

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 2008-10-372-13

Before **KELLY**, Circuit Judge.

ORDER OF DISMISSAL

Complainant has filed a complaint of judicial misconduct against eight circuit judges and two district judges 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 Judicial Conference Committee on Judicial Conduct and Disability and the Tenth Circuit Judicial Council 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 judges shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

The complaint takes issue with various rulings made by the subject judges in both prior misconduct matters and underlying district court cases and appeals. Complainant's theory is that a pattern of dismissals of prior misconduct complaints and a pattern of adverse rulings in underlying cases (brought by complainant and others) demonstrates that the subject judges and the circuit's Judicial Council systematically discriminate against pro se litigants. Complainant references the opinions of those who criticize the current judicial misconduct procedures and standards, but provides no supporting factual allegations which would distinguish these allegations from a category of claims that are not cognizable in judicial misconduct proceedings: claims that are "directly related to the merits of a decision or procedural ruling." *See* Misconduct Rule 3(h)(3)(A). Such claims do not constitute misconduct because adjudication procedures contain numerous statutorily-granted opportunities to challenge a court's rulings and directly appeal its decisions. Therefore "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." Further, and without determining whether such a theory advanced could properly

support a claim of misconduct, complainant's factual allegations come nowhere near the requisite "clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law." *In re Comm. on Judicial Conduct and Disability*, 517 F.3d 558, 562 (U.S. Jud. Conf. 2008). Equally unavailing are complainant's arguments that the burden of proving such a pattern or practice is undue and should be borne by the Judicial Council.

Complainant contends that either improper motive (discrimination against pro se litigants or a desire to protect colleagues) or incompetence informs the subject judges' rulings. Such claims are cognizable here, *see* Misconduct Rules 3(h)(1)(A) & (D), but complainant provides no evidentiary support for them. Statistics indicative of low rates of success for pro se cases and comments about those statistics do not provide support for claims of improper motive. Arguments about the intelligence and research capabilities of pro se litigants do not indicate that the statistics must, therefore, demonstrate discrimination by the subject judges. Similarly, complainant's assertion of conspiracy without supporting factual allegations is not sufficient to "raise an inference that misconduct has occurred." Misconduct Rule 11(c)(1)(D).

In addition to the numerous complaints about the judges' rulings, complainant speculates that one of the subject circuit judges must be working only part time, in light of the judge's other academic pursuits of writing and

teaching. A judge may engage in such extra-judicial activities consistent with proper performance of judicial duties and no factual basis supports any impropriety, let alone any judicial misconduct. *See* Misconduct Rule 11(c)(1)(A). Complainant asserts that certain judges hand their cases over to law clerks or magistrate judges with instructions to deny relief and pay no further attention to them. These claims also lack merit, because they lack evidentiary and factual support. *See* Misconduct Rule 11(c)(1)(D).

After the complaint was filed and assigned in accord with Misconduct Rule 25(f), complainant filed a supplemental letter which sets out additional claims against one of the named district court judges. Complainant takes issue with the judge's use of an image of a pig included in an opinion criticizing citation of authority that did not support a proposition advanced. Albeit in poor taste, the image apparently was a comment on the authority submitted. To the extent relevant to the case under consideration, such a comment is presumptively merits-related. *See Commentary*, Misconduct Rule 3. Regardless, it does not rise to the level of "treating litigants or attorneys in a demonstrably egregious or hostile manner." *See* Misconduct Rule 3(h)(1)(D).

Complainant next contends that a magistrate judge, who is not the subject of this complaint, made certain comments to a litigant in a settlement conference about a district judge's disdain for a certain type of case. Based on those comments, the litigant filed a motion to recuse the district judge. Complainant

takes issue with the judge's ruling on this motion, contending that the judge has conceded the existence of the remarks and condoned settlement pressure by considering the context of the remarks. First, this claim is not cognizable to the extent that it is related to the merits of the judge's ruling. *See* Misconduct Rules 3(h)(3)(A); 11(c)(1)(B). Second, the judge's conduct in responding to a recusal motion and discussing the context of the remarks simply does not constitute misconduct; to the contrary, it represents no more than the judge's reasoning in performing his judicial function. *See* Misconduct Rules 3(h)(3)(A); 11(c)(1)(A).

Complainant makes further allegations against the district judge in relation to proceedings in the judge's court and the judge's ruling in a case some seventeen years ago, based on third-hand reports by plaintiff's counsel. These claims are similarly not cognizable here, either because they do not rise to the level of misconduct, or are "directly related to the merits" of the judge's ruling. *See* Misconduct Rules 3(h)(3)(A); 11(c)(1)(A), 11(c)(1)(B). In the end, complainant's allegations that the procedure and results in various types of cases (many of which he has no personal knowledge) suggest a conspiracy to rule against pro se litigants are pure speculation, and directly related to the merits of the judge's ruling and are therefore not properly brought here. Misconduct Rules 3(h)(3)(A); 11(c)(1)(B), 11(c)(1)(D).

In light of the length of this complaint and prior complaints filed by this complainant, all of which contain vague and unsupported allegations focusing on

the merits of judges' rulings in underlying cases and matters in which complainant was involved, complainant is warned that misconduct complaints should be limited to "a concise statement that details the specific facts on which the claim of misconduct or disability is based." Misconduct Rule 6(b). Complainant should be aware of Misconduct Rule 10(a), which sets out procedures and standards for the imposition of limitations on complainants who file repetitive, harassing, or frivolous complaints.

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 judges as well as 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 8th day of May, 2008.

/s/ Paul J. Kelly, Jr.

Honorable Paul J. Kelly, Jr.
Circuit Judge