

22-90180-jm
December 15, 2023
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re
CHARGE OF JUDICIAL MISCONDUCT Docket No. 22-90180-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

On October 12, 2022, 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. §§ 351–364 (the “Act”), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the “Rules”), charging a judge (the “Judge”) of this Circuit with misconduct.

BACKGROUND

On September 23, 2022, the Complainant filed a “Request for Assisted Resolution” under the Employment Dispute Resolution [EDR] Plan for the Judge’s court alleging abusive and harassing conduct in the Judge’s treatment of chambers staff. In the Request for Assisted Resolution, the Complainant indicated that he could “no longer continue working for [the Judge].” The

court's EDR Coordinator began immediately to discuss with the Complainant alternatives to the Complainant's resignation. Before any inquiry was conducted into the allegations contained in the Request for Assisted Resolution, and with the full support of the Judge, the Complainant—a law clerk—was offered the opportunity to transfer to another clerkship position with a different judge. The Complainant accepted the option to transfer and was officially transferred on October 11, 2022. The Complainant then filed the instant complaint on October 12, 2022.

The complaint includes substantially similar allegations to those contained in the Request for Assisted Resolution but adds other allegations regarding, for instance, the Judge's acceptance of a gift from a departing law clerk and solicitation and acceptance of a jar of grape jam from a member of chambers staff. The complaint also notes concerns about the Judge exchanging text messages with an attorney and the Judge conducting research on a defendant's assets related to a bail decision.

Under Rule 11(a), after reviewing a complaint, a chief judge must determine whether a complaint should be [1] dismissed; [2] concluded on the ground that voluntary corrective action has been taken; [3] concluded because

intervening events have made action on the complaint no longer necessary; or [4] referred to a special committee.

In determining what action to take under Rule 11(a), the chief judge may conduct a “limited inquiry.” *See* Rule 11(b) (“The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter and may obtain and review transcripts and other relevant documents.”). In this instance, the limited inquiry involved the Circuit Executive and the Circuit Director of Workplace Relations conducting interviews of current and former chambers staff, including the Complainant, to inquire about the workplace environment. These interviews revealed that the workplace conduct concerns raised in the complaint were shared by other law clerks who, while recounting that they had learned a lot from the Judge, agreed that the Judge’s management style could be overly harsh. The limited inquiry also involved several meetings between the Judge and me to discuss the allegations and possible corrective action. The Complainant was apprised of these discussions and of the contemplated corrective actions. At all times, the Judge and the Complainant cooperated fully with the inquiry.

DISCUSSION

With respect to the workplace conduct allegations, the complaint is concluded based on voluntary corrective action. As to all other allegations, the complaint is dismissed.

i. Workplace Conduct Allegations

The Rules clearly provide that cognizable misconduct can include “abusive or harassing behavior.” For example, Rule 4(a)(2) states that “[c]ognizable misconduct includes . . . treating . . . judicial employees . . . in a demonstrably egregious and hostile manner; or creating a hostile workplace environment for judicial employees.” Similarly, the Code of Conduct for United States Judges (the “Code”) provides that “[a] judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct.” Code, Canon3(B)(4) cmt.

“Abusive conduct” is not expressly defined in the Rules, but the Federal Judiciary’s Model EDR Plan—which every court in the Second Circuit has adopted and implemented—defines “abusive conduct” as “a pattern of demonstrably egregious and hostile conduct . . . that unreasonably interferes with an Employee’s work and creates an abusive working environment.” It further provides that abusive conduct is “threatening, oppressive, or

intimidating.” It clarifies, however, that abusive conduct does not include “communications and actions reasonably related to performance management, including but not limited to: instruction, corrective criticism, and evaluation; performance improvement plans; duty assignments and changes to duty assignments; office organization; progressive discipline; and adverse action.”

This Circuit has not defined the contours of abusive conduct, nor need I do so here. Clearly, the aim of the Federal Judiciary should not be merely to avoid abusive conduct. Rather, as noted by the Chief Justice of the United States, the goal should be to “ensure an exemplary workplace for every judge and every court employee.” Chief Justice John G. Roberts, Jr., United States Supreme Court, Year-End Report on the Federal Judiciary, at 11 (2017). Presumably, there is a range of workplace environments between exemplary and abusive, and our aim is the former.

Most importantly, regardless of whether the allegations raised here would rise to the level of abusive conduct under the Rules, the Judge has cooperated fully with the inquiry, has acknowledged the significant problems raised by the complaint, and has pledged to fix them. As the commentary to the Rules makes clear, “the emphasis [of the Act] is on correction of the judicial conduct that was

the subject of the complaint. Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct . . . may be preferable to sanctions.” Rule 11 cmt. The Judge shared on several occasions how deeply troubled and saddened the Judge was at hearing the concerns expressed by the Complainant and others, and wanted it to be clear that the Judge is committed to creating a better workplace environment for chambers staff. As the Judge put it, the Complainant has been heard. Subsequent interviews appear to bear this out, indicating that current clerks’ experiences have generally improved since these concerns were brought to the Judge’s attention when the instant complaint was filed.

More specifically, the Judge has agreed to take the following voluntary action to correct the concerns raised in the complaint:

1. receiving and participating in counseling about workplace conduct and management of chambers staff, including meeting with me on several occasions;
2. watching or committing to watch multiple workplace conduct videos/webinars that provide training on how to ensure an exemplary

- workplace free from sexual harassment, discriminatory harassment, abusive conduct, discrimination, and retaliation;
3. pledging to bring any workplace conduct concerns that come to the Judge's attention to me (or to a future chief judge) and to inform new law clerks that they may bring any concerns to my attention in addition to making use of regular complaint procedures;
 4. affirming, consistent with Rule 4, "the judiciary's commitment to maintaining a work environment in which all judicial employees are treated with dignity, fairness, and respect, and are free from harassment, discrimination, abusive conduct, and retaliation." *See* Rule 4 cmt; and
 5. agreeing that the Circuit Director of Workplace Relations will check in with each term clerk at or near the midpoint of the clerkship term to ensure compliance with the undertakings set forth in paragraph 4. This practice will discontinue in August 2025 if no additional concerns arise.

Accordingly, the complaint proceeding as to the workplace conduct allegations is concluded because "the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised

by the complaint.” Rule 11(d)(2); *see also* 28 U.S.C. § 352(b)(2) (providing that chief judge may conclude the complaint proceeding upon finding that “appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events”); Rule 11 cmt. (including an apology or “a pledge to refrain from similar conduct in the future” as examples of “appropriate corrective action”).

ii. Other Allegations

The remaining allegations in the complaint are dismissed as “lacking sufficient evidence to raise an inference that misconduct has occurred.” Rule 11(c)(1)(D).

Receipt of Gifts: The complaint alleges that the Judge committed ethical violations by accepting a gift from an outgoing law clerk of a framed newspaper cutting from the 1970s featuring one of the Judge’s favorite bands, as well as requesting and accepting a jar of grape jam from a member of chambers staff who was vacationing in New Hampshire.

The Code provides that “[a] judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations.” Code, Canon 4(D)(4). The Judicial Conference Gift Regulations provide that although a judge generally cannot

accept a gift from an employee, a judge may “accept a gift from a judicial officer or employee receiving less pay, on a special occasion such as marriage, anniversary, birthday, retirement, illness, or under other circumstances in which gifts are traditionally given or exchanged.” *Guide to Judiciary Policy*, Vol. 2, Pt. C., Ch. 6 § 620.40(b)(1). In this case, the occasions on which the Judge accepted small gifts from members of chambers staff—a term clerk finishing a clerkship and a staff member returning from vacation with token gifts for all chambers employees—fall well within this exception to the general prohibition against accepting gifts.

Furthermore, even if this were not the case, these two instances would not lead to disciplinary action in a judicial misconduct proceeding under the Act:

Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, 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, Canon 1 cmt. The commentary to Rule 4 similarly provides:

Even where specific, mandatory rules exist—for example, governing the receipt of gifts by judges,

outside earned income, and financial disclosure obligations—the distinction between the misconduct statute and these specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the Act. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

In sum, there is no basis upon which to conclude that the Judge's acceptance of these de minimis gifts was a violation of any ethical rules or regulations. And, if there were any violation, given the circumstances of the gift giving and the minimal value of the gifts at issue, it would certainly not rise to misconduct under the Act. Therefore, these allegations are dismissed.

Communication with Attorney: The complaint also alleges that the Judge improperly engaged in text message communication with a defense attorney on a pending criminal case in the Judge's court. A limited inquiry revealed that the text message exchange at issue involved an attorney sending the Judge a text message congratulating the Judge on a professional accomplishment, and was followed by a perfunctory back and forth of a few exchanges related to that accomplishment. The Judge was not assigned to the criminal case referenced in the complaint.

A brief exchange between a judge and an attorney about a judge's professional accomplishments does not give rise to concerns about ex parte communications or other misconduct. Here, the Judge was not assigned to the criminal case on which the attorney was working and the text message communication did not relate to the pending criminal case, or any other case, for that matter. It is a reality that many judges have personal relationships and friendships with attorneys who may appear in the court where a particular judge sits. Given many judges' long practice histories within their districts and circuits, these types of relationships and communications about personal matters are not uncommon, and without more, do not give rise to any ethical concerns. The allegation is accordingly dismissed.

Research on Defendant's Assets: The final allegation in the complaint is that the Judge conducted research on a criminal defendant's assets after the defendant failed to appear for a status conference. A limited inquiry revealed that the Judge, in coordination with the court's pre-trial and probation department, looked at public property records to confirm that the defendant owned certain property in order to determine whether the defendant's bail should be secured.

The Judge's actions here are not, under the Code or the Rules, improper. A judge can determine that a defendant's pretrial release be conditioned upon a defendant "execut[ing] an agreement to forfeit upon failing to appear as required, property of sufficient unencumbered value[.]" 18 U.S.C. 3142(c)(B)(xi). Here, in contemplating a change in bail conditions, the Judge properly considered the defendant's assets, and appropriately coordinated with the probation department to conduct the relevant research into the defendant's real property assets. The allegation is accordingly dismissed.

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