

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 2008-10-372-03

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

Complainant has filed a complaint of judicial misconduct and disability against a district judge in this circuit. My consideration of this complaint is governed by 1) the misconduct rules issued by the Judicial Council of the Tenth Circuit, entitled *Rules Governing Complaints of Judicial Misconduct and Disability*; 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 exist, prior decisions of the full Judicial Council of this circuit consistent with those authorities may also govern my consideration of this complaint.

Complainant has received or has access to a copy of this circuit’s 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 4(f)(1).

Complainant contends that the respondent judge has committed misconduct and suffers from “mentally incapacitating disability” as demonstrated by the judge’s rulings in an underlying case. Complainant contends that those rulings are self-contradictory and contain “clearly erroneous findings of material fact” evidencing the judge’s mental disability. These claims are not cognizable as misconduct because they are “directly related to the merits of a decision or procedural ruling.” Misconduct Rule 4(c)(2). 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 this circuit’s misconduct rules, only a court has the power to change a judge’s ruling. Misconduct Rule 1(e). Neither I, acting as Chief Judge, nor the Judicial Council of the circuit - both charged with the determination of judicial misconduct matters under the federal statute - can do that.

Next, complainant contends that the judge had ex parte communications with defendants in the underlying case. As support for this claim, complainant again points to language in the judge’s ruling - a reference to the Veteran’s Administration - contending that the judge referred to matters outside the record which could only have come from contact with defendants. Ex parte communications do fall within the purview of the misconduct statute; however, complainant’s allegations are not enough to demonstrate that such ex parte communications occurred. I have conducted a limited inquiry by reviewing the

court-filed documents in the underlying case. *See* Misconduct Rule 4(b). The complaint stated that complainant is a “combat wounded war veteran.” The judge’s summary of complainant’s physical disability, including a reference to the Veteran’s Administration does not constitute evidence sufficient to implicate either disability on the judge’s part or ex parte communications with defendants. Misconduct Rule 4(c)(3) states that a complainant must support misconduct claims with evidence that is sufficient to “raise an inference that some kind of cognizable misconduct has occurred.” This allegation falls short of that standard.

Accordingly, this complaint is dismissed. The Circuit Executive is directed to transmit this order to complainant and a copy to the respondent judge. To seek review of this order, complainant must file a petition for review by the Judicial Council. As set out in the misconduct rules, the petition should be in the form of a letter, and need not include a copy of the original complaint or this order. *See* Misconduct Rule 6. The petition must be filed with the Office of the Circuit Executive, at the address set out in the rules, within 30 days of the date of the letter transmitting this order. *Id.*

So ordered this 21 day of February, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge