

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-10-90015

Before **BRISCOE**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a magistrate 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, by way of a formal complaint and two subsequent letters, presents general claims of bias, hostility, and conspiracy on the part of the judge. These claims, with one exception noted below, are based solely on the judge's rulings against complainant as to various pleadings and motions filed in underlying civil rights cases. These claims are not cognizable as misconduct because they are "directly related to the merits of a decision or procedural ruling." Misconduct Rule 11(c)(1)(B). 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.

Further, to the extent that allegations of bias and conspiracy can state valid claims for misconduct even when they relate to a judge's ruling, *see* Commentary to Misconduct Rule 3, these general claims fail because they are completely unsupported. 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). No factual allegations which would give rise to a reasonable inference of misconduct are set forth in the complaint in support of these general claims. *See id.* Similarly, complainant's claims that the judge was hostile towards complainant during a video conference

are unsupported by the transcript of that hearing. My independent review of the transcript finds no support for this claim.

There is one claim set out in the complaint which merits further discussion. Complainant contends that “a couple” of prison officials, reportedly also defendants in one of complainant’s civil rights cases, escorted complainant to a video conference before the subject judge. Complainant states that, after the hearing, these officials opined that the judge would never rule against them because of a reported personal bias on behalf of the judge in favor of those defendants, based on sexual orientation. Complainant further contends that this opinion was supported by the judge’s subsequent ruling in the underlying case, denying complainant’s proposed supplemental complaint. These facts are more specific than complainant’s conclusory allegations of bias, hostility, and conspiracy. Nonetheless, I conclude that they do not rise to the level of a valid misconduct claim.

First, these alleged facts cannot be adequately investigated. They involve statements made outside of the judge’s presence and off the record. Commentary to the Misconduct Rules indicates that a party’s motivation to tell the truth should be considered in conducting a limited inquiry. *See* Commentary to Misconduct Rule 11. Here, where reportedly all of the parties named in the misconduct complaint are either defendants in the underlying lawsuit or the subject of the complaint itself, and no other witnesses are identified, I cannot establish the

validity of the allegations by investigation. *See* Misconduct Rule 11(c)(1)(E). Second, and more importantly, outside of the substance of the judge's ruling, the alleged facts do not describe or attest to conduct by the judge that would reasonably imply the judge ruled based on improper motive. The prison officials' opinion of the judge, even if truthfully reported by complainant, is rank speculation, unaccompanied by factual support. The language of the ruling denying complainant's proposed supplemental complaint does not support a claim of bias on any ground. These allegations are not tied to the judge's conduct and do not provide an adequate basis to support a reasonable inference of misconduct.

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 respondent 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 13th day of July, 2010.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge