

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE  
JUDICIAL CONDUCT AND  
DISABILITY ACT

No. 10-15-90031

Before **TYMKOVICH**, 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 “JCD Rules”); and 2) the federal statute dealing with judicial misconduct, 28 U.S.C. § 351 *et seq.* 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.

The JCD Rules and this circuit’s local misconduct rules are available to complainants on the Tenth Circuit’s web page at: <http://www.ca10.uscourts.gov/ce/misconduct>. Paper copies are also furnished by the Circuit Executive’s Office upon request. In accordance with those rules, the names of the complainant and subject judge shall not be disclosed in this order. *See* JCD Rule 11(g)(2).

Complainant, an attorney representing the plaintiff in a civil case before the subject judge, alleges the subject judge engaged in misconduct by refusing to follow proper procedure with respect to a motion for recusal. Specifically, complainant contends the motion should have been assigned to another judge, but that the subject judge considered the motion and denied it. Complainant asserts the judge demonstrated bias toward plaintiff during trial and the judge's refusal to abide by the proper procedure for the recusal motion was motivated by that bias.

First, the complainant's assertion that the subject judge refused to follow proper procedure with respect to the motion for recusal is not cognizable as misconduct because it is "directly related to the merits of a decision or procedural ruling." JCD Rule 11(c)(1)(B); *see* Commentary to JCD Rule 3 ("This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling.").

Next, I conducted a limited inquiry by reviewing the docket and relevant order to determine whether the judge's statements demonstrated bias. At trial, the judge questioned whether complainant's evidence was sufficient and indicated an intention to allow a renewed motion for judgment as a matter of law if the jury returned a verdict in the plaintiff's favor. Pursuant to Commentary to JCD Rule 3, "[i]f the judge's language was relevant to the case at hand – for example a statement that a claim is legally or factually 'frivolous' – then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive." Because the judge's statement was relevant to the case and complainant has not

provided further evidence, I conclude the judge's comments, as quoted in the complaint and stated on the record, do not demonstrate bias and complainant's claim of bias can be dismissed as merits-related.

Accordingly, complainant's contention that the subject judge was motivated by bias in making a ruling on the motion to recuse is unsupported. While allegations of improper motive may state a valid claim for misconduct even when related to a judge's ruling on a motion to recuse, *see* Commentary to JCD Rule 3, this claim fails because it is unsupported by evidence of an improper motive. The JCD Rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." *See* JCD Rule 11(c)(1)(D).

Accordingly, this complaint is dismissed pursuant to JCD 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* JCD 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 JCD Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 42 days after the date of the chief judge's order. *Id.*

So ordered this 9th day of November, 2015.

/s/ Timothy M. Tymkovich

Honorable Timothy M. Tymkovich  
Chief Circuit Judge