconduct." Complainant filed a petition for review by the Circuit Judicial Council, whose members included Judges 37, 38, 39, and 40. The petition for review was denied.

Complainant has now filed the instant complaint against Judges 35, 36, 37, 38, 39, and 40. Complainant asserts that these judges, because they participated in review of complainant's Tax Court appeal, either as members of the merits panel or as members of the en banc court, should not have participated in review of the complaint against Judge 35, because such review of Judge 35's conduct amounted to a review of their own conduct.

¹ In this memorandum, the subject judges will be identified by the last two digits of the complaint number assigned to each.

Further, complainant “recommend[s]” that the complaint be referred to another circuit’s judicial council, pursuant to JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL - DISABILITY PROCEEDINGS Rule 26. Pursuant to *id.*, Rule 25(f), however, the Council has authorized me to act as Chief Judge in this matter.

Although complainant names Judge 35 as a subject of the complaint, the complaint itself contains no allegations of misconduct against that judge with respect to the handling of the prior complaint. Complaint No. DC-14-90035 must therefore be dismissed.

A chief judge’s decision whether to consider a misconduct complaint is not subject to review by the circuit council. See *In re Complaint of Judicial Misconduct*, 623 F.3d 1101, 1102 (9th Cir. Jud. Council 2010). Nor, as here, is such a decision the appropriate subject for a separate complaint. See JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL- DISABILITY PROCEEDINGS Rule 3(h)(3)(A) (Cognizable misconduct does not include “an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related.”).

Complainant argues that he has provided “more,” by virtue of the subject judges’ participation in consideration of the merits of the Tax Court appeal. But misconduct proceedings are administrative in nature, and not subject to the recusal standards that apply to judicial proceedings. See *In re Complaint of Judicial Misconduct*, 591 F.3d 638, 647-648 (U.S. Jud. Conf. 2009). Personal knowledge of relevant facts does not necessarily disqualify a judge from participating in a misconduct matter. *Id.* at 648. The appropriate inquiry should simply be whether, “under all of the circumstances, including prior knowledge of the case and even a previously held opinion, the judge believes that he or she can be ‘fair-minded’ in his or her participation,” and if so, “recusal is not warranted

and the judge should fulfill his or her duty to participate.” *Id.* (internal quotation omitted).

Complainant asserts that his decision to file his first complaint against Judge 35 was “arbitrary,” that he could have filed his complaint against all three judges who decided his Tax Court appeal. He could have, but he did not. And because he did not, Judge 36 was not the subject of that complaint, and committed no misconduct by fulfilling the judge’s duty to participate in the complaint proceeding. Complaint No. DC-14-90036 must therefore be dismissed.

With respect to Judges 37, 38, 39, and 40, who acted as members of the Judicial Council to deny review of Judge 36's disposition, the complaints also fail. Contrary to complainant’s assertion, these judges were not being asked to “render[] a decision against themselves.” These judges were not the subjects of the complaint, and complainant has brought forth nothing that calls into question these judges’ discretionary determination that they could, with fair minds, participate in the disposition of the petition for review. Complaint Nos. DC-14-90037 through -90040 must therefore also be dismissed.

In summary, complainant’s allegations are “directly related to the merits of a decision or procedural ruling, or otherwise “lack[] sufficient evidence to raise an inference that misconduct has occurred.” *Id.*, 11(c)(1)(B), (D). Accordingly, the complaint must be dismissed as to each of the subject judges. See 28 U.S.C. § 352(b)(1)(A)(ii), (iii).²

² Pursuant to 28 U.S.C. § 352(c) and JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL -DISABILITY PROCEEDINGS Rule 18(a), the complainant 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 Circuit Executive for the D.C. Circuit within 35 days of the date of the Circuit Executive’s letter transmitting the dismissal Order and this Memorandum. *Id.* Rule 18(b).