

# The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of

Judicial Council Complaint No. DC-17-90023

## A Charge of Judicial Misconduct or Disability

Before: GARLAND, *Chief Judge*.

### 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 Circuit Executive is directed to send copies of this Order and accompanying Memorandum to the complainant, 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).

  
Merrick B. Garland, Chief Judge

Date: 12/22/17

**MEMORANDUM**

The complainant has filed a complaint of judicial misconduct against a judge of the United States District Court for the District of Columbia. For the following reasons, the misconduct complaint will be dismissed.

The complainant filed an employment discrimination lawsuit against her then-employer that was assigned to the subject judge. The defendant moved for summary judgment and submitted a large number of exhibits in support of the motion. Four days later, the complainant filed a motion for sanctions on the ground that the defendant's attorneys had filed exhibits with her full social security number appearing once and her full date of birth appearing 42 times, in violation of Federal Rules of Civil Procedure 5.2(a) and Local Rule 5.4(f). That same day, the defendant submitted new exhibits with the personal information redacted.

In its response to the motion for sanctions, the defendant argued that sanctions were unwarranted because, as soon as it learned of the mistake, it "filed redacted copies of the exhibits and requested that the Court deactivate the links to the original exhibits on its [electronic filing] system, . . . which it did." Thereafter, the subject judge denied the motion for sanctions, stating: "[O]n the date [the complainant] filed her Motion for Sanctions, [the defendant] filed redacted copies of its exhibits and contacted the Court to have the offending exhibits deleted from the electronic filing system. That was done and the original documents are no longer available to the public."

The complainant has now filed a judicial misconduct complaint against the judge,

alleging that the judge had an “improper discussion” with the defendant’s counsel outside of her presence. As evidence of the ex parte communication, the complaint points to the defendant’s opposition to the motion for sanctions, in which the defendant stated that it had requested “the Court” to deactivate the links to the original exhibits on the electronic docket. Because the defendant did not submit a written pleading related to the filing of the corrected exhibits, the complainant infers that the defendant must have made an ex parte communication to the judge. The complaint argues that the judge’s order denying the motion for sanctions further supports the allegation of ex parte contact because the judge stated that the defendant “contacted the Court” to have the exhibits deleted from the electronic case filing system.

There is nothing in the docket to indicate whether the above-quoted references to “the Court” refer to the judge rather than to court staff. But even assuming that the contact was with the judge, the contact would not constitute misconduct. *See* JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, RULE 11, commentary (“[I]f it is clear that the conduct . . . alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed.”).

The rule against ex parte communications is aimed at communications addressing “substantive matters,” rather than those for “administrative . . . purposes” that will not permit a party “to gain a procedural, substantive, or tactical advantage.” CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 3(A)(4)(b); *see* COMMITTEE ON CODES OF CONDUCT, ADVISORY OPINION NO. 95 (“Canon 3A(4) advises that judges should not

engage in *ex parte* communications on the merits of the case.”); *Law Offices of David Efron v. Matthews & Fullmer Law Firm*, 782 F.3d 46 (1st Cir. 2015). In this case, the request to delete the original documents from the records system was for administrative action to correct an improper filing. Moreover, its effect was not to permit the defendant to gain an advantage, but rather to protect the complainant, who had rightly complained that the defendant should not have included personal identifiers in its electronically filed exhibits because that made them “accessible globally by anyone performing a Google search.” Accordingly, even if the contact was directly with the judge, it did not constitute “conduct prejudicial to the effective and expeditious administration of the business of the courts,” JUDICIAL-CONDUCT RULE (3)(h)(1). This part of the complaint must therefore be dismissed. JUDICIAL-CONDUCT RULE 11(c)(1)(A) (requiring dismissal where the complaint “alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts”); *see* 28 U.S.C. § 352(b)(1)(A)(iii).

After filing the original misconduct complaint, the complainant filed a supplement that further charged the subject judge with violating the Rules for Judicial-Conduct and Judicial-Disability Proceedings by granting the defendant’s motion for summary judgment in the employment discrimination case the complainant had filed against her employer. Granting the motion constituted a violation, the complaint contends, because the Rules provide that a “judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint.”

The relevant rule, however, bars a subject judge “from considering a *complaint*,” JUDICIAL-CONDUCT RULE 25(b) (emphasis added), which “relates only to . . . any proceeding arising under the [Judicial Conduct and Disability] Act or these Rules,” JUDICIAL-CONDUCT RULE 25, commentary. The judge did not enter the summary judgment order in a misconduct proceeding under the Act or Judicial-Misconduct Rules, but rather in the case the complainant brought against her employer under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117. Accordingly, this part of the complaint must also be dismissed because it does not “raise an inference that misconduct has occurred.” JUDICIAL-CONDUCT RULE 11(c)(1)(D); *see* 28 U.S.C. § 352(b)(1)(A)(iii).<sup>1</sup>

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<sup>1</sup> Pursuant to 28 U.S.C. § 352(c) and Judicial-Conduct 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 42 days of the date of the dismissal order. JUDICIAL-CONDUCT RULE 18(b).