THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT

219 South Dearborn Street
Chicago, Illinois 60604

November 10, 2016

No. 07-16-90021
IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant filed a judicial misconduct complaint against the district court judge to whom a case involving her husband's business had been assigned. She asserted that the judge had not been fair to her husband and his business in his rulings and disposition of the case, which was a *qui tam* case. The Chief Judge of the circuit reviewed the complaint under 28 U.S.C. § 352(a) and found that although most of the complaint did not state a misconduct claim, because they were directly related to procedural rulings and the merits of that case, see 28 U.S.C. § 352(b)(1)(A)(ii), one specific incident fell outside that category and could be resolved only after a hearing. See 28 U.S.C. § 353(a). In particular, Complainant alleged that during a recess in the trial, in early 2013, the subject judge made a statement that she understood as anti-Semitic. The statement alleged in the complaint was "I know what the Jewish families in Champaign do. The husbands put the businesses in their own names and their houses in their wives' names."

The Chief Judge convened a special committee pursuant to 28 U.S.C. § 353(a), consisting of Circuit Judge David Hamilton as chair, District Judge Gary Feinerman, and Chief Judge Wood, ex officio, pursuant to § 353(a). The special committee conducted a preliminary investigation with the assistance of Circuit Executive Collins Fitzpatrick and then held an evidentiary hearing on July 6, 2016, in Chicago, Illinois.

Circuit Judge Joel M. Flaum, a member of the Judicial Council, did not participate in this decision.

The special committee heard testimony from the subject judge, the Complainant, and thirteen other witnesses connected to the litigation. They may be grouped as follows: (1) the husband and his attorney and nephew by marriage; (2) three outside

defense attorneys; (3) one of the *qui tam* relators and four relators' attorneys; and (4) several members of the court's staff. The subject judge and several witnesses appeared by video links that allowed the special committee and the subject judge to see and hear them clearly.

The special committee reported to the Judicial Council, which now finds as follows: During the trial, in the courtroom and during a recess with some parties, attorneys, and court staff present, the subject judge did make the complained-of statement, quoted above, to the effect that Jewish families in Champaign arrange their affairs so that businesses are in the husbands' names and homes are in the wives' names. The subject judge initially had not recalled making the statement and denied having done so when he first learned of the complaint. After he learned that one of the lawyers (known well to him) recalled hearing the statement, however, the subject judge agreed that he must have made the statement, though he did not recall it independently.

The circumstances surrounding his making of the statement are not entirely clear. Some witnesses said that it seemed to come "out of the blue." No one recalled any follow-up by the subject judge, nor was the statement addressed to the courtroom as a whole. In fact, it is not clear to whom the statement was addressed. The statement was heard by some people in the courtroom but not by all.

Evidence was presented during the trial concerning the ownership structure of the defendant company and related entities. The subject judge knew that Complainant and her husband were Jewish. (Indeed, the judge had modified the trial schedule to ensure that they could observe the Sabbath. Also, the husband wore a kippah and kept a book of Psalms at counsel table throughout the trial.) The Complainant and the personal lawyer for Complainant and her husband had been present throughout the trial.

The most likely context for the statement is that during a recess, the subject judge and a member of the court staff were chatting about that aspect of the case, in the context of the evidence about ownership. The subject judge made his comment loudly enough that others in the courtroom heard him. The courtroom acoustics made it possible for even quiet comments at the bench to be heard all over the courtroom.

Complainant and her husband heard the comment, as did their lawyer and at least one defense lawyer. Complainant and her husband perceived the comment as a reflection of anti-Semitic bias on the part of the subject judge. Over the lengthy course of the litigation, the subject judge had made rulings and taken actions that Complainant and her husband had believed were erroneous and unfair to the defense. (One major

point of their concern had been the judge's efforts to recruit counsel for relators when their original attorney quit, even though such efforts by judges are occasionally made under some circumstances.) Complainant and her husband had not understood why the subject judge had ruled and acted as he had. Upon hearing his statement about Jewish families in Champaign, they concluded they had found their answer—anti-Semitic bias.

The Judicial Council finds no actual bias on the part of the subject judge. No witness, including both court staff and attorneys who have known him for decades, had ever seen any other indication of bias on the part of the subject judge, anti-Semitic or otherwise. His lengthy time on the federal bench has been marked by distinguished, fair, and wise service. Moreover, if the defense lawyers had perceived actual bias, the Council believes that they would have taken action to protect their clients' interests. They took no such action.

Our inquiry requires us to go beyond the question of actual bias, however, for the statute in question addresses conduct that is "prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). Our concern is with ensuring the appearance, not just the reality, of an unbiased judiciary. Statements by a judge or by court staff that seem to stereotype people based on religion, race, sex, national origin, or other characteristics can undermine the appearance of fairness even where there is no actual bias or animus.

The Judicial Council views the statement by the subject judge as unfortunate and inappropriate. It did not reflect actual animus or bias against defendants or Jews, but it could too easily be misunderstood as a sign of such animus or bias. Consider, for example, a comment from a judge along the lines of "that's just what black people do," or "that's typical of a woman (or man)."

In employment discrimination cases, where federal judges encounter such issues most often, evidence that a decision-maker made such comments, which do not necessarily reflect animus or hostility but are consistent with stereotyping, ordinarily is not enough by itself to show a hostile work environment or unlawful bias. *E.g.*, *Ezell v. Potter*, 400 F.3d 1041, 1048 (7th Cir. 2005) (comments reflecting "some ignorant stereotypes of men, of older workers and of Caucasian workers"); *Russell v. Board of Trustees*, 243 F.3d 336, 343 (7th Cir. 2001) ("all intelligent women are unattractive," among others).

Nevertheless, such comments may contribute, along with other evidence, to a finding of unlawful bias by an employer. See, *e.g.*, *Ezell*, 400 F.3d at 1051 (disparaging comments about older workers); *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990) (reversing summary judgment where evidence included remarks that "these older

people don't much like or much care for us baby boomers, but there isn't much they can do about it," and "the old guys know how to get around things"); *Gorence v. Eagle Food Center*, 242 F.3d 759, 762 (7th Cir. 2001) ("stray remark" such as "old women are hard to deal with" would not be actionable itself but could provide relevant evidence of discrimination). Consistent with this case law, while the subject judge's statement did not, in the view of the Council, show hostility and did not amount to actual bias, it was the sort of statement that can lead to an appearance of bias and must be avoided.

The need for avoiding such statements is especially compelling in the context of litigation, where all parties, and often their attorneys, feel considerable stress. In the case that gave rise to this complaint, some individuals on both sides felt that the judge was too generous to the other side in various respects. Each side also had people who thought that the subject judge was fair to both and did a good job with the case. But the perception that a judge is favoring the other side is not unusual and illustrates just how fraught the situation is. That is why it is so important for the court to avoid giving even a hint of favoritism or hostility toward either side.

In considering an appropriate response, the Council has also considered several mitigating factors. As noted, we are confident the subject judge's statement did not reflect any actual bias or hostile animus. During the trial, the subject judge had not exhibited any hostility toward the faith of Complainant and her husband, and in fact had adjusted the trial schedule to accommodate their observation of the Sabbath. The isolated comment was not made before a jury but was off the record and without hostile intent; it was an idle and almost private comment, probably about some of the evidence in the trial. And the subject judge has had a long and distinguished career on the federal bench and has earned a reputation for fairness to all who appear before him.

In light of all these circumstances, the Judicial Council admonishes the subject judge that his statement was not consistent with the duty of a judge to ensure the appearance of fairness in the matters before him.