

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-10-90001

Before **HENRY**, Chief Judge.

ORDER

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.

I have provided the complainant a copy of the Misconduct Rules, and the Rules are also accessible on the Tenth Circuit's web page at: <http://www.ca10.uscourts.gov/misconduct.pdf>. 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's allegations include several claims against court staff other than the subject judge. Those claims cannot be considered here because the misconduct procedures apply only to federal judges. *See* Misconduct Rule 4. Further, a large number of complainant's allegations either take issue with rulings by the subject judge or are based solely on the merits of those decisions. 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). 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.

Additionally, complainant contends that the language in three of the subject judge's orders demonstrates bias and prejudice against complainant. I have reviewed the orders in question and conclude that nothing in the orders supports a reasonable inference of bias or prejudice. The fact that those rulings denied complainant's motions is not support for complainant's claims. *See* Misconduct Rule 11(c)(1)(B).

Complainant further argues that one of the orders implicates ex parte communications by the subject judge. The Defendants in the case brought by the complainant had requested an extension of time to respond to the complaint, and they had attached a proposed order granting their request. The judge, using that proposed order, granted the extension of time. Throughout the order, the word “Defendant” was used in the singular rather than the plural. Because there are multiple defendants in the case, complainant argued that the order’s language limited the extension of time to a single defendant. The subject judge responded that the use of the singular language had been inadvertent, and that the extension of time applied to all defendants. Complainant now argues that this ruling demonstrates the judge must have had ex parte communications with defendants because the judge would not otherwise have known defendants’ intentions with regard to the use of the singular language. This argument does not support complainant’s claim of ex parte communications. First, the complainant was advised by the state attorney general’s office that it represented all the defendants. Second, regardless of who drafted the proposed order, the order was signed and issued by the subject judge. The judge is responsible for the order’s language and only the judge can clarify what the judge’s meaning was in granting the motion for an extension of time. Defendants’ intentions, or lack thereof, with regard to the singular language, are irrelevant.

Complainant also takes issue with the timing of the judge's orders, speculating about the judge's motives and contending that the timing demonstrates bias. My review of the arguments and the chronology of the judge's rulings reveals no evidence that would support a reasonable inference of bias. Finally, complaint contends that the subject judge should not be handling any matters in the underlying case because complainant did not consent for the case to be decided by a magistrate judge pursuant to 28 U.S.C. § 636(a)(3). However, and as clearly set forth in subsection (b)(1) of that statute, district court judges may, at their discretion, designate magistrates to handle pretrial matters and hearings. The subject judge's continued handling of these matters in complainant's case does not support a claim of misconduct.

In sum, complainant's claims of bias, prejudice, and ill motive fail for lack of evidentiary support. 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). Complainant has not done so in this instance.

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 18th day of March, 2010.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge