ORIGINAL

JUDICIAL COUNCIL OF THE SECOND CIRCUIT

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In re
CHARGE OF JUDICIAL MISCONDUCT. **No. 06-9056-jm**

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Dennis Jacobs, Chief Judge:

On November 29, 2006, the Complainant filed a complaint with the Clerk's Office of the United States Court of Appeals for the Second Circuit pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351 (2006) (the "Act"), and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers (the "Local Rules"), charging a magistrate judge of this Circuit (the "Judge") with misconduct. On February 13, 2007, the Complainant supplemented her misconduct complaint with additional information. These two filings will be referred to collectively as the "Complaint." The Complaint alleges that the Judge engaged in misconduct by (1) intentionally striking the Complainant without justification and, as a result, being charged with a criminal offense; (2) committing perjury in connection with the criminal

investigation; and (3) possibly "allow[ing], encourag[ing], or instruct[ing]" the Judge's nephew to "feign ignorance and thereby obstruct an investigation" of an alleged assault on at least one of the Complainant's daughters. Allegations (1) and (2) are dismissed because, even if true, the particulars do not constitute misconduct under the Act--i.e., they do not constitute "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). Allegation (3) is dismissed as "lacking sufficient evidence to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii).

I. Background and Allegations

On the evening of August 20, 2006, an altercation between the Complainant and the Judge occurred at a beach community. The context and allegations are set out in the Complaint; in two state court civil complaints that are attached to the Complaint, one of which purports to be a civil lawsuit by the Complainant against the Judge;[1] and in

[1] While the Complaint states that the two state civil complaints were filed, the copies attached are not stamped, and a search of state court databases did not uncover any such actions. Because the question of whether these civil complaints were filed is

a signed statement provided by the Judge to the police dated August 29, 2006. The undisputed facts are as follows: In the early morning of August 20, the Complainant's 15-year old daughter and two other girls (one of whom may also have been a daughter of the Complainant) were assaulted by persons who took some of their clothing and possessions. Later that evening, the Complainant confronted a group (seated around a campfire on the beach) that included the Judge, the Judge's sister, and the Judge's small children, and accused (with profanity) the Judge's nephew of being a witness to the assault, and knowing the identities of the perpetrators.[2] When the Judge stated that her nephew did not know their identities, the Complainant answered the Judge with obscene language (in front of the Judge's children). What happened next is disputed: the Complainant later told the police that the Judge had assaulted her, while the Judge gave a different account in her August 29,

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irrelevant to the disposition of this matter, no further inquiry was made.

[2] The second state court complaint attached to the Complaint relates to the alleged attack on the Complainant's daughter(s). The Judge's nephew is not named as a defendant in that complaint, and appears late in the complaint as someone who helped the girls retrieve their clothing.

2006 statement to the police. The Judge's statement was submitted on a form advising that a false statement could entail misdemeanor penalties. The Judge was charged with second degree harassment (under New York Penal Law § 240.26) and was ordered by a state court to avoid any contact with the Complainant. In December 2006, the criminal proceedings were "adjourn[ed] in contemplation of dismissal" pursuant to a "plea offer." The charge was later dismissed in accordance with the adjournment order.

As mentioned above, the exact nature of the alleged physical confrontation is disputed, but I assume for purposes of this opinion that the Judge committed the alleged assault--i.e., that she intentionally struck the Complainant as alleged.[3] The question becomes whether a personal altercation on a beach can amount to judicial misconduct under the statutory standard of the Act. The Complainant concedes that the Complaint is based on an "extra-judicial, personal matter"; but she argues that the

[3] The Complainant characterizes the alleged conduct of the Judge variously as assault (in the Complaint) and battery (in the civil complaint). The criminal charge noted in the adjournment order was for harassment. These terms have distinct meanings under New York state law. For ease of reference, this opinion refers to the "alleged assault."

alleged assault "clearly evidences that [the Judge] 'has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts'," the applicable statutory standard.

Even assuming out-of-court, extra-official conduct may, depending on the circumstances, constitute judicial misconduct within the meaning of the Act, I conclude that the allegations presented here do not.

II. Applicable Principles

Judicial misconduct is "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). This wording does not explicitly require that the conduct be judicial in nature, that it take place in a court setting, or that it directly affect a case. Without specifically considering the issue, the Judicial Council of the Second Circuit has treated certain out-of-court, extra-official conduct (a judge's public expression of partisan political views at a legal conference) as sanctionable, notwithstanding that the conduct did not relate to any current or future case before the judge. See In re Charges of Judicial Misconduct, 404

F.3d 688, 695-97 (2d Cir. Jud. Council 2005) (en banc). Other circuits have assumed (for purposes of decision) that out-of-court conduct could fall within the Act. See, e.g., In re Charge of Judicial Misconduct or Disability, 39 F.3d 374, 379 (D.C. Cir. Jud. Council 1994) (finding it "unnecessary to determine the breadth of the statutory standard in order to dispose of the pending complaints," since, "however broad the statutory standard is to be read, complainants do not allege conduct by the subject judge that could have even an indirect prejudicial effect on the administration of the business of the courts"); but see In re Charge of Judicial Misconduct, 62 F.3d 320, 322 (9th Cir. Jud. Council 1995) ("[T]he Canons' scope is broad enough to include purely private conduct by judges, whereas the Act specifically excludes such extrajudicial conduct from its jurisdiction. 'Complaints relating to the conduct of a member of the judiciary which are not connected with the judicial office or which do not affect the administration of justice are without jurisdiction and therefore outside the scope of this [Act].'" (citing S. Rep. No. 362, at 3 (1979), reprinted in 1980 U.S.C.C.A.N. 4315, 4317)).

Two recent federal court committees charged with examining the administration of the Act conclude that extra-official, out-of-court conduct may subject a judge to disciplinary action. The following commentary is taken from an appendix to the September 2006 report of the Judicial Conduct and Disability Act Study Committee, chaired by Justice Stephen Breyer:

> Needless to say, the fact that a judge's alleged conduct occurred off the bench and had nothing to do with the performance of official duties, absolutely does not mean that the allegation cannot meet the statutory standard. The Code of Conduct for U.S. Judges expressly covers a wide range of extra-official activities. Allegations that a judge personally participated in fundraising for a charity or attended a partisan political event--conduct having nothing to do with official duties--are certainly cognizable.
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> Nevertheless, many might argue that judges are entitled to some zone of privacy in extra-official activities into which their colleagues ought not venture. Perhaps the statutory standard of misconduct could be construed in an appropriate case to have such a concept implicitly built-in. Thus, for example, a chief judge might decline to investigate an allegation that a judge habitually was nasty to her husband, yelling and making a scene in public (as long as there was no allegation of criminal conduct such as physical abuse), even though this might embarrass the judiciary, on the ground that such matters do not constitute misconduct.

Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice, 239 F.R.D. 116, 239 (September 2006). And the Judicial Conference Committee on Judicial Conduct and Disability has proposed a new set of rules to govern judicial misconduct proceedings. See Rules Governing Judicial Conduct and Disability Proceedings Undertaken Pursuant to 28 U.S.C. §§ 351-364. The draft rules include the following language in defining "misconduct" under the Act:

> Conduct occurring outside the performance of official duties is not excluded if it might have a prejudicial effect on the administration of the business of the courts, including, but not limited to, a lowering of public confidence in the courts among reasonable persons.

Id., R. 3(b) (proposed July 16, 2007) (emphasis added).

The legislative history concerning whether extra-official conduct by a judge can ever constitute "conduct prejudicial to the effective and expeditious administration of the business of the courts" is ambiguous, but even the most expansive interpretations referenced in the legislative history, as well as in other sources, require some nexus to the judiciary or the courts--i.e., conduct that "brings the judicial office into disrepute," see S. Rep. No. 96-362, at

9 (1979), reprinted in 1980 U.S.C.C.A.N. 4315, 4322-23; or causes "any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system," see Report of the Proceedings of the Judicial Conference of the United States 8 (Mar. 1974) (interpreting similar language contained in 28 U.S.C. § 332(d)(1)).

Accordingly, the extra-official conduct alleged in the Complaint constitutes "conduct prejudicial to the effective and expeditious administration of the business of the courts" only if it "lower[s] . . . public confidence in the courts among reasonable persons," or "brings the judicial office into disrepute," or causes "any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system." Certain types of extra-official conduct, such as partisan political speech or fundraising, can have such an effect, because they may call into question the impartiality of the judiciary. See, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt. (2002) [hereinafter Code of Conduct] ("The test for appearance of impropriety is whether the conduct would create in reasonable minds . . . a perception that the judge's ability

to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."). And while this effect need not necessarily be concrete and measurable, behaving badly is not always "prejudicial to the effective and expeditious administration of the business of the courts" simply because the actor is a judge.

Moreover, categorization of conduct as an offense under state law is not a sufficient basis for a finding of judicial misconduct.[4] See Report of the National Comm'n on Jud. Discipline & Removal (1993), reprinted in 152 F.R.D.

[4] This is especially true here, as the charge against the Judge was fairly minor, and dismissed. The charge of second degree harassment is neither a felony nor a misdemeanor. See N.Y. Penal Law § 240.26. The prosecutor and the state court were willing to agree to an adjournment in contemplation of dismissal, a device that "provides a less structured means of disposing of relatively minor charges." See Hollender v. Trump Vill. Coop., Inc., 58 N.Y.2d 420, 424 (1983). Such a dismissal does not "connote either a conviction or, as in the case of a plea, an admission of guilt." Id. at 424. The entry of such a dismissal renders the arrest and prosecution a "nullity" and entitles the defendant to be "restored, in contemplation of law, to the status [s]he occupied before h[er] arrest and prosecution." N.Y. Crim. Proc. Law § 177.55(8). In order "to avoid stigmatizing one who has been granted the ACOD dismissal, such a person expressly is included among those entitled to the full benefit of the record sealing and expunging provisions which come into play when a criminal action or proceeding has been terminated in favor of an accused. ... The over-all effect of a consummated ACOD dismissal is then to treat the charge as though it never had been brought." Hollender, 58 N.Y.2d at 425. However, the dismissal nullifies only the criminal charge and prosecution, not the underlying conduct, which would still be sanctionable under the Act if it met the statutory standard.

265, 343 (1994) (noting that "some criminal conduct by a judge unquestionably does not fall within the Act's jurisdiction"). Nor is it decisive that conduct violates one of the Canons of the Code of Conduct:

> The Code [of Conduct] may . . . provide standards of conduct for application in proceedings under the [Act], although it is not intended that disciplinary action would be appropriate for every violation of its provisions. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

Code of Conduct Canon 1 cmt.; see also In re Charge of Judicial Misconduct, 62 F.3d 320, 322 (9th Cir. Jud. Council 1995) ("Judicial *discipline* under the Act is not, and was never meant to be, coextensive with judicial *ethics* as embodied in the Canons.").

III. Disposition

A. The August 20, 2006 Alleged Assault

For present purposes, it is assumed that the Judge struck the Complainant in the manner described in the Complaint. The following factors lead me to conclude that

the alleged assault did not constitute "conduct prejudicial to the effective and expeditious administration of the business of the courts." First, the alleged assault occurred out-of-court and away from any judicial environment or context, did not relate to any particular case, and was not encompassed by the judge's official or unofficial duties. In other words, it was clearly extra-official conduct, which the Complainant concedes. Second, the Complainant and the Judge describe a confrontation that was highly charged: the Complainant was (understandably) extremely upset over a violent attack on her children (including a minor); the Judge (who had nothing to do with the attack on the children) was responding to an accusation that her nephew and sister were concealing knowledge of the attack; and the Complainant concedes that she accused the Judge herself of lying, and insulted the judge using obscene language notwithstanding the presence of small children (as it happens, the Judge's own children). This context is relevant to whether the alleged assault should be seen as reflecting the Judge's attitude toward law, or her understanding of ethical boundaries, and whether it would

likely be seen by others as connected or related to the Judge's position in the federal judiciary in such a way as to lower the public's confidence in the courts or otherwise bring disrepute on the judiciary. Finally, the Complainant has not alleged, and there is no evidence, that the Judge has engaged, at any other time, in any other questionable conduct bearing on the business of the courts--in other words, that the alleged conduct is part of a "pattern of improper activity." Code of Conduct Canon 1 cmt.; see also Local Rule 1(a) (noting the Act's "purpose is essentially forward-looking and not punitive" and that the "emphasis is on correction of conditions that interfere with the proper administration of justice in the courts").

In sum, this was a one-time private dispute between private citizens, one of whom happens to be a judge. At worst, the Judge used physical force to terminate a private confrontation in which the Complainant was using obscenities in the presence of the Judge's small children. The ramifications in criminal and tort law are for others to sort out; but this extra-official conduct is not "prejudicial to the effective and expeditious administration

of the business of the courts." It did not (and does not) bring any stigma, disrepute, or loss of esteem or confidence on the court system or on the judiciary among reasonable persons; nor does it "create in reasonable minds . . . a perception that the Judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired," Code of Conduct Canon 2A cmt. Even assuming arguendo that the Judge brought disrepute on herself, no disrepute was cast on the judiciary, or on the Judge qua judge. Accordingly, this allegation is dismissed as "not in conformity with section 351(a)."[5] 28 U.S.C. § 352(b)(1)(A)(i).

B. The August 29, 2006 Statement

The allegation that the Judge committed perjury in connection with the police investigation of the alleged

[5] The allegation that the Judge may have identified herself as a United States Magistrate Judge at some point during the confrontation with the Complainant does not itself constitute judicial misconduct or cause the alleged assault to be converted into judicial misconduct. The identification cannot be seen as an attempt to "lend the prestige of judicial office for the advancement of the private interests of the judge or others." Code of Conduct Canon 2B cmt.

Similarly, the Complainant's allegation of judicial misconduct based on the Judge's failure to apologize for the alleged assault is untenable, given that the Complainant has sued--or at least threatened to sue--the Judge for the underlying conduct.

assault is based on the Judge's August 29, 2006 statement to the police (the "Judge's Statement"), which was submitted on a form advising that a false statement could entail misdemeanor penalties under New York law. The Complainant contends that the Judge's Statement "is patently phony and is rife with material falsehoods." Once again, the categorization of conduct under state law is not determinative of whether the conduct constitutes judicial misconduct.[6] Moreover, no judicial finding of perjury or of the making of a false written statement has been made in any court.

The circumstances here do not support a finding of judicial misconduct. The Complainant and the Judge have presented different versions of the August 20 incident. In order to determine whether the Judge had knowingly provided false information to the police, the Act would permit a special committee to take testimony from the Complainant, the Judge, and all relevant witnesses in an effort to determine what portions, if any, of the Judge's Statement

[6] Under New York law, any violation here would be a violation of § 210.45 (entitled "Making a punishable false written statement") and not perjury, an offense covered by other statutes, see N.Y. Penal Law § 210.05-210.15.

were made with knowing falsity. No special committee is needed in these circumstances. Allegations that a party has made false statements, based on a conflict between the factual assertions of two persons involved in litigation, are common and often tactical; and courts often refuse to take any action in ambiguous cases, given that a factual conflict can result from a great many circumstances that would not justify a finding that a sanctionable falsehood was presented.

I conclude that the allegation that the Judge presented false information to the police does not rise to the level of misconduct, and does not justify the appointment of a special committee, in view of: (a) the tangential relationship of the alleged assault and the Judge's Statement to any official duty of the Judge; (b) the volatility of the underlying situation; (c) the Complainant's responsibility, at least in part, for the confrontation that led to the assault and the Judge's Statement; (d) the unlikelihood that any investigation would reveal the truth of the matter; and (e) the lack of evidence that the Judge has engaged in any other questionable conduct

or might do so in the future. Accordingly, this allegation is also dismissed as "not in conformity with section 351(a)." 28 U.S.C. § 352(b)(1)(A)(i).

C. The Nephew's Alleged Failure to Cooperate with the Investigation

Finally, the Complainant has provided no evidence, direct or circumstantial, in support of the allegation that the Judge allowed, encouraged, or instructed her nephew to "feign ignorance and thereby obstruct an investigation" of the attack on the Complainant's daughter(s). The assertion that the Judge was in some way responsible for any alleged lack of cooperation is pure speculation, and, for that reason, is dismissed as "lacking sufficient evidence to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii).

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.

DENNIS JACOBS
Chief Judge

Signed: New York, New York
December 14, 2007