

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE  
JUDICIAL CONDUCT AND  
DISABILITY ACT

No. 10-16-90009 (DC-16-90009)

Before **TYMKOVICH**, Chief Circuit Judge, **BACHARACH**, **PHILLIPS**, **McHUGH**,  
**MORITZ**, Circuit Judges, and **HERRERA**, **DEGIUSTI**, **NUFFER**, **MELGREN**,  
District Judges

**ORDER**

On March 14, 2016, complainant filed a complaint of judicial misconduct against a district judge in the District of Columbia Circuit. Applying the Rules for Judicial-Conduct and Judicial-Disability Proceedings (“RJCD”) (Jud. Conf. of the U.S. 2015), the acting chief judge of the D.C. Circuit, Judge Karen LeCraft Henderson, considered and dismissed the complaint against the subject judge.<sup>1</sup> She determined that the subject judge’s recent retirement “render[ed] . . . the allegations moot or [made] remedial action impossible.” *In re A Charge of Jud. Misconduct or Disability*, No. 16-90009, Order and Memorandum at 2 (D.C. Cir. 2016) (Henderson, Acting C.J.) (quoting RJCD 11(e)). The complainant filed a petition for review, and the Judicial Council for the D.C. Circuit requested that the Chief Justice transfer the matter to another circuit. *See* RJCD 26 (permitting the Chief Justice to transfer a proceeding to the judicial council of another

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<sup>1</sup> D.C. Chief Circuit Judge Merrick Garland recused from the matter and it was assigned to Judge Henderson pursuant to RJCD 25(f).

circuit). This judicial misconduct matter comes to us following the Chief Justice's transfer of the proceeding to the Tenth Circuit.

On consideration of the petition and other materials filed in this matter, we have determined that the subject judge's retirement did not immunize the judge from the complaint of misconduct. Because we have not considered the merits of the allegations contained in the complaint, we are returning the matter to the chief judge of the Tenth Circuit.

For a district judge to retire on disability under 28 U.S.C. § 372(a), he or she must provide the President with a certification of disability signed by the chief circuit judge. On March 15, 2016, Acting Chief Judge Henderson certified to the President that the subject judge was permanently disabled from performing the duties of a judge in regular active service. On March 16, 2016, the subject judge notified the President of the retirement. On March 18, 2016, Judge Henderson dismissed the complaint after determining that the subject judge's retirement mooted the complaint.

Judge Henderson's memorandum supporting dismissal of the misconduct complaint states:

The subject judge retired from active service effective March 16, 2016. In consequence thereof, the complaint proceeding is concluded under 28 U.S.C. § 352(b)(2), as "action on the complaint is no longer necessary because of intervening events." *See* 28 U.S.C. 352(b)(2); *see also* JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 11(e) ("The chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible.")

*In re A Charge of Jud. Misconduct or Disability*, No. 16-90009, Order and Memorandum at 2.

The subject judge retired from regular active service pursuant to 28 U.S.C. § 372(a) (“Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service . . .”). The status of a judge retired from regular active service is defined in 28 U.S.C. § 294(b):

Any judge of the United States who has retired from regular service under . . . 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

Thus, the subject judge is now designated a “senior judge” and may still be designated and assigned to “perform judicial duties,” regardless of his disability retirement. *See id.* § 294(e); *see also, Boomhower, Inc. v. Am. Auto. Ins. Co.*, 220 F.2d 488, 491 (D.C. Cir. 1955) (holding “that a judge who is retired for permanent disability continues to be available for assignment by designation to perform judicial duties”).

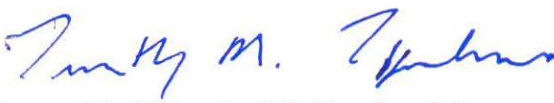
Moreover, neither the Act nor the RJCD distinguish between active and senior judges. The Act defines “judge” as “a circuit judge, district judge, bankruptcy judge, or magistrate judge.” 28 U.S.C. § 351(d)(1). Similarly, RJCD 4 states, “[a] complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.” Further, cognizable misconduct includes “conduct occurring outside

the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.” RJCD 3(h)(2). Consequently, even if a judge is not currently designated to hear cases, a senior judge’s actions have the ability to lower public confidence in the courts.

Though the subject judge did retire from active service, the judge did not resign or otherwise relinquish his commission. Because the subject judge is now considered a senior judge and remains available for assignment by designation, the statute under which he retired does not preclude him from coverage under the Judicial Conduct and Disability Act. Accordingly, the complaint is not moot.

The petition for review is GRANTED IN PART. The March 18, 2016 dismissal order is VACATED. We are returning the complaint to the chief judge of the Tenth Circuit for further action pursuant to RJCD 19(b).

So **ORDERED**, October 26, 2016, and  
Entered on behalf of the Judicial Council  
Of the Tenth Circuit

By:   
Honorable Timothy M. Tymkovich  
Chief Circuit Judge

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

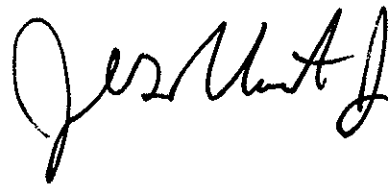
May 10, 2016

The Honorable Timothy M. Tymkovich  
Chief Circuit Judge  
United States Court of Appeals  
for the Tenth Circuit  
Byron White United States Courthouse  
1823 Stout Street, Room 102G  
Denver, Colorado 80257-1823

Dear Chief Judge Tymkovich:

On May 5, 2016, I received a request from the Judicial Council of the United States Court of Appeals for the District of Columbia Circuit, under Rule 26 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, to transfer a judicial conduct proceeding captioned *In re Judicial Misconduct Complaint*, No. 16-90009, to the judicial council of another federal judicial circuit. In response, I have selected the Judicial Council of the United States Court of Appeals for the Tenth Circuit to accept the transfer and to exercise the powers of a judicial council with respect to the identified complaint and any pending or new complaints relating to the same subject matter.

Sincerely,

A handwritten signature in black ink, appearing to read "John Roberts", is written in a cursive style.

cc: Mr. David Tighe  
Circuit Executive, U.S. Court of Appeals for the Tenth Circuit  
Ms. Elizabeth H. Paret  
Circuit Executive, U.S. Court of Appeals for the District of Columbia Circuit  
Mr. James C. Duff  
Director, Administrative Office of the United States Courts  
The Honorable Anthony J. Scirica  
Chair, Judicial Conference Committee on Judicial Conduct and Disability

# Judicial Council of the District of Columbia Circuit

In the Matter of

Judicial Council Complaint Nos. DC-16-90009

**A CHARGE OF JUDICIAL  
MISCONDUCT OR DISABILITY**

## ORDER

BEFORE: Garland\*, Chief Circuit Judge; Henderson\*, Millett, Pillard, and Wilkins, Circuit Judges; Howell, Chief District Judge; and K. Jackson, Cooper, and Chutkan, District Judges.

By order dated March 18, 2016, Judge Henderson dismissed a complaint filed against a Judge of the United States District Court for the District of Columbia. On April 29, 2016, the complainant filed with the Judicial Council a petition for review of the order of dismissal. Upon consideration thereof, it is

ORDERED, by the Judicial Council, that this matter be referred to the Chief Justice to consider transferring it to another circuit's judicial council pursuant to Rule 26 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

FOR THE COUNCIL:



ELIZABETH H. PARET  
Circuit Executive

\*Chief Circuit Judge Garland and Judge Henderson did not participate in the instant order.

Filed: May 5, 2016

# The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of

Judicial Council Complaint No. DC-16-90009

**A CHARGE OF JUDICIAL  
MISCONDUCT OR DISABILITY**

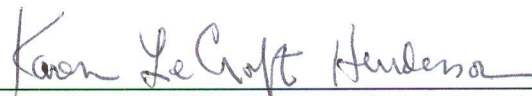
**Before:** HENDERSON, *Acting Chief Judge of the Circuit*

## 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 proceeding be concluded for the reasons stated in the attached Memorandum. See 28 U.S.C. § 352(b)(2); JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 11(e).

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).



Karen LeCraft Henderson, Acting Chief Judge  
District of Columbia Circuit

Date: MARCH 18 2016



## MEMORANDUM

Complainant has filed a Judicial Complaint alleging that a judge of the United States District Court for the District of Columbia has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. In accordance with 28 U.S.C. § 352(a), the complaint has been “expeditiously review[ed].” The subject judge retired from active service effective March 16, 2016. In consequence thereof, the complaint proceeding is concluded under 28 U.S.C. § 352(b)(2), as “action on the complaint is no longer necessary because of intervening events.” See 28 U.S.C. § 352(b)(2); see *also* JUD. CONF. U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 11(e) (“The chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible.”)<sup>1</sup>

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<sup>1</sup> 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 42 days of the date of the dismissal order. *Id.* Rule 18(b).