

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-08-90098

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

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.supremecourtus.gov/publicinfo/breyercommitteereport.pdf>. To the extent that any relevant prior decisions of the full Judicial Council of this circuit consistent with those authorities exist, they may also govern my consideration of this complaint.

Complainant has received or has access to a copy of the misconduct rules. 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).

Complainant takes issue with rulings by the subject judge, contending that the judge 1) wrongly expanded a single claim in complainant's underlying civil case to three separate claims; 2) prevented the remaining issue from being decided at trial after summary judgment on two of the issues identified by the judge; 3) prevented complainant's remaining issue from being heard by a jury; 4) ignored controlling case law; 5) changed a "without prejudice" ruling to "with prejudice" without authority to do so; and 6) failed to rule on complainant's motion for judgment pursuant to Fed. R. Civ. P. 54(b). Despite complainant's assertion that the complaint does not seek review of the judge's rulings, these claims are not cognizable as misconduct because they are "directly related to the merits of a decision or procedural ruling." Misconduct Rule 3(h)(3)(A). 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. These claims must be dismissed. *See* Misconduct Rule 11(c)(1)(B).

Finally, complainant contends that the subject judge demonstrated bias in the judge's "general demeanor, expressions of attitude, and opinions" both oral and written. Although allegations of bias can state valid claims for misconduct, *see* Misconduct Rule 3(h)(3)(A), the rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." Misconduct Rule 11(c)(1)(D). Aside from these conclusory

characterizations, complainant offers no supporting allegations such that an inference of misconduct is reasonable. This claim is also dismissed.

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 respondent 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 11th day of November, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge