

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-10-90038

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).

In an original complaint and three subsequent letters submitted in this matter, complainant takes issue with rulings by the subject judge in an underlying case. 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.

Complainant also contends that the judge’s rulings are evidence that the judge has become a participant in a conspiracy alleged in the underlying case. Similarly, complainant contends that those rulings made by the subject judge after the filing of this misconduct complaint evidence retaliation on the part of the judge. While claims of conspiracy and retaliation can state valid claims for misconduct even when the claims relate to a judge’s rulings, *see* Commentary to Misconduct Rule 3, these 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). The underlying rulings themselves, and complainant’s challenges to the correctness of those rulings, do not constitute evidence of either conspiracy or retaliation.

Finally, complainant complains of delay in the processing of this misconduct complaint, contending that the delay was intentional so as to preclude the merits-related relief complainant seeks. Complainant misunderstands the nature of these misconduct procedures. As noted in the Misconduct Rules, misconduct complaints may not be “used to collaterally attack the substance of a judge’s ruling.” Commentary to Misconduct Rule 3. Any delay in the determination of this misconduct complaint is unrelated to court proceedings.

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 23rd day of November, 2010.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge