

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-09-90025

Before **HENRY**, Chief Judge.

ORDER

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* (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 contends that the subject judge, in ruling on an underlying matter brought by complainant, failed to read complainant's pleadings and was biased against complainant in that the judge had pre-determined the outcome of the case. In support of these claims, complainant points to the judge's rulings. Complainant states that this challenge is not to the merits of the rulings, but to the process by which the rulings were reached. Complainant's contentions that the judge was biased and failed to read the pleadings are essentially claims that the judge decided the case on improper grounds or with improper motive.

Specifically, complainant states that twice during the proceedings complainant included direct inquiries or challenges to the subject judge in the pleadings, questioning whether the judge had read the pleadings and asking the judge to indicate whether the judge had, in fact, done so. The judge's rulings did not respond to these inquiries or challenges. Complainant also characterizes the judge's rulings as "generic" and "pro forma" in an attempt to bolster this claim.

Complainant notes that all of the judge's rulings in the case were contrary to complainant. Complainant further asserts that the judge's rulings failed to mention legal authorities on which complainant heavily relied, and contends that one ruling in particular fails to identify the specific reasons why relief was denied. Complainant states that the judge's ruling failed to correct factual issues that complainant had argued were misstated. Despite complainant's protestations

that the subject matter of the rulings is not at issue here, complainant seeks reversal and remand of the underlying case as partial relief in this matter.

To the extent that complainant complains about the judge's failure to credit complainant's factual arguments or mention complainant's legal authority, and to the extent that complainant seeks substantive relief in this matter, these claims are not cognizable as misconduct because they are "directly related to the merits of a decision or procedural ruling." Misconduct Rule 11(c)(1)(B). These matters are excluded from the realm of judicial misconduct to preserve the independence of judges in the exercise of their judicial power. *See* Breyer Report, App. E., ¶ 2.

To the extent that complainant seeks to establish misconduct in the process of the judge's decision-making and claims bias by the judge, complainant's speculative arguments and expectations provide no evidence of misconduct on either basis. The claim that the judge failed to read any of complainant's pleadings is based solely on the pleadings themselves and complainant's apparent belief that the judge somehow had a duty to respond to complainant's inquiries or challenges to prove that the judge had read the pleadings. Although allegations of bias and other improper grounds for decision can state valid claims for misconduct even when related to a judge's ruling, *see* Commentary to Misconduct Rule 3, such claims must be supported. The Misconduct Rules require complainants to support their allegations with "sufficient evidence to raise an

inference that misconduct has occurred.” *See* Misconduct Rule 11(c)(1)(D).

Here, no such evidence has been presented.

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 1st day of August, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge