

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL  
MISCONDUCT

No. 2008-10-372-09

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 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 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 has filed a lengthy complaint against a district court judge who presided over a motion hearing in an underlying case in which complainant was the plaintiff. The gist of the allegations in the complaint is that the judge, due to age and physical infirmity, was unable to perform the duties of a judge at the hearing, and ignored a judge's professional responsibilities. Complainant alleges that the respondent judge 1) was ignorant of the case presented, despite prior briefing; 2) demonstrated an inability to grasp the issues; 3) had pre-judged the outcome of the hearing; 4) asked questions that indicated a lack of understanding of what was being said; 5) demonstrated bias towards defense counsel and a witness (complainant's former counsel) and bias against complainant's counsel; 6) would not let complainant testify to facts or answer questions; 7) unfairly restricted the time spent on the hearing because the judge wanted to go to a court birthday party; 8) generally indicated contempt for complainant and counsel; 9) acted as an advocate for the defendants; and 10) created a hostile environment by threatening to assess costs against complainant. Complainant contends that the fees assessed are unfair and assessed as punishment for pursuing complainant's legal rights. Finally, complainant also takes issue with the judge's legal rulings and factual findings in the underlying case, contending that these rulings demonstrate confusion on the part of the judge

In a limited inquiry, as provided by Misconduct Rule 4(b), I have reviewed the docket sheet and various documents filed in the underlying case. This review reveals the following procedural history:

In late 2005, complainant filed suit in federal district court alleging breach of contract, wrongful discharge, and “public policy tort.” A mediation was conducted in early 2006, and the court was notified that a settlement was reached. A little over a month later, defendants moved to enforce the settlement agreement. Shortly thereafter, complainant’s counsel asked for leave to withdraw from the case at complainant’s request.

After the motion to withdraw was granted, the court allowed complainant some time to find new counsel or to elect to proceed *pro se*, and scheduled a hearing on defendants’ motion to enforce for one month later. The court’s order stated that if new counsel entered an appearance within two weeks time, the court would allow thirty days for counsel to prepare. The court’s order further noted that complainant had contacted the court directly on three prior occasions, ordered complainant to cease doing so, and directed complainant to put all further communications in writing, file them with the court, and properly serve defendants. The court also commented that its order should not prevent the parties from reaching agreement on the matter prior to any hearing.

Complainant subsequently sought, and was granted, an extension of time to find new counsel. In its order granting the extension, the court also set a new

hearing date and a new deadline for counsel's entry of appearance. Again, the court noted that the parties were free to reach agreement on the matter prior to the hearing.

Counsel entered an appearance and requested an extension of time to prepare, which extension was also granted. The hearing was rescheduled to a date approximately eleven weeks later. After counsel filed a motion to dismiss the defendant's motion to enforce the settlement agreement, the hearing was again rescheduled to a later date.

After the hearing was held, the court granted defendants' motion to enforce the settlement agreement and assessed costs against complainant. The court's written order was filed in late 2006. Complainant appealed the decision and the subject judge's decision was upheld by the appellate court in early 2008. This misconduct and disability complaint followed.

In light of the above procedural history and after reviewing the full transcript of the hearing in question, I conclude that complainant's claims fall into three categories. First, those claims that take issue with the judge's rulings, whether substantive or procedural, are not cognizable as misconduct. Misconduct Rule 4(c)(2) directs dismissal of claims that are "directly related to the merits of a decision or procedural ruling." 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.

Second, the claims of bias and improper motive for the assessment of costs and fees are unaccompanied by "sufficient evidentiary support to raise an inference that some kind of cognizable misconduct has occurred." Misconduct Rule 4(c)(3). Further, I conclude these claims are not supported by the hearing transcript. The judge treated counsel for both sides equally, and, while occasionally indicating impatience with complainant's delay in answering questions and failure to answer questions directly, also demonstrated patience and a willingness to hear complainant's point of view and the arguments of complainant's counsel.

Third, the balance of the claims - setting out examples and describing the judge as unprepared, confused, rude, and dismissive of the matter at hand - are not borne out by the transcript. My review of the transcript indicates no basis for a reasonable inference that the judge was either disabled, *i.e.*, "unable to discharge all the duties of office by reason of mental or physical disability," Misconduct Rule 1(b), or that the judge committed misconduct by ignoring a judge's professional or ethical responsibilities. Therefore, I conclude that these claims must be dismissed pursuant to Misconduct Rule 4(c)(1).

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 2nd day of April, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry  
Chief Circuit Judge