

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-12-90008

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).

Claimant raises several issues with regard to a hearing conducted by the subject judge in an underlying case. I have undertaken a limited inquiry into this matter, pursuant to Misconduct Rule 11(b), by reading the transcripts of the hearing in question. Claimant first contends that the hearing constituted impermissible *ex parte* communications, and therefore was both misconduct and a violation of the judicial Code of Conduct. Not all *ex parte* communications are impermissible. In this instance, the judge conducted a hearing on a motion which specifically sought *ex parte* relief. The judge determined that the facts and the law warranted both the *ex parte* hearing and the ultimate relief. Claimant also asserts that, during the hearing, the judge failed in carrying out an alleged duty to protect the interests of the parties not present at the hearing because the judge failed to adequately cross-examine the moving party and/or investigate the supporting facts and legal principles. These arguments are essentially legal challenges to the judge's ruling in the underlying case, and therefore "directly related to the merits of a decision or procedural ruling" and not cognizable as a misconduct claim. 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.

Claimant alleges that a comment made by the judge during the hearing demonstrated bias against the opposing parties. Specifically, the judge stated that unnamed parties weren't "smart." This single comment does not support a reasonable inference of bias such that it rises to the level of misconduct. *See* Misconduct Rule 11(c)(1)(A).

Claimant also contends that the judge assisted the moving party in supporting its case for relief by providing legal advice and by helping that party rewrite supporting affidavits and a memorandum, even commenting on details such as spelling errors and asking counsel to make specific changes. However, the hearing transcripts demonstrate that the judge took pains to hold the moving party to its burden of proof, including the amended supporting affidavits. The specific language claimant cites in support of these claims was part of a protracted discussion where the judge was editing a draft Report and Recommendation, initially prepared by counsel at the judge's request. The Report and Recommendation is a document which the judge would ultimately sign; the judge was entitled to rewrite and edit that document.

Finally, claimant alleges that the judge violated due process and a local court rule by refusing to file, or allow to be filed, a supporting affidavit. The transcript belies this claim. The judge's comments indicated that it was easier to

amend the affidavit before filing than to have to file an amended affidavit. The judge took pains to insure that the amended affidavit was properly filed.

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). Claimant’s allegations do not give rise to 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 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 25th day of June, 2012.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge