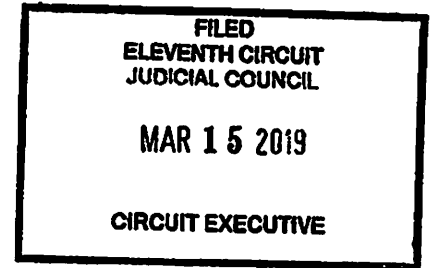


**FOR THE JUDICIAL COUNCIL  
OF THE ELEVENTH CIRCUIT**

**11-18-90124**



**IN RE: COMPLAINT OF JUDICIAL  
MISCONDUCT OR DISABILITY**

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**ON PETITION FOR REVIEW\***

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Before: TJOFLAT, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDÁN, ROSENBAUM, JILL PRYOR, and NEWSOM, Circuit Judges; MOORE, MERRYDAY, THRASH, BOWDRE, WATKINS,\*\* DuBOSE, HALL, and WALKER, Chief District Judges.

Upon consideration of the petitioner's complaint by a review panel consisting of Judges Tjoflat, Wilson, William Pryor, Moore, and Walker, the order of Chief Judge Ed Carnes, filed on 11 January 2019, and of the petition for review filed by the complainant on 18 January 2019, with no non-disqualified judge on the Judicial Council Review Panel having requested that this matter be placed on the agenda of a meeting of the Judicial Council,

The Judicial Council Review Panel hereby determines that the disposition of this matter was proper and said disposition is hereby **AFFIRMED**.

The foregoing actions are **APPROVED**.

**FOR THE JUDICIAL COUNCIL:**

  
United States Circuit Judge

- \* Chief Circuit Judge Ed Carnes and Chief District Judge Clay D. Land did not take part in the review of this petition.
- \*\* Former Chief District Judge W. Keith Watkins is no longer a member of the Council.

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

JAN 11 2019

David J. Smith  
Clerk

**CONFIDENTIAL**

**BEFORE THE CHIEF JUDGE  
OF THE ELEVENTH JUDICIAL CIRCUIT**

**Judicial Complaint No. 11-18-90124**

**IN THE MATTER OF A COMPLAINT FILED BY \_\_\_\_\_**

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IN RE: The Complaint of \_\_\_\_\_ against \_\_\_\_\_, U.S. District Judge for the U.S. District Court for the \_\_\_\_\_ District of \_\_\_\_\_, under the Judicial Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C. §§ 351-364.

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**ORDER**

\_\_\_\_\_ (“Complainant”) has filed this Complaint against United States District Judge \_\_\_\_\_ (the “Subject Judge”), pursuant to Chapter 16 of Title 28 U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (“JCDR”).

Background

The record shows that in February 2018 Complainant filed a lawsuit against a company raising, among other things, claims of harassment and hostile work environment pursuant to Title VII of the Civil Rights Act of 1964. A few months later, she filed an amended complaint in which she alleged that her claims stemmed from statements by the defendant’s employees that she had an affair with a regional director. The parties later requested a scheduling conference to resolve certain scheduling and discovery issues.

At a scheduling conference in July 2018, the Subject Judge asked Complainant questions about the individuals she wished to depose, noting that he wanted to make sure Complainant understood she would have to pay a court reporter to take each deposition. The Subject Judge determined that Complainant would be permitted to take six depositions, and if she wished to take more after that, she could file a motion to add additional individuals. The Subject Judge stated that it made sense for the defendant to depose Complainant first because she was the one bringing the claims. After discussing some logistical concerns, the Subject Judge asked Complainant if she had tried to get a lawyer, and she responded that she had not. The Subject Judge responded, “Okay. Well, you’re going to have all these issues that are going to arise.”

The Subject Judge asked Complainant whether her claim for sexual harassment was based on employees telling others that she had gotten a promotion solely because she

had an affair with the regional boss, and Complainant responded in the affirmative. The Subject Judge noted that under federal law allegations of harassment needed to be based on race or gender, and that it seemed to him that there could be an agreement as to what happened, which the Court could use to determine whether there was a federal claim and which could possibly save the parties time and money. Counsel for the defendant: (1) responded, "We're on the same page, Your Honor, to some extent here"; (2) asserted that Complainant admitted "there's no evidence that the person who terminated her even knew about this before"; and (3) stated, "And I'm with you. I mean, I'm trying to figure it out. I think we're wasting the Court's time . . . ." The Subject Judge noted, "I haven't prejudged your claim at all," but he stated that he was "skeptical" about whether Complainant had a claim under Title VII.

After additional discussion, counsel for the defendant stated that his client likely would be interested in a "low settlement value" to avoid the costs of litigation. The Subject Judge asked Complainant if she had an interest in possibly settling the case, again noting that Title VII provided a remedy only if discrimination is based on gender or race. He further stated, "I think that's going to be a difficult claim to prove. I'm not saying at this point you couldn't prove it, but that's not the classic Title VII hostile work environment/harassment claim." He later stated, "I'm not suggesting what you should do as far as settlement goes," but "they're likely going to be inclined to pay you more money early than they are later on . . . ."

The Subject Judge determined that the defendant would be authorized to depose Complainant a few weeks later, which would give the parties time to determine whether the matter could be settled. He explained that, after counsel for the defendant took Complainant's deposition, if it appeared that she did not have a claim, he did not "see any reason" for the defendant to delay filing a motion for summary judgment. He noted that Complainant could then depose the six individuals if she thought it was needed to respond to the summary judgment motion. The Subject Judge continued:

What I'm expecting is -- I'm not telling -- saying how I'm going to rule, but I would expect that motion would be based on almost like a motion to dismiss. But it would -- it would be just assuming that what she says is true. I mean, if y'all -- if you put in your motions all these other factual allegations that she needs to respond with these depositions, then you're going to kind of defeat the purpose of an expedited summary judgment motion.

The Subject Judge also stated:

There's just a question, \_\_\_\_\_, as to whether anybody would have a claim if what happened to you happened to them. It's a question about whether under federal law that would be a claim. And it just seems that it would make sense to get that decided early on in the case before you spend a lot of money.

After that, the defendant filed a motion to stay discovery to allow it to file an expedited summary judgment motion after taking Complainant's deposition, and the Subject Judge granted the motion. Complainant then filed multiple motions seeking various types of relief, including motions to alter or amend the order granting the motion to stay discovery, a motion to recuse the Subject Judge, and a motion for a protective order. In the motion to recuse, Complainant generally argued that the Subject Judge's statements at the July 2018 scheduling conference brought his impartiality into question and demonstrated actual bias or prejudice against her based on her pro se status.

The defendant filed a response in opposition to Complainant's motion for a protective order in which it argued that the motion to recuse had no effect on her ability to sit for a deposition. The Subject Judge denied the motion for a protective order, stating that the pending motion to recuse had no bearing on the scheduled deposition. In September 2018 the Subject Judge issued an order denying the motion to recuse, stating that the procedure he had announced at the pretrial conference "was not irregular and did not demonstrate bias or prejudice," and the court's "initial skepticism as to [Complainant's] novel Title VII theory likewise does not indicate bias." After that, Complainant filed multiple motions seeking various types of relief, and the defendant filed a motion for summary judgment.

### Complaint

In her Complaint of Judicial Misconduct or Disability, Complainant contends that, during the July 2018 scheduling conference, the Subject Judge made numerous statements that would cause a reasonable person to doubt his impartiality and that reflected "actual bias and prejudice towards [Complainant's] case based on the fact that she was proceeding Pro Se." She sets out various statements the Subject Judge made at the conference that she contends show his lack of impartiality and bias. She alleges that the Subject Judge's concerns about the difficulty she may have subpoenaing witnesses, conducting depositions, or confronting issues caused him to make "a conscious decision to steer the case towards the finish line while ignorantly prejudicing the case simultaneously."

Complainant contends that the Subject Judge "openly challenged the validity" of her claim without hearing any evidence, and his bias against her as a pro se litigant "forced him to overlook his personal knowledge of the many cases" involving claims "that did not fit the classic role of Title VII cases." She states that, in light of the "bias[ed] rhetoric," the defendant's counsel was "enticed . . . to enter the prejudice conversation," thus signaling to the court that the defendant was "on board with the exit strategy." Complainant asserts that any "sane and truthful person" would conclude that the Subject Judge had prejudged the case in the defendant's favor and that he tried to persuade her to accept a settlement offer. Complainant also alleges that the Subject

Judge informed the defendant's counsel how to prepare a summary judgment motion "in part due to his desire to dismiss the case without allowing [her] to depose any witnesses."

Complainant describes various statements the defendant's counsel made at the conference, she contends that those statements were untruthful, and she alleges that if the Subject Judge "had not prejudice the case [sic], he would have seen the untruthful statements being made." She also alleges that the Subject Judge "lost all power to discipline" the defendant's counsel "for creating the very problem that was utilize[d] as a farce to get into the courtroom in order to stop [Complainant] from deposing the witnesses." She contends that the defendant's counsel did not take certain actions they were directed to take, and that, if the Subject Judge "had not prejudice the case [sic], he would have been able to confront the untruthful behavior of counsel." Finally, Complainant asserts that a "quick glance" at the Subject Judge's order on her motion for a protective order and the defendant's response to her motion "proved that collaboration in litigation between the [Subject Judge] and the Counsel for the Defendant does exist." She attached documents to her Complaint.

### Discussion

Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable misconduct does not include "an allegation that is directly related to the merits of a decision or procedural ruling." The Rule provides that "[a]n allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related." *Id.* The "Commentary on Rule 3" states in part:

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related.

To the extent Complainant's allegations concern the substance of the Subject Judge's official actions, rulings, findings, and orders in the case, the allegations are directly related to the merits of the Subject Judge's decisions or procedural rulings. Complainant's remaining claims are based on allegations lacking sufficient evidence to raise an inference that the Subject Judge was biased or prejudiced against her, was not impartial, improperly collaborated with the defendant's counsel, or otherwise engaged in misconduct.

The allegations of this Complaint are “directly related to the merits of a decision or procedural ruling,” JCDR 11(c)(1)(B), and the Complaint “is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists,” JCDR 11(c)(1)(D). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.

A handwritten signature in black ink, appearing to read "S. A. James", written over a horizontal line.

Chief Judge