JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-14-90044

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

MEMORANDUM OPINION

(Filed: February 19, 2016)

PRESENT: McKEE, Chief Judge, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, SIMANDLE, TUCKER, CONTI, CONNER, STARK, Members of the Judicial Council

McKEE, Chief Judge.

This is a complaint filed by an attorney under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, and pursuant to the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the "Rules")[1] against a United States Magistrate Judge (the "Subject Judge"). For the reasons discussed below, the Judicial Council adopts the

[1] The Rules for Judicial-Conduct and Judicial-Disability Proceedings govern judicial misconduct proceedings under the Act and therefore apply to this proceeding. See Rule 1. Unless otherwise specified, all Rules cited in this Report are the Rules for Judicial-Conduct and Judicial-Disability Proceedings (as adopted March 11, 2008). The amendments to the national rules adopted by the Judicial Conference on September 17, 2015 are not relevant to disposition of the pending proceedings.

factual findings and recommendations for action in the Special Committee's Report and dismisses the complaint.

I. BACKGROUND

Complainant is a licensed attorney who has been a member of the Pennsylvania bar since April 2004. He is affiliated with a small firm based in Pennsylvania and practices with some frequency in District Court.

A. The District Court Proceeding

In May 2012, Complainant filed a civil complaint in the District Court on behalf of his mother ("Client I") and her former co-worker ("Client II"). The complaint alleged that Client I and Client II suffered employment discrimination and retaliation by their former employer and several employees on the basis of their race (Latina).[2] Defendants were represented by their attorneys ("Attorney I" and "Attorney II").

The case was assigned to a District Judge. Complainant filed an amended complaint in October 2013. Both sides filed a number of discovery-related motions. Among other things, Defendants sought to compel the depositions of two former employees who had been named as individual defendants in the original complaint.[3] In

[2] Complainant also represented Client I against the same company in earlier cases filed in state court.

[3] The claims against one employee were voluntarily dismissed shortly before Plaintiffs filed their amended complaint. The other employee was named in both the original and the amended complaints, but it appears she was not served and did not enter an appearance.

December 2013, the District Judge referred the matter to the Subject Judge for resolution of the discovery disputes.

The Subject Judge held a discovery conference on March 27, 2014, attended by counsel for both sides and the Subject Judge's law clerk. The conference was not recorded or transcribed. After the conference concluded, the Subject Judge issued orders resolving the pending discovery motions. Among other things, because Complainant stated that he interviewed a company employee shortly before he filed the complaint,[4] the Subject Judge directed Complainant to produce a sworn affidavit setting forth a detailed proffer of the contents of the interview. The Subject Judge further directed that, if Defendants continued to seek the depositions of the two company employees, the depositions must be scheduled. Finally, she precluded Plaintiffs from introducing evidence in support of certain other claims due to a failure to comply with discovery obligations.

Subsequently, Defendants moved for summary judgment and sought sanctions against Plaintiffs based upon their dilatory behavior and failure to comply with the Federal Rules of Civil Procedure and District Court orders, including a continued failure to provide the affidavit concerning Complainant's interview of the company employee. Plaintiffs also filed a cross-motion for sanctions against Defendants, claiming the sanctions motion was vexatious and filed for the purpose of harassment.

[4] The interview in question occurred before Complainant filed the District Court complaint, but after he filed a similar complaint (that also named the company employee as a defendant) in state court.

On May 13, 2014, the Subject Judge conducted a settlement conference accompanied by her law clerk and her courtroom deputy. All parties attended, but were separated for the majority of the conference. The conference was not recorded or transcribed. After the conference, the Subject Judge issued a memorandum opinion in which she addressed the cross-motions for sanctions. On May 22, 2014, the Subject Judge granted Defendants' motion and, as a sanction, dismissed the complaint in its entirety. She denied Plaintiffs' cross-motion for sanctions.

On December 12, 2014, construing the memorandum opinion as a report and recommendation, the District Judge adopted the Subject Judge's report and recommendation and closed the case.[5]

B. The Complaint of Judicial Misconduct

Complainant filed this complaint of judicial misconduct on June 6, 2014, naming the Subject Judge. The allegations of the complaint are based entirely upon events at the discovery conference of March 27, 2014 and the settlement conference of May 13, 2014. According to Complainant, "[d]uring both those meetings [the Subject Judge] made statements that I believe to be misconduct embarrassing to the judiciary of the United States . . . ."

[5] Complainant moved for reconsideration, which the District Judge denied. He then filed a notice of appeal on February 2, 2015, but because he did not file an appearance or other required case opening forms, the appeal was dismissed for failure to prosecute. On May 28, 2015, Complainant filed a second motion in the District Court seeking reconsideration. The District Judge denied the motion and Complainant filed a notice of appeal. The appeal is pending.

During the March 27, 2014 discovery conference, Complainant alleges that the Subject Judge opened the conference by referring to the Chief Justice of the United States Supreme Court in a disparaging way during a discussion in which the Subject Judge "described her recollection of remarks the Chief Justice had made earlier that week during oral argument in the Hobby Lobby case . . . ." Complainant claims he found this reference to be "disrespectful" and "embarrassing."

Complainant further alleges that, also during the same discovery conference, the Subject Judge referred to litigating in the District Court as "facing 'the original 'F' word.'" Complainant interpreted this comment as a "clear statement that officers of the court, such as me, are at risk of getting 'fucked' when practicing in the [District Court]." Complainant alleges that the statement was "deeply troublesome as the use of sexual dominance analogies by a Magistrate of the United States when addressing counsel is embarrassing."

Complainant presents three allegations concerning the Subject Judge's actions during the May 13, 2014 settlement conference. First, he alleges that, "at least twice," the Subject Judge referred to him as an "idiot" while laughing at him. More specifically, he states that he "clearly recall[s] [the Subject Judge] looking at me and then at my clients who were sitting next to me while saying 'of course only an idiot represents his family as is the case with you today.' [Client I] is my mother." Complainant claims he "was profoundly offended and embarrassed because she called me an 'idiot.'"

Second, Complainant alleges that the Subject Judge told Client I to look her in the eye while she was speaking. According to Complainant, "[w]hen [Client I] said this bothered her eyes because of the glare behind [the Subject Judge] she told [Client I] either to put on sunglasses or that she would lend her some." Complainant alleges that the Subject Judge made this statement about the sunglasses in "an aggressive, demeaning, and condescending manner that humiliated [Client I]."

Third and finally, Complainant alleges that, toward the end of her statements to Plaintiffs, the Subject Judge "looked at [Client II], who had been like [Client I] quietly listening along, and told [Client II] in a tremendously condescending manner to repeat what [the Subject Judge] was saying because she did not believe [Client II] understood English." Complainant alleges that Client II complied, "humiliated and in English."

Complainant states that, due to these events, his clients "were offended, hurt and lost a significant amount of trust in the Courts . . . ." Complainant further makes allegations of racial bias: he alleges he was "personally embarrassed and find[s] [himself] significantly at a disadvantage to understand why [the Subject Judge] would take this tone with me and with my clients particularly as she was well aware of our ethnicity. We are all Latinos and I certainly felt that [the Subject Judge] was treating us differently and detrimentally because of that."

C. Limited Inquiry and the Subject Judge's Response

After analyzing the allegations of the complaint and accompanying materials, Chief Judge McKee determined that a limited inquiry under 28 U.S.C. § 352(a) was

warranted. See also Rule 11(b). As part of the limited inquiry, Chief Judge McKee requested that the Subject Judge file a written response to the complaint. Although the Subject Judge was invited to comment upon the entire complaint, the limited inquiry specifically requested a response to the allegations of racial bias.

The Subject Judge filed a response on August 15, 2014.[6] In brief, she denies the allegations of improper conduct and describes the complaint as a "preposterous fabrication and distortion," which was "maliciously filed in retaliation to an adverse ruling" imposing sanctions against Complainant and his clients. The Subject Judge asserts that Complainant "grossly misrepresented what was said" at the two conferences. The substance of the response will be discussed in more detail where relevant below.

D. Appointment of the Special Committee

After considering the Subject Judge's response and the record as a whole, Chief Judge McKee determined that disputed issues of material fact remained with respect to Complainant's allegations of racial bias. The Act and the applicable rules prohibit the Chief Judge from making findings of fact "about any matter that is reasonably in dispute." 28 U.S.C. § 352(a); Rule 11(b); Commentary on Rule 11 ("An allegation of fact is ordinarily not 'refuted' simply because the subject judge denies it . . . . If it is the complainant's word against the subject judge's – in other words, there is simply no other significant evidence of what happened or of the complainant's unreliability – then there

[6] In accordance with 28 U.S.C. § 352(a), the Subject Judge's response was not made available to Complainant.

must be a special-committee investigation."). Accordingly, Chief Judge McKee determined that the Act and the Rules required referral of the complaint to a Special Committee. See 28 U.S.C. § 353(a); Rule 11(f).

On January 20, 2015, Chief Judge McKee entered an order appointing a Special Committee to investigate the matter. The five Committee members were: Chief Judge Theodore A. McKee, presiding judge; Circuit Judge Julio M. Fuentes of the United States Court of Appeals for the Third Circuit; Senior Circuit Judge Walter K. Stapleton of the United States Court of Appeals for the Third Circuit; Chief District Judge Jerome B. Simandle of the United States District Court for the District of New Jersey; and District Judge Cathy Bissoon of the United States District Court for the Western District of Pennsylvania. On the same day that he appointed the Special Committee, Chief Judge McKee certified the record in J.C. No. 03-14-90044 to the members of the Special Committee. See 28 U.S.C. § 353(a)(2); Rule 12(d). The Special Committee voted to appoint the Honorable Jane R. Roth, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, as the Committee's Investigator in accordance with Rule 13.

II. THE SPECIAL COMMITTEE'S INVESTIGATION

Although the entire complaint was referred to the Special Committee, the Special Committee determined that its investigation would primarily focus on the allegations of racial bias. In the course of investigating the complaint on the Special Committee's behalf, Judge Roth conducted confidential interviews with eight individuals with

potentially relevant information. She met in person with seven of them: the Subject Judge, the courtroom deputy, the law clerk, Complainant, Client I, and Attorneys I and II. Judge Roth conducted one telephone interview with Client II. Upon completion of the investigation, Judge Roth prepared and submitted a Report to the Special Committee.[7] The most salient aspects of the Report are briefly summarized here.

Complainant, Client I, and Client II all repeated in their interviews essentially what they had stated in the complaint and in the declarations attached thereto. The Subject Judge elaborated upon the information in her response and provided some additional details, including Complainant's lack of preparation for the conferences and his history of having been sanctioned in other District Court proceedings. The Subject Judge also stated that she was unaware that Complainant was Latino. The courtroom deputy and the law clerk confirmed the Subject Judge's description of the incidents. Attorney I and Attorney II, the least partial witnesses, provided their observations that the Subject Judge's demeanor was professional at all times and did not reflect bias against Latino individuals. Judge Roth noted, however, that Complainant had accused both Attorneys I and II of racism in the course of the District Court proceeding.

Judge Roth concluded that the resolution of the disputed issues – namely, exactly what the Subject Judge had said to Complainant and his clients, and the tone and manner of those statements – depended upon the credibility of the witnesses. Relying upon her

[7] A copy of the Investigator's Report was not provided to the Subject Judge. See Commentary on Rule 15.

years of experience in making credibility determinations, she carefully observed and considered each witness's demeanor and statements in light of the record as a whole. Ultimately, Judge Roth concluded that the Subject Judge, Attorney I, Attorney II, the courtroom deputy, and the law clerk were all credible in their descriptions of the incidents. Judge Roth also found Client I and Client II to be credible as to their descriptions of what words were spoken, but concluded they were not credible in their interpretations of the Subject Judge's tone of voice or her motivation in making the statements. Finally, Judge Roth concluded that Complainant has a tendency to attribute racist motivations to the actions of others, particularly in situations in which he has been unsuccessful. Because of this tendency, Judge Roth did not find Complainant to be credible.[8]

Thus, the witness interviews and written exhibits led Judge Roth to conclusively determine that the Subject Judge did not make "embarrassing, uncouth, offensive and deeply demeaning remarks" and did not treat Complainant and his clients "differently and detrimentally" because they are "all Latinos."

[8] In making this determination, Judge Roth considered the written statement provided by Complainant during his interview and the opening pages of a memorandum of law in opposition to the motion for sanctions that Complainant had prepared in advance of the May 14, 2014 settlement conference. These documents reflect Complainant's strong sensitivity to nearly every word or action of the Subject Judge and opposing counsel. For example, in Complainant's written statement he complains of the Subject Judge entering "in a committee, followed by clerks, to impose a hierarchy." Judge Roth also considered Complainant's statements and demeanor during his interview.

In considering whether a hearing would be necessary in this matter, the Special Committee considered Judge Roth's assessments in her detailed and thorough investigation and Report. In addition, the Special Committee considered other record evidence relevant to the assessment of Complainant's credibility.

Specifically, as the Subject Judge emphasized in her response, the complaint of judicial misconduct was filed only a few weeks after she issued an order granting Defendants' motion for sanctions based upon Complainant's "systemic failure to comply" with discovery orders. In addition, her order dismissed the complaint in its entirety in favor of Defendants and awarded them attorney's fees in view of Complainant's "history of dilatoriness" and her finding that his conduct had been "willful and in bad faith."[9] Similarly, approximately a week after the Subject Judge issued the order, Client I and Client II executed their declarations in support of the complaint of judicial misconduct.

Moreover, Complainant previously filed a complaint of judicial misconduct against another judge of the same court, in which he made similar allegations of racial bias. See J.C. No. 03-11-90121. Chief Judge McKee dismissed that complaint because a limited inquiry, including a review of the relevant transcript and audio recording of the hearing, demonstrated that there was no support for the allegations. The prior dismissal

[9] Notably, Complainant made an allegation of racism on the part of Defendants in his cross-motion for sanctions, which the Subject Judge rejected as "baseless and sensational allegations of racist motivation."

of a similar misconduct complaint making unsupported allegations of racial bias, and the suspect timing of the filing of this current complaint on the heels of the Subject Judge's order sanctioning Complainant, together work to further undermine Complainant's credibility in this matter.

In light of all of these considerations and based upon the record as a whole, the Special Committee determined there was not "sufficient evidence to warrant a formal fact-finding proceeding."[10] Commentary on Rule 14. The Special Committee concluded the record provided sufficient information to fully dispose of the allegations of this complaint of judicial misconduct.

On November 12, 2015, the Special Committee filed its Report with the Judicial Council pursuant to 28 U.S.C. § 353(c) and Rule 17. A copy of the Report was sent to the Subject Judge in accordance with Rule 15. Complainant was provided with notice of the filing of the Report pursuant to Rule 16(a).[11] Although the Subject Judge was offered

[10] Pursuant to Rule 15(d), the Subject Judge was provided an opportunity to provide oral argument to the Special Committee, but she declined to do so. Both the Subject Judge and Complainant also were provided the opportunity to submit additional written argument to the Committee. Rules 15(d), 16(c). The Subject Judge declined to submit additional written argument, while Complainant submitted a supplemental written argument on June 19, 2015. The Special Committee considered Complainant's supplemental written argument and determined that nothing in the submission affected the Committee's decision not to hold formal hearings.

[11] Complainant is not entitled to a copy of the Special Committee's Report, and we decline to exercise our discretion to release a copy of the Report to Complainant. Rule 16(a).

an opportunity to file a response to the Report and to present argument pursuant to Rule 20(a), she did not choose to do so.

The Judicial Council voted unanimously to adopt the factual findings and recommendations for action in the Special Committee's Report. In accordance with Rule 20(f), this memorandum opinion sets forth the Judicial Council's factual determinations and explains the reasons for the Judicial Council's dismissal of the complaint. Rule 20(f).

III. JUDICIAL COUNCIL'S FACTUAL DETERMINATIONS AND DISPOSITION OF CLAIMS

A. Complainant's Allegations of Racial Bias on the Part of the Subject Judge

As previously discussed, Complainant alleges that the Subject Judge made "embarrassing, uncouth, offensive and deeply demeaning" remarks and treated him and his clients "differently and detrimentally" because they are "all Latinos." After a thorough review, the Special Committee recommended that these allegations of racial bias be dismissed without a hearing. Judge Roth, a Senior Circuit Judge and a former District Court Judge, was uniquely qualified to assess credibility and demeanor of witnesses. In her view, the Subject Judge did not engage in any improper conduct motivated by racial bias. The Special Committee agreed, adopted the Investigator's findings as its own, and recommended dismissal. We also agree, and now turn to our analysis of the specific comments complained of by Complainant.

1. Allegation that the Subject Judge called Complainant an "Idiot" for Representing his Mother

Complainant contends that the Subject Judge laughed at him and stated that "of course only an idiot represents his family as is the case with you today" and "you would have to be an idiot" to represent your own mother. Client I and Client II submitted declarations reiterating these allegations.

The Subject Judge provided a thorough response to these allegations, supported by statements from the courtroom deputy and the law clerk, both of whom witnessed the events. She acknowledges that she used the word "idiot," but explains that it was in reference to an anecdote about her brother and his experience representing their father. She told Complainant during the conference that the trial judge in that case told her brother, "Only an idiot would represent his father in a trial." The Subject Judge stated that this is an anecdote she has told many times, and she emphasized to Complainant that she knew he was not an idiot, but that a natural desire to protect his mother could be an obstacle in the case. She states that she told the anecdote in an effort to emphasize the potential difficulty in representing family and friends.

The courtroom deputy and the law clerk supported the Subject Judge's description of the statements. In her written statement, the law clerk affirmed that the Subject Judge did not call Complainant an idiot. Rather, she:

> shared a story about an attorney she knew who had represented his own family member and how that attorney was told by someone else that only an idiot represents their family because of the difficulties. I believe [the Subject Judge] shared the story in an attempt to relate to [Complainant] and

> any challenges he may be facing. I did not view this statement as discriminatory against [Complainant] because of his ethnicity.

The law clerk reiterated this account in her witness interview with Judge Roth. Likewise, the courtroom deputy affirmed in his interview that the Subject Judge told an anecdote about how a state judge told her brother that only an "idiot" would represent his family. He also confirmed that the Subject Judge took care to state that by no means was she calling Complainant an idiot.

Based on our findings regarding the witnesses' relative credibility, we believe that the Subject Judge's account of the incident, which is supported by her courtroom deputy and her law clerk, is credible.[12] We find that the Subject Judge used the term "idiot" in the context of recounting an anecdote about potential difficulties in representing a family member. In any event, even assuming *arguendo* that the Subject Judge made a statement to the effect that Complainant was an "idiot" for representing his mother, such a statement is not indicative of racism or improper bias on the part of the Subject Judge. It is a well-known adage that a lawyer who represents himself has a "fool for a client." It is a widely held and accepted corollary to that view that representing one's own family in a legal matter can be similarly ill-advised because of the personal emotions and feelings involved. Making a comment consistent with this commonsense view in the context of a humorous anecdote is not evidence of racism or judicial misconduct.

[12] Attorney I and Attorney II cannot remember the Subject Judge telling this anecdote. However, they may not have been in the room when the judge told the story. As noted above, these two attorneys did not observe any behavior indicative of racism on the part of the Subject Judge.

We find that the facts regarding this claim "have not been established" and therefore dismiss this portion of the complaint under Rule 20(b)(1)(A)(iii).

2. Allegation that the Subject Judge Told Client I To Look Her in the Eye or Put On Sunglasses

Complainant next alleges that, during the same settlement conference, the Subject Judge instructed Client I "to look at her in the eye" while she was speaking and, when Client I told her that the glare bothered her eyes, the Subject Judge told her to put on sunglasses "or that she would lend her some." Complainant contends this was stated in an "aggressive, demeaning and condescending manner" that "humiliated" his mother. In her declaration, Client I stated that minutes after the "idiot" comment:

> [The Subject Judge] rudely told me to look at [her] in the eye. I told her that the glare behind [the Subject Judge] bothered my eyes. [The Subject Judge] was sitting behind a large bright window and underneath a bright interior light. In addition I suffer from macular degeneration and light hurts my eyes. [The Subject Judge] told me to put my sunglasses on if I had any (I said I did have them) or that she would lend [me] her own sunglasses. No one replied to this statement but I was embarrassed after it.

The Subject Judge denies using a hostile tone or otherwise engaging in a discriminatory action. According to the Subject Judge, during the settlement conference, Client I:

> sat next to her son, and simply looked straight ahead refusing to engage. I explained to her that attending the conference was not a punishment, that it was "business as usual" and the district judge wanted the conference. After a long while, I absolutely asked for her attention and requested she please look at me while I was speaking to her . . . after all, this was a court proceeding. We were in a smaller courtroom, and I was standing between counsel tables, just a few feet from where [she] was sitting. She responded that the light hurt her eyes, even though she had been staring straight ahead

> directly at the window for a long time already and there was no bright light coming through the tinted, blinded, curtained windows of the courtroom. At no time did [Complainant] bring to my attention any issue of this type, or any special needs of his mother. I told her she was welcome to put on sunglasses if that made her more comfortable. I offered to lend her mine if she needed, but I needed her attention so that the conference could go forward.

The law clerk witnessed the exchange and affirmed in her affidavit that the Subject Judge offered to the litigant that she could "move seats, adjust window blinds, or if it would help, [Client I] could wear sunglasses, or if she did not have a pair, she could borrow the Judge's sunglasses. I did not perceive this statement to be made in a hostile or discriminatory manner . . . rather [the Subject Judge] was asking for [Client I's] attention and wanted to know what could be done to help her be able to give her attention." The courtroom deputy said in his statement that the Subject Judge "is a consummate professional and treats all with dignity and respect . . . ." He affirmed in his interview that the Subject Judge offered to Client I the opportunity to put on sunglasses if she had an eye sensitivity issue. The courtroom deputy said this was an effort to help Client I be comfortable and not an attempt to upset her.

In brief, Complainant and the Subject Judge agree on the basic facts of the encounter: the Subject Judge asked Client I to make eye contact, Client I complained about a glare, and the Subject Judge made the offer to wear sunglasses. Nothing in these actions is inherently racist or constitutes judicial misconduct. Requiring proper courtroom decorum, including eye contact from a litigant while being addressed by a federal judge, is completely appropriate.

We are left, therefore, with the issue of whether the Subject Judge exhibited an improper manner indicative of racism when she engaged in these actions. Based on the Special Committee's Report, we conclude that the Subject Judge did not. We agree with the Special Committee's finding that Client I and Client II were not credible in their interpretations of the Subject Judge's tone of voice and her motives in making the statements. In addition, the Subject Judge's law clerk and courtroom deputy witnessed the exchange and they both denied that the judge acted improperly. Attorney I and Attorney II did not witness the specific exchange in question, but neither attorney observed anything in her demeanor in the course of the litigation that would indicate any prejudice against Latinos.[13]

Thus, the Judicial Council finds that the facts regarding Complainant's allegations about the sunglasses incident "have not been established" and dismisses them under Rule 20(b)(1)(A)(iii).

[13] Even assuming the Subject Judge appeared rude or impatient to the litigants, expressions of impatience or even anger during a judge's efforts at courtroom administration do not rise to the level of judicial misconduct. Cf. Liteky v. U.S., 510 U.S. 540, 555-556 (1994) (discussing the recusal standard and providing "*Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.") (emphasis in original).

3. Allegation that the Subject Judge Assumed Client II Did Not Understand English

Complainant maintains that the Subject Judge told Client II "in a tremendously condescending manner" to repeat what the Subject Judge was saying "because she did not believe [Client II] understood English. [Client II], clearly embarrassed, repeated a very faithful version of what [the Subject Judge] had just said. [Client II] did so humiliated and in English." Client II's declaration provided that:

> [A]fter [the Subject Judge] had spoken for a long time, she looked at me and told me "I want you to repeat what I just said because it is not clear to me that you understand what I am saying." So I repeated what [the Subject Judge] had just said . . . . I was embarrassed that [the Subject Judge] assumed I did not understand English and treated me in that manner . . . . I was disappointed and offended because of this behavior . . . which I certainly did not expect.

Client I's declaration was essentially identical to the above statement.

In her response, the Subject Judge denied any racist motivation for asking Client II to repeat her statement in English. She stated that her request was similar to hundreds of other requests she has made to parties to make sure they understand the legal terminology. The Subject Judge explained:

> [Throughout] the conference, [Client II] sat at the end of the trial table. I do not recall that she ever averted her eyes from looking straight ahead. Eventually, I asked her if she understood what I was saying about the case and the proceedings to follow if settlement was not reached. I felt this was particularly important for her because of the family dynamic between her counsel and co-plaintiff. I said to [Client II], as I have said literally hundreds of times to other litigants, that the 'legal mumbo-jumbo' is a lot to understand, and asked her if she could repeat what I was saying because it was my job to make sure she understood. There was never any suggestion of any language issue . . . nothing.

The law clerk, who witnessed the exchange, confirmed in her statement:

> [The Subject Judge] asked [Client II] whether she understood what the Judge was saying and asked her to repeat back what the Judge had said. The question was not asked in a hostile tone. [Client II] had been very quiet, if not silent, and I believe the question was asked in a sincere way to make certain [Client II] was an active and knowing participant in the litigation, and was not asked to make her uncomfortable.

In her interview with Judge Roth, the law clerk said that the Subject Judge was making sure Client II was engaged in the process and that the Subject Judge's tone of voice was very calm. The courtroom deputy, who also witnessed the conference, said that the Subject Judge's tone of voice was not harsh and that the Judge asked Client II if she understood what she was saying. The courtroom deputy said he has never seen any indication of ethnic prejudice in his dealings with the Subject Judge.

There is no factual dispute about whether the Subject Judge asked Client II to repeat statements made in the course of the settlement conference. Rather, the parties dispute the motivation for the request. Complainant, Client I, and Client II attribute the request to an assumption that Client II does not understand English. For the reasons explained by the Special Committee and discussed above, we find that Complainant, Client I, and Client II are not credible in their interpretation of this event. We conclude that the Subject Judge's request that Client II repeat her statements does not constitute evidence of improper bias against Latinos. We find the Subject Judge's explanation to be credible; i.e., that she was concerned about whether Client II was paying sufficient attention to the proceedings, especially given the client-attorney dynamic between

Complainant and Client I. Moreover, it is a common practice, regardless of litigants' racial background, to request that litigants repeat a judge's statement to make sure that the litigants understand the important rights being discussed. The Subject Judge's actions do not constitute judicial misconduct under the circumstances presented here.

In summary, we conclude that there is no credible evidence that the Subject Judge made "embarrassing, uncouth, offensive and deeply demeaning remarks" or otherwise treated Complainant and his clients "differently and detrimentally" because they are "all Latinos." See Rule 20(b)(1)(A)(iii) (allegations may be dismissed by the Judicial Council because "the facts on which the complaint is based have not been established"). Accordingly, these allegations are dismissed. Id.

B. Other Allegations of Improper Remarks

Complainant alleges that the Subject Judge made two remarks during the March 27, 2014 discovery conference that were "embarrassing" or otherwise inappropriate. For the reasons discussed below, these allegations are also dismissed.

1. Allegation that the Subject Judge Described the Chief Justice of the Supreme Court as an "imbecile"

Complainant alleges that the Subject Judge opened the March 27, 2014 conference with a discussion during which she allegedly referred to the Chief Justice of the United States Supreme Court an "imbecile." Specifically, she allegedly said "you imbecile" as she "described her recollection of remarks the Chief Justice had made earlier that week

during oral argument in the Hobby Lobby case . . . ." Complainant claims that he found this statement to be both "disrespectful" and "embarrassing."

In her response, the Subject Judge agrees that she discussed the Hobby Lobby case, but denies that she disparaged the Chief Justice of the Supreme Court or anyone else. Rather, she explains that she was using a current anecdote about a pending case before the Supreme Court to illustrate a point about the need to comply with court orders:

> An example I used was the pending Hobby Lobby case as it was in the news . . . and I tried to make the point that however that case was decided, whether or not a corporation can have a conscience, whether you agree or disagree and think it crazy does not matter . . . whatever the ultimate decision, then that is the law, and lawyers and judges whether or not they see it differently, must follow the law. . . and, likewise, [Complainant] must comply with the rules and court rulings for discovery.

(ellipsis in original). The Subject Judge denies using the word "imbecile" to describe Chief Justice Roberts and, indeed, states that "[t]he word 'imbecile' is not even in my vocabulary."

The Special Committee determined that it need not resolve any factual disputes concerning whether or not the Subject Judge recounted an anecdote in which she referred to Chief Justice John Roberts as an "imbecile." Even accepting the allegation as true, the use of the word "imbecile" to describe a Supreme Court Justice, without more, does not constitute conduct prejudicial to the effective and expeditious administration of the business of the courts. Rule 20(b)(1)(A)(i); see also Rule 11(c)(1)(A). Moreover, Attorney I, who was presenting argument, said he did not recall the Subject Judge referring to the Chief Justice as an imbecile and further commented that he did not

remember any remark that was inappropriate about anyone. Attorney II, who was taking notes, said he did not recall the remark either. In addition, the Subject Judge's law clerk did not remember the Subject Judge making a disparaging remark about the Chief Justice.[14] Accordingly, this portion of the complaint is dismissed. See Rule 20(b)(1)(A)(iii).

2. Allegation that the Subject Judge Referred to Federal Court as Facing "the Original 'F' Word"

Complainant alleges that the Subject Judge referred to litigating in District Court as "facing 'the original 'F' word.'" He interpreted this comment as a "clear statement that officers of the court, such as me, are at risk of getting 'fucked' when practicing in the [District Court]." Complainant alleges that the statement was "deeply troublesome as the use of sexual dominance analogies by a Magistrate of the United States when addressing counsel is embarrassing."

The Subject Judge responds that she "often say[s] in conferences to lawyers who are playing loosely with procedural or ethical rules, that this place is 'the original 'f' word . . . . this being federal court . . . this being the serious . . . this being the big leagues . . . this not being the way we do business here.'" She agrees that she "positively" made this point to Complainant during the discovery conference. She does not, however, agree with his characterization that the phrase reflected a "sexual dominance analogy," and

[14] The Subject Judge's courtroom deputy did not attend the conference where this statement was allegedly made.

states that "there is no vulgarity, nothing uncouth, no offense intended, no sexual dominance analogy that could reasonably be gleaned from" the use of the expression.

We find it undisputed that, during the March 27, 2014 discovery conference, the Subject Judge used the phrase "the original 'f' word" to refer to the federal judiciary. We further find that, while the Subject Judge did not intend for this phrase to reflect a "sexual dominance analogy," it does evoke an expletive that many find offensive and, as occurred here, it can easily be perceived as disrespectful. Accordingly, we advise the Subject Judge to refrain from the use of this phrase in the future. Without more, however, the use of this phrase does not constitute "demonstrably egregious and hostile" treatment of an attorney that would rise to the level of cognizable misconduct. See Rule 3(h)(1)(D). Accordingly, we conclude that the Subject Judge's use of the phrase "the original 'f' word" in reference to the federal courts, without more, does not constitute conduct prejudicial to the effective and expeditious administration of the business of the courts, see Rule 20(b)(1)(A)(i); see also Rule 11(c)(1)(A), and this portion of the complaint is dismissed.

IV. CONCLUSION

Having considered the Special Committee's Report and the record of this proceeding, we adopt the Special Committee's Report and unanimously accept the Special Committee's recommendations. Having found no violation of the Judicial Conduct and Disability Act, the complaint is dismissed pursuant to 28 U.S.C.

§ 354(a)(1)(B) and Rules 20(b)(1)(A)(i) and (iii).

s/ Theodore A. McKee
Theodore A. McKee, Chief Judge

Dated: February 19, 2016

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 03-14-90044

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
OR DISABILITY

ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 351

ORDER

(Filed: February 19, 2016)

PRESENT: McKEE, Chief Judge, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, SIMANDLE, TUCKER, CONTI, CONNER, STARK, Members of the Judicial Council

McKEE, Chief Judge.

After consideration of the Report of the Special Committee and the record and on the basis of the foregoing memorandum opinion entered on this date, it is ORDERED AND ADJUDGED that the Special Committee's Report is adopted and the complaint filed pursuant to 28 U.S.C. § 351 is hereby dismissed pursuant to 28 U.S.C. § 354(a)(1)(B) and Rules 20(b)(1)(A)(i) and (iii) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.[1]

[1] All Rules cited in this Report are the Rules for Judicial-Conduct and Judicial-Disability Proceedings (as adopted March 11, 2008). The amendments to the national rules adopted

Complainant and the Subject Judge are notified that this order constitutes the final order of the Judicial Council under 28 U.S.C. § 354 and is conclusive and not subject to further review by the Judicial Council. In addition, this order is not judicially reviewable on appeal or otherwise except as provided by 28 U.S.C. § 357(a) and Rule 21 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. In accordance with 28 U.S.C. § 357(a), "[a] complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof." The procedure for seeking such review by the Judicial Conference is specified in Rules 21 and 22 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. The deadline for seeking review of this decision is due within 63 days of the date of the order for which it is sought. A petition for review may be filed by sending a brief written statement to the Committee on Judicial Conduct and Disability at JCD_PetitionforReview@ao.uscourts.gov or by mail at the address set forth in Rule 22.

The full text of the Rules for Judicial-Conduct and Judicial-Disability Proceedings is available from the Circuit Executive's Office for the Third Circuit and on the Court of Appeals' internet site, www.ca3.uscourts.gov.

s/ Theodore A. McKee
Theodore A. McKee, Chief Judge

Dated: February 19, 2016

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by the Judicial Conference on September 17, 2015 are not relevant to disposition of the pending proceedings.