

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 2008-10-372-11

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

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*; 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 contends that the subject judge, who presided over complainant's criminal trial, made certain statements before the trial. Specifically, complainant alleges that the judge said complainant was guilty of all charges and should make a plea agreement because the prosecutor would agree to a lesser sentence than the judge would impose. Complainant contends that the trial transcript supports this claim. In a limited inquiry pursuant to Misconduct Rule 11(b), I have reviewed the relevant transcript, and conclude that it does not support complainant's contentions. Prior to trial, the subject judge questioned complainant's counsel to ensure that counsel had warned complainant about the risks of going to trial.

THE COURT: One of the things that always does concern me – again, all I'm here for in the end is to accommodate the parties on how you all want to resolve your dispute, but one of the things that does concern me is that the defendant goes to trial and it winds up that that was really a bad decision to make for that defendant and they wind up doing more time in prison or time in prison when they might not have done time in prison had they resolved their case otherwise. That's why it's important to me that it's a knowing decision to go to trial and not simply having seen shows on television where somebody wins the case and walk away, because the fact is in the time that I have been a judge in federal court, which is 15 ½ years, there have been two or three cases where the defendant has been found not guilty out of all the cases that I've tried. . . . My experience in federal court has been, generally speaking, the government doesn't bring cases [it] can't prove to the satisfaction of 12 people most every time. I'm not suggesting that's the case here, but it's something that I hope the defendant has considered in all of this, the realities of going to trial in federal court in Kansas City, Kansas. Let me particularize it to this particular situation.

And as long as he's well aware of all this universe of information and he decides what he wants to do is have trial, that's what he should do, but I want to make sure he's well informed. [Complainant's counsel], do you feel that he is well informed?

[COMPLAINANT'S COUNSEL]: Well, he is well informed.

Transcript of Trial Proceedings, pp. 153-154.

The transcript does not support complainant's claims that the judge had pre-determined complainant's guilt or threatened to impose a heavy sentence should complainant go to trial.

The balance of complainant's claims, save one, are essentially challenges to the judge's substantive and procedural rulings in complainant's underlying criminal case. These claims are not cognizable in misconduct proceedings. *See* Misconduct Rule 11(c)(1)(B). Claims that are "directly related to the merits of a decision or procedural ruling" do not constitute misconduct. Misconduct Rule 3(h)(3)(A). The policy behind this rule is that "the complaint procedure cannot be a means for collateral attack on the substance of a judge's rulings." Breyer Report, App. E., ¶ 2. As explained in the commentary to Misconduct Rule 3, "[t]his exclusion preserves the independence of judges in the exercise of judicial power."

Complainant also expresses doubt that the judge will afford complainant a fair and impartial hearing. Even when related to a judge's ruling, claims of bias or improper motive can be cognizable as misconduct. *See* Commentary to

Misconduct Rule 3(h)(3)(A). Nonetheless, such claims must be supported by “sufficient evidence to raise an inference that misconduct has occurred,” *see* Misconduct Rule 11(c)(1)(D). Complainant’s doubts about the judge’s fairness are unsupported by any such evidence, and therefore lack merit.

Finally, complainant makes allegations against the judge’s clerk. These allegations do not implicate the respondent judge in any way, and therefore are not cognizable here. *See* Misconduct Rule 4 (these procedures apply to federal judges only).

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 30th day of April, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge