

UNITED STATES TAX COURT
WASHINGTON, DC 20217

In the Matter of

A CHARGE OF JUDICIAL
MISCONDUCT OR DISABILITY,

No. TC-16-90001


ORDER

The Court received a complaint, and supplements thereto, alleging that a special trial judge of the United States Tax Court engaged in judicial misconduct.¹ Upon due consideration, it is

ORDERED that the complaint is dismissed for the reasons stated in the attached Memorandum.

The Clerk of the Court is directed to send copies of this Order to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability. Rule 11(g)(2), Rules for Judicial Conduct and Disability Proceedings for the United States Tax Court.

The complainant and the subject judge have the right to petition the Judicial Conduct and Disability Council to review this order. USTC Rules for Judicial Conduct, Rule 11(g)(3). The deadline for filing such a petition is within forty-two (42) days after the date of the Chief Judge's order, and the timely mailing/timely filing provision of 26 U.S.C. sec. 7502 does not apply. USTC Rules for Judicial Conduct, Rule 18(a), (b).


L. Paige Marvel
Chief Judge

Dated: Washington, DC
June 1, 2017

¹ The Rules for Judicial Conduct and Disability Proceedings for the United States Tax Court (USTC Rules for Judicial Conduct) require the Chief Judge's decision to be publicly available, but the identities of the judge and the complainant are protected if the complaint is finally dismissed under Rule 11(c). USTC Rules for Judicial Conduct, Rule 24. Accordingly, the Court will not identify the parties in this matter, nor describe the context in which the complainant's grievances arose with any degree of specificity.

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MEMORANDUM

MARVEL, Chief Judge: Complainant has filed a complaint of judicial misconduct against a special trial judge (hereinafter also referred to as “subject judge” and “judge”) of the United States Tax Court (Tax Court), with first and second supplements thereto. For the following reasons, the misconduct complaint will be dismissed.

The complainant filed a petition with the Tax Court to commence a case, which was first assigned to the subject judge for purposes of disposing of pending motions. Complainant filed a motion for reassignment of judge with respect to the special trial judge, which was denied. Subsequently, the entire case was assigned to the special trial judge, and, by multiple orders, pending motions in the case were set for hearing. The case was not calendared for trial so no notice of trial or standing pretrial order was issued. Petitioner did not appear at the hearing. After the hearing date, complainant filed this misconduct complaint, including first and second supplements thereto.

Complainant alleges that she did not consent to her case being assigned to a “magistrate judge”. The statutory provisions applicable to the underlying Tax Court case authorize special trial judges to make decisions in such cases. 26 U.S.C.

sections 7443A(b)(6), (c). Relevant Federal laws and rules were followed with respect to complainant's Tax Court case assignment to a special trial judge, and a review of the record in the underlying case reveals that the special trial judge did not exceed the judge's jurisdiction.

Complainant further alleges that the subject special trial judge violated her due process rights because she alleges the judge did not follow the Federal Rules of Civil Procedure when a scheduling order was not issued and when her request for a pre-trial conference was denied, and that she was denied her constitutional right to participate in a calendar call and to conduct initial discovery. Complainant also contends that the subject judge exhibited bias against her because the judge scheduled a hearing date without consulting her, that scheduling multiple motions for hearing on the same day was unfair to her as a pro se litigant, and that the judge permitted the Internal Revenue Service to file documents in support of a pending motion. Cognizable misconduct does not include allegations that are directly related to the merits of a decision or procedural ruling, and a complaint must be dismissed in whole or in part when the Chief Judge concludes this is so. USTC Rules for Judicial Conduct, Rules 3(i)(3)(A) and 11(c)(1)(B). These assertions raised in the complaint,

which are directly related to the merits of a decision or procedural ruling, must be dismissed. See id.

Complainant also alleges that the subject judge assigned to her case erred by denying her motion for reassignment of judge. Complainant offers no evidence that the judge failed to recuse for an improper purpose. She argues that because the judge was previously employed by the Office of Chief Counsel of the Internal Revenue Service (I.R.S.), pending motions in her case should be reassigned to a different judicial officer.

When a judge has previously worked in the executive branch of the Federal government, recusal is required based on a “personal participation” rule – that is, where the judge, in his/her former position, “participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.” 28 U.S.C. sec. 455(b)(3); see also Baker & Hostetler LLP v. U.S. Dept. of Commerce, 471 F.3d 1355, 1357-1358 (D.C. Cir. 2006) (holding where a decision of the executive branch was under review, the Federal judge’s recusal was not required based on his executive branch service because he had taken no part in nor expressed opinions concerning the merits of the case at issue). The U.S. Tax Court special trial judge in the underlying Tax Court

case has not been an employee of the I.R.S. for many years, and accordingly did not participate at any stage of the I.R.S. administrative proceedings. Thus, recusal was not required. Allegations that a judge failed to recuse are subject to dismissal because they pertain 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.” USTC Rules for Judicial Conduct, Rule 3(i)(3)(A). Complainant offers no evidence that the judge failed to recuse for an improper purpose, so this charge must be dismissed as merits-related. USTC Rules for Judicial Conduct, Rules 3(i)(3)(A) and 11(c)(1)(B).

Complainant also alleges that the subject judge discriminated against her but does not explain how. Only unlawful or invidious discrimination may support a claim for judicial misconduct. See In re Complaint of Judicial Misconduct, 569 F.3d 1093 (2009). A review of the record does not support complainant’s general assertions of racial bias. A complaint or part thereof must be dismissed when there is a lack of sufficient evidence to raise an inference that misconduct has occurred regarding this assertion. USTC Rules for Judicial Conduct, Rule 11(c)(1)(D). Accordingly, this allegation raised in the complaint must also be dismissed.