

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-08-90043

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*; 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 committed misconduct when the judge “degraded” complainant for having filed an appeal with the Tenth Circuit. In support of this claim, complainant states that the judge said: “there was no Byron White Court House.” Complainant also takes issue with the judge’s rulings in an underlying case. Finally, complainant asserts that the judge had ex parte communications with defendant in the underlying case.

The first claim, that the judge “degraded” complainant for taking an appeal, does not appear to rise to the level of misconduct. The judge’s alleged statement about the Byron White Courthouse, offered in support of this claim, does not support the characterization that the judge “degraded” complainant. No further examples or statements have been provided in support of the allegation. I conclude that this claim must be dismissed under 11(c)(1)(A), as alleging conduct that “even if true, is not prejudicial to the effective and expeditious administration of the business of the courts.”

Complainant’s claim that the judge’s rulings were incorrect is not cognizable as a misconduct claim. This claim is “directly related to the merits of a decision or procedural ruling,” and, as such, must be dismissed. Misconduct Rule 11(c)(1)(B). 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.

Finally, complainant's allegation that the judge engaged in ex parte communications is unsupported by any allegations or other evidence. The Misconduct Rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." Misconduct Rule 11(c)(1)(D). Lacking any supporting evidence, this claim must be dismissed. *Id.*

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 24th day of June, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge