

# The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of

Judicial Council Complaint No. DC-17-90014

## A Charge of Judicial Misconduct or Disability

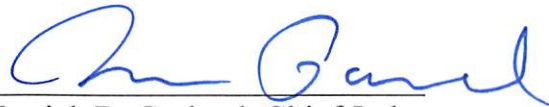
Before: GARLAND, *Chief Judge*.

### ORDER

Upon consideration of the complaint herein, 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: 11/9/18

**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 complaint concerns the behavior of the subject judge in a lawsuit in which the complainant was counsel for the plaintiffs. The complainant represented the plaintiffs in an action against former Secretary of State Hillary Rodham Clinton, alleging that she caused the death of the plaintiffs' sons, defamed the plaintiffs, and placed them in a false light. The suit also alleged that Secretary Clinton's conduct intentionally and negligently caused them to suffer emotional distress. The case was assigned to the subject judge.

Pursuant to the Westfall Act, 28 U.S.C. § 2679, the United States moved to substitute itself as the defendant for any actions that Secretary Clinton took as Secretary of State. In that substituted capacity, the government moved, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2680, to dismiss the claims for wrongful death and negligence in their entirety and to dismiss those portions of the claims for intentional and negligent infliction of emotional distress that were premised on actions that Secretary Clinton took as Secretary of State. For her part, Secretary Clinton moved to dismiss the defamation and false light claims, as well as the intentional and negligent infliction of emotional distress claims insofar as they were premised on actions she took after she left office. The subject judge granted both the government's and defendant Clinton's motions to

dismiss. On June 5, 2017, the plaintiffs noticed an appeal from the dismissal of their case. That appeal is currently pending.

The complainant has now filed a judicial misconduct complaint against the subject judge, alleging that the “timing” of the judge’s order granting the motions to dismiss, “in conjunction with clearly intentionally false and manufactured reasoning,” showed that the judge engaged in judicial misconduct.

With respect to timing, the complaint notes that the judge issued the order on the Friday before Memorial Day, which was observed on Monday, May 29, 2017. Further noting that the plaintiffs’ sons died in service to their country, the complaint alleges that the timing of the order “was vindictively calculated to inflict additional emotional distress on Plaintiffs.” As to why this timing showed “vindictiv[e] calculat[ion]” on the judge’s part, the complaint simply states that “[t]he timing of [the] decision was obviously motivated by an attempt to curry favor with Defendant Clinton at a time that she was signaling that she may run for president again, and to preserve [the judge’s] chance to be nominated to a higher bench.” But the complaint proffers no evidence of such a motivation for the timing of the order other than the timing itself (and the merits challenge discussed below). Because the timing alone is insufficient “to raise an inference that misconduct has occurred,” this part of the complaint must be dismissed.

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PROCEEDINGS, RULE 11(c)(1)(D); *see* 28 U.S.C. § 352(b)(1)(A)(iii).

The complaint further contends that the timing of the judge’s order “was the result of animus toward Plaintiffs and their counsel, or both.” The only evidence of animus that the complaint offers is a minute order in which the judge granted the plaintiffs’ motion for an extension of time, on the condition that “plaintiffs utilize the additional time to review and edit the pleading carefully to ensure that the unnecessarily vituperative and sarcastic tone of [a] previous pleading is eliminated.” The minute order shows animus, the complaint maintains, because it did not likewise instruct the defendants with respect to their pleadings. But that is a challenge that goes to the merits of the judge’s orders, which is excluded from the definition of “cognizable” misconduct under the Judicial-Conduct Rules. JUDICIAL-CONDUCT RULES 3(h)(3)(A); *see* 28 U.S.C. § 352(b)(1)(A)(ii). Nor does the judge’s characterizations of the plaintiffs’ pleading reflect “the sort of ‘deep-seated and unequivocal antagonism’ that may constitute misconduct.” *In re Complaint of Doe*, 640 F.3d 861, 863 (8th Cir. Jud. Council 2011) (quoting *Liteky v. United States*, 510 U.S. 540, 556 (1994)); *see Liteky*, 510 U.S. at 555 (“[J]udicial remarks during the course of [litigation] that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.”). To the contrary, when a “judge’s language was relevant to the case at hand - - for example, a statement that a claim is legally or factually ‘frivolous’ -- then the judge’s choice of language is presumptively merits-related and excluded [from the definition of ‘cognizable misconduct’], absent evidence apart from the ruling itself suggesting an

improper motive.” JUDICIAL-MISCONDUCT RULE 3(h)(3)(A), commentary. No such evidence is proffered here. Accordingly, this part of the complaint must likewise be dismissed. JUDICIAL-CONDUCT RULE 11(c)(1)(D).

Finally, the complaint contends that the subject judge’s “extra-judicial bias extends to [the judge’s] unsupported findings in her actual Memorandum Opinion granting the Motions to Dismiss.” The complaint contends that the judge: wrongly held Secretary Clinton’s statements were not “capable of defamatory meaning”; “completely ignore[d] this jurisdiction’s well decided jurisprudence that taking a defamation matter out of the jury’s hands is inappropriate, except in . . . rare cases”; and “improperly allow[ed] the United States to substitute in on Plaintiffs’ wrongful death claim against Defendant Clinton without even allowing for discovery as a predicate.” All of these allegations are “directly related to the merits” of the subject judge’s decisions and procedural rulings. Accordingly, they do not constitute “cognizable” misconduct under the Judicial-Conduct Rules and must also be dismissed. JUDICIAL-CONDUCT RULES 3(h)(3)(A), 11(c)(1)(B); *see* 28 U.S.C. § 352(b)(1)(A)(ii).<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 after the date of the dismissal order. JUDICIAL-CONDUCT RULE 18(b).