

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE  
JUDICIAL CONDUCT AND  
DISABILITY ACT

No. 10-16-90005

Before **TYMKOVICH**, 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 the misconduct rules issued by the Judicial Conference of the United States, entitled *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (the “JCD Rules”), the federal statutes addressing judicial conduct and disability, 28 U.S.C. § 351 *et seq.*, and relevant prior decisions of the full Judicial Council of this circuit that are consistent with those authorities.

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 questions the subject judge’s mental competence and alleges the subject judge engaged in misconduct while presiding over complainant’s lengthy and

complex civil case in district court. Complainant alleges the subject judge has demonstrated “intermittent confusion and disorientation, inability to remember critical facts, inability to focus and engage in complex analytical thought, irritation with the [] attorneys, and abnormal repetition of questioning . . . .” Given the seriousness of the allegations, I conducted a limited inquiry pursuant to JCD Rule 11(b) (providing, “[i]n determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge . . . may communicate . . . with . . . any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents.”).

I asked the subject judge to respond to complainant’s allegations and the judge volunteered to undergo a neuropsychological evaluation to determine whether he had any cognitive impairment that would render him unable to function effectively as a judicial officer. The neuropsychologist reported that the subject judge “displays excellent performance on neuropsychological testing, with no significant deficits noted” and did not recommend further testing or treatment. A consulting psychiatrist reviewed the report and agreed with the neuropsychologist’s conclusions. Accordingly, the assertion that the subject judge suffers from age-related cognitive impairments is unsupported by sufficient evidence that a disability exists. *See* JCD Rule 11(c)(1)(D).

Complainant also alleges that the subject judge has demonstrated hostility, racial or ethnic animus, and bias, and has thus deprived complainant due process and equal treatment under the law. Complainant cites to several places on the record to support its assertion. I have reviewed the relevant transcripts, pleadings, and orders in the matter.

As to the claim of hostility, “[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.” Commentary to JCD Rule 3. My review of the record indicates that the judge’s statements were relevant to the case on its face and, thus, those statements did not rise to a level of hostility; rather, those statements are not cognizable as misconduct because they are “directly related to the merits of a decision or procedural ruling.” JCD Rule 11(c)(1)(B); *see also* Commentary to JCD Rule 3 (stating, “[a]ny allegation that calls into question the correctness of an official action of a judge—without more—is merits-related”).

Complainant also contends the subject judge demonstrated racial or ethnic animus and bias. Since the present complaint was filed, another district judge and an appellate panel have reviewed the claim of bias in the case and have concluded that the judge was not biased against complainant. After my review of the record, I agree. While allegations of bias and racial animus can state valid claims for misconduct even when the allegations relate to a judge’s ruling, *see* Commentary to JCD Rule 3, these claims fail because they are unsupported by “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 21<sup>st</sup> day of December, 2016.

/s/ Timothy M. Tymkovich

Honorable Timothy M. Tymkovich  
Chief Circuit Judge