

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-10-90056

Before **BRISCOE**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct and disability 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).

I. INTRODUCTION

Complainant, a former career law clerk to the subject judge, filed a complaint covering the judge's alleged conduct during complainant's 8-year period of employment. The complainant alleges both misconduct and disability. I conducted a limited inquiry on these claims, *see* Misconduct Rule 11(b), by asking the subject judge for a response and by inviting the complainant to provide more details in support of the allegations.

II. THE COMPLAINT

A. Disability

Complainant divides the disability claims into four categories:

1. Memory Loss. Complainant contends that the subject judge has had "senior moments" which became more frequent over the time period of complainant's

employment. Complainant provides examples of the judge's forgetfulness,¹ including leaving paperwork in another judge's office, and claims that the judge relied heavily on chambers staff to keep track of things such as the judge's calendar and objections and prior rulings during trial. Complainant alleges that the judge left the courthouse during a break in the middle of a meeting with complainant, requiring complainant to reorient the judge afterwards about the matters discussed at the meeting.

2. Inappropriate Affect. Complainant alleges that the judge's reactions to problems and events in chambers and the courthouse became increasingly erratic and angry over time, providing one example in which complainant characterized the judge's reaction as a "break with reality," giving rise to complainant's speculation whether the judge was experiencing a "psychotic episode."

Complainant contends that the judge has had constant personnel issues with chambers staff and was verbally abusive towards staff. Complainant alleges that

¹ Complainant generally contends, throughout the complaint, that the alleged conduct occurred with such frequency that complainant "infer[red] a pattern," and that the specific allegations provided are only examples of that conduct. In the response to my limited inquiry, discussed below, Complainant suggests that other court staff, former court staff, and other judges may have witnessed similar conduct and implies that I should contact those persons. However, complainant also recognizes that misconduct complainants must provide evidence which gives rise to a reasonable inference of misconduct. *See* Misconduct Rule 11(c)(1)(D). General allegations do not rise to this level and, without further evidentiary support, do not compel further inquiry. *Id.*

the judge took things personally, evidencing displeasure, anger, and quickly changing moods.

3. Loss of Executive Functioning. In this section of the complaint, Complainant takes issue with the judge's priorities and time management, contending that this conduct resulted in frequent rescheduling and shuffling of work priorities on the part of the judge's staff.

4. Lack of Structure. Complainant contends that the judge made less than efficient use of staff resources; often kept people waiting, including jurors; and held court sessions early in the mornings and sometimes late in the evenings. Complainant states that the judge required court staff to misrepresent where the judge was in instances when the judge was late. Complainant set out detailed allegations about one instance when the judge reportedly kept jurors waiting past the time the judge set for court to start after lunch, and was seen in a nearby restaurant eating.

These allegations neither provide evidence of an existing disability nor give rise to a reasonable concern about the existence of a disability such that I feel compelled to further investigate. The judge's response contains court statistics demonstrating that the judge has taken on a workload comparable to or greater than the judge's colleagues, and that the judge's work is completed in a timely fashion. Examples of forgetfulness and general allegations about frequency and pattern do not, without more, establish a reasonable inference of disability. It

appears the judge is using available staff resources to keep on top of the details of the work. Contrary to complainant's claim, the general allegations of "inappropriate affect" and "verbal abuse" do not evidence misconduct, and the examples provided do not rise to a level such that I can conclude that the judge is treating staff in a hostile manner (assuming without deciding that such conduct may constitute misconduct in light of Misconduct Rule 3(h)(1)(D)). Nor do those allegations and complainant's speculations give rise to concerns about the judge's mental state. The allegations under the headings "Loss of Executive Functioning" and "Lack of Structure" appear to be no more than complainant's disagreement with how the judge organizes and performs the work assigned, uses staff, prioritizes time between case and administrative tasks, and addresses personnel issues. These contentions do not rise to the level of misconduct. The allegation that the judge was late returning to trial after lunch, while initially of concern, does not rise to the level of misconduct without further supporting facts. No other similar or specific examples were offered in either the complaint, or complainant's response to the limited inquiry.

B. Misconduct

Complainant divides the allegations of misconduct into three categories, citing to Canons from the Judicial Code of Conduct for United States Judges.

1. Prioritization of Time. Again, complainant takes issue with the judge's use of time, alleging in general terms that the judge fails to promptly handle the assigned case load and is not punctual in performing work or attending court. The allegations here contend that the judge 1) "on several occasions" kept people waiting in the courtroom to attend to personal business; 2) elected not to swap a case with another judge because it would not reduce the subject judge's own workload; and 3) would not allow law clerks to attend an orientation session as retaliation for an imagined slight.

2. Treatment of Staff. Complainant again asserts that the judge was verbally abusive toward court staff, making disrespectful comments about attorneys who appeared before the court, other judges, and court employees. Complainant generally alleges that the judge required staff to provide false explanations to excuse the judge's absences from scheduled court hearings.

I conclude that most of these allegations neither rise to the level of misconduct nor support a reasonable inference of misconduct such that I should refer this matter for further investigation. The allegations about lateness, absence from court hearings, and keeping people waiting are vague and fail to provide evidence upon which a reasonable inference of misconduct can be based. The

judge's motivation in deciding whether to accept a case from another judge is not, without more, misconduct. Again, the workload statistics demonstrate that the judge is carrying a full workload in comparison with the judge's colleagues. Complainant's repeated allegations about the judge being verbally abusive towards staff are not supported by the examples complainant provides, and therefore do not provide support for a reasonable inference of misconduct.

3. Failure to Hear and Decide Matters Assigned. Complainant contends that, without reviewing it, the judge directed complainant to file an opinion on which complainant had done substantive edits. Complainant also takes issue generally with the judge's review of drafts of opinions and other court documents, opining that the judge did not spend enough time on those matters to make an informed decisions. Complainant speculates that a review of the judge's workload statistics would reveal a high number of mistrials and recusals, which complainant surmises were meant to reduce the judge's workload.

Court statistics show that in recent years the subject judge took more cases from other judges than the judge gave away to other judges due to conflicts or recusal issues. The other issues in this section are addressed below, as they were the subject of a specific limited inquiry.

III. LIMITED INQUIRY

A. Declining to Review Opinion Edits

In my limited inquiry, I asked complainant to provide further details to support the above allegations and, specifically, the allegation that the judge directed an opinion be filed without review of substantive edits performed by complainant at the judge's direction.

Complainant responded to this specific request, identifying the case in question, explaining that complainant was asked to edit work that had already been drafted by another law clerk, and noting the judge's directions as to analysis and outcome of the case. Complainant's response also included a copy of the draft opinion, highlighted to indicate which portions were reportedly written by the judge and which portions were added by complainant. The balance, it is assumed, was drafted by the other law clerk at the judge's direction. Although, as noted above, complainant argues generally about the adequacy of the judge's review of edited drafts, no other incidents were alleged where the judge reportedly did not review an opinion or other court document before it was filed.

My review of the draft opinion reveals that both the analysis and the outcome of the case were in place when the initial draft was prepared by the other clerk. The paragraph reportedly added by the subject judge is an early summary, essentially portending the ultimate outcome of the case. Complainant properly characterized complainant's own edits to the draft opinion as "better fram[ing] the issues and strengthen[ing] the analysis." Those edits changed neither the analysis

nor the case outcome. I also note that complainant had worked for the subject judge for about seven years at the time this alleged conduct took place.

It is a judge's duty to hear and decide cases, and that duty extends to review of drafts prepared by a judge's staff. If a judge regularly refused to review staff work, that could amount to misconduct. In contrast, here a single instance is alleged. The facts as reported indicate that the case analysis and outcome were set and in place before complainant's edits took place and that the judge's directions about the opinion and complainant's edits were followed. In light of the then long-standing work relationship, it seems likely that the judge relied on complainant's own verbal representations that the judge's instructions were followed as to the edits. I cannot conclude under these circumstances that this single incident of declining to review edits to an opinion amounts to misconduct. Complainant's speculation that the judge was rushing in order to meet court workload reporting deadlines does not support an inference of misconduct.

B. Claims of Inadequate Review

Complainant reiterates the earlier general allegations that the judge failed to adequately review opinions and other court documents before filing, again noting as a possible motive the judge's desire to meet the internal reporting deadline. These allegations are based solely on complainant's own opinion as to what constitutes sufficient review and therefore do not implicate misconduct.

Similar vague allegations that the judge attempted to avoid work and shift court duties onto other judges are not grounds for misconduct in light of the court's own workload statistics.

C. Delay in Attending to Court Business

Complainant contends that the judge's review of drafts submitted by court staff was subject to lengthy delays. Complainant states that, in line with complainant's theory that the judge wanted to meet internal reporting deadlines, the judge often waited until the deadline to review multiple opinions over several days in order to have them filed within the deadline. Again, in light of court workload statistics, these allegations do not evidence misconduct on the part of the subject judge. At most, they indicate complainant's own disagreement with how the judge performs and organizes work in chambers.

D. Erratic Court Hours and Mistrials

Complainant next alleges that several trials handled by the subject judge have resulted in mistrials over the past few years; complainant lists eight such cases. Complainant notes that in these cases the judge often held court sessions late into the evenings prior to jury deadlock. These allegations do not evidence or implicate misconduct on the part of the subject judge.

E. Case Example

Complainant discusses one specific case in some detail, stating that the judge's handling of this matter provides support for many of the general

allegations set forth in the complaint, including forgetfulness and reliance on court staff to keep objections, rulings, and paperwork straight. Complainant also contends that the judge developed “a deep personal animosity” towards one of the attorneys on the case, which in part informed a ruling by the judge in which the judge reportedly found the attorney guilty of professional misconduct.

Complainant notes that, after the judge was approached by separate counsel, the ruling was withdrawn and replaced by a ruling without that finding. Complainant contends that the judge also developed animosity towards another attorney on the case, and would discuss the judge’s opinions of that attorney with complainant.

The general allegations of forgetfulness and use of court staff to keep trial matters organized do not rise to the level of misconduct. Even were I to accept as true the allegation that the judge was improperly motivated to making a finding of professional misconduct towards counsel in the referenced case, the judge voluntarily corrected any possible misconduct by reissuing the order without the finding. *See* Misconduct Rule 11(d)(2) and related Commentary (“the emphasis is on correction of the judicial conduct that was the subject of the complaint.”). The judge’s discussions about counsel with complainant do not rise to the level of misconduct.

F. Staff Turnover

Complainant contends that there was considerable turnover in the judge’s staff during complainant’s employment, and provides a chart in support of this

allegation. Complainant reiterates earlier general allegations that the judge instructed staff to give false reasons for absence or lateness and required matters to be rescheduled on short notice to accommodate personal matters, inviting me to talk to other court staff to get supporting details. These general claims, without factual support which would allow some consideration of their import, do not rise to the level of misconduct.

Complainant also alleges that, when approached by an attorney for the court about a serious personnel matter in which the judge was involved, complainant chose not to talk to the attorney because complainant “feared the judge would pressure me to commit perjury.” Complainant alleges as a basis for this claim a conversation with the judge in which complainant brought to the judge’s attention certain facts surrounding the personnel matter and was told by the judge that those facts were unimportant. Complainant also notes that it was during the pendency of this personnel matter that the judge was involved in the case referenced above. Nonetheless, complainant’s decision not to discuss the personnel matter with an attorney for the court, based on this speculation about the judge’s response, does not constitute grounds for a misconduct claim.

G. Health Concerns

Complainant alleges that the judge had a frontal head injury sometime before complainant’s employment which may have played a role in complainant’s claims of diminished capacity. Complainant also contends that the judge was greatly

affected by the death of a parent during complainant's employment. Finally, complainant contends that the judge is a "heavy user" of unidentified medications and supplements, and "stimulants (such as caffeine)." Complainant surmises that this may have contributed to the usual court session hours and the frequency of mistrials alleged, and may have affected the judge's mental state. Complainant does not support these general and speculative allegations with facts or evidence that would give rise to concerns about the judge's mental or physical fitness to perform a judge's duties. The judge's response to my limited inquiry discussed several health issues that the judge has dealt with during the time period of complainant's employment, none of which provide the basis for misconduct or disability concerns.

IV. CONCLUSION

In addition to considering each of complainant's claims and allegations individually, I have considered whether all of the complained of conduct, viewed at as whole, would give rise to a reasonable inference of either misconduct or disability. I conclude that it does not. In large measure, the complaint sets out general allegations comprised of complainant's viewpoints and speculation about the judge's motivations, habits, character, and priorities which do not implicate misconduct, but are simply evidence of complainant's personal and critical opinion about how the subject judge should operate chambers, handle work, and

treat staff. The few contentions that compelled a closer look and those that were supported with factual allegations do not rise to the level of misconduct.

Accordingly, this complaint is dismissed pursuant to Misconduct Rule 11(c) and (d). 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 April, 2011.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge