

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-12-90012

Before **BRISCOE**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a district judge in this circuit. My consideration of this complaint is governed by 1) the misconduct rules issued by the Judicial Conference of the United States, entitled *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (the “Misconduct Rules”); 2) the federal statute dealing with judicial misconduct, 28 U.S.C. § 351 *et seq.*, and 3) the “Breyer Report,” a study by the Judicial Conduct and Disability Act Study Committee, headed by Supreme Court Justice Stephen Breyer, entitled *Implementation of the Judicial Conduct and Disability Act of 1980*. The Breyer Report may be found at: <http://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf>. To the extent that there are any relevant prior decisions of the full Judicial Council of this circuit which are consistent with those authorities, they may also govern my consideration of this complaint.

Complainant has been provided with a copy of the Misconduct Rules, and the Rules are also accessible on the Tenth Circuit’s web page at:

<http://www.ca10.uscourts.gov/misconduct.php>. In accord with those rules, the names of the complainant and subject judge shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Complainant sets out several claims against the subject judge in connection with an underlying civil rights case and seeks the judge's recusal on a pending habeas matter. To the extent that any of claimant's allegations may be seen as challenging the merits of any of the judge's rulings, they are not cognizable as misconduct claims. Misconduct Rule 11(c)(1)(B) requires dismissal of claims "directly related to the merits of a decision or procedural ruling." As explained in the Breyer Report, this exclusion of matters related to the merits of underlying cases protects the independence of the judges deciding those cases. *See* Breyer Report, App. E., ¶ 2.

Claimant asserts a claim of *ex parte* communications, although claimant admits to having no knowledge of facts which would indicate such communications. Instead, claimant wonders how the judge came to know about previous lawsuits filed by claimant and dismissed as frivolous. Case dispositions are generally public. The subject judge, in noting claimant's history of filing numerous and frivolous suits, has cited to those opinions and taken judicial notice of them. This claim lacks factual support and therefore fails. *See* Misconduct Rule 11(c)(1)(D).

Claimant alleges bias by the judge on the basis of claimant's being an illegal alien and having a criminal record, and also contends that the judge has treated claimant in an egregious and hostile manner, *see* Misconduct Rules 3(h)(3)(A), 3(h)(1)(D). These claims center on the judge's opinion dismissing an underlying civil rights case and comments made in that ruling. Claimant has set out four specific allegations in support of these claims:

First, claimant takes issue with the judge's summary of claimant's criminal history, saying that claimant was "a one-man crime wave," and listing claimant's numerous criminal matters in various jurisdictions. While the judge might have chosen a different expression to describe claimant's extensive criminal history, I cannot conclude that this statement, viewed either alone or in the context of the ruling as a whole, supports a claim of either bias or hostile treatment.

Next, claimant says that the judge has falsely accused claimant by stating that claimant switched last names in other litigation. A review of the case citations in the subject judge's civil rights ruling demonstrates the use of differing versions of claimant's last name in past law suits. Again, this statement fails to support a reasonable inference of either bias or hostile treatment.

Claimant contends that the judge made discriminating remarks by commenting on past prisoner civil rights litigation and especially one case in which claimant reportedly sought baked, instead of canned, chicken. A review of the pertinent case cited by the judge demonstrates that this characterization was

not penned by the subject judge, but by the judge in the cited case. The subject judge simply repeated the prior court's notations as evidence of claimant's history of filing frivolous lawsuits. Contrary to claimant's allegations, the judge's comments were neither an exaggeration nor evidence of ridicule or insult amounting to hostile treatment.

Finally, claimant contends that the judge tried to expose claimant as a liar by stating, as part of the judge's summary of claimant's underlying civil rights case, that claimant was held in a military prison in Mexico. Claimant protests that claimant has never been in a military prison, either in Mexico or the United States. The judge's characterization of claimant's factual allegations was supported by a citation to claimant's own statement of the facts in the civil rights complaint. Therein, complainant stated that Mexican soldiers falsely arrested and detained claimant in Mexico, and held claimant for over two years awaiting trial. The judge's assumption that the prison was a military one, even if in error, does not support claimant's allegations of bias or hostile treatment.

The Misconduct Rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." *See* Misconduct Rule 11(c)(1)(D). None of the allegations in this complaint, taken singly or as a whole, rise to the level of supporting a reasonable inference of misconduct on the basis of either bias or hostile treatment.

Accordingly, this complaint is dismissed pursuant to Misconduct Rule 11(c). The Circuit Executive is directed to transmit this order to complainant and copies to the subject judge and the Judicial Conference Committee on Judicial Conduct and Disability. *See* Misconduct Rule 11(g)(2). To seek review of this order, complainant must file a petition for review by the Judicial Council. The requirements for filing a petition for review are set out in Misconduct Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 35 days of the date of the letter transmitting this order. *Id.*

So ordered this 7th day of May, 2012.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge