

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. Nos. 03-20-90043 and 03-20-90044

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

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

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MEMORANDUM OPINION

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(Filed: July 27, 2021)

PRESENT: MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN,  
SÁNCHEZ, HORNAK, WOLFSON, JONES, AND CONNOLLY  
*Members of the Judicial Council of the Third Circuit*

SMITH, *Chief Judge*.

For the reasons discussed below, the Judicial Council of the Third Circuit (the Council) adopts the factual findings and recommendations for action in the Special Committee's Report and dismisses the complaint under Rule 20(b)(1)(A). The Judicial Council further repudiates in the strongest terms Complainant's surreptitious recording of federal judges.

**I. BACKGROUND**

Complainant, a retired unit executive from another circuit, filed a complaint and amended complaint under the Judicial Conduct and Disability Act against two Circuit

Judges (hereinafter “Subject Judge I” and “Subject Judge II”). Complainant alleges that the Subject Judges abused their judicial authority and acted with racial animus when they interviewed employees and prepared a report (the “Subject Judges’ report”) about Complainant’s management and leadership. He claims their goal was to force him out of his position.

Complainant alleges that the Subject Judges improperly used “their judicial positions to initiate an unsanctioned and poorly executed investigation in pursuit a [*sic*] personal agenda which constituted a violation of the . . . ethical canons” 2A and 3B.4.2.<sup>1</sup> Compl. at 6. Complainant asserts that the Subject Judges initiated a campaign to force him out of his role by compelling his staff to sit for interviews, which were not court-sanctioned and of which the then-Chief Judge was unaware; never conferring with Complainant; and authoring a persuasive, but “not quantified or tested,” report. *Id.* at 2, 3.<sup>2</sup> Complainant asserts that the Subject Judges’ conduct created a compromised or hostile work environment and constituted disparate treatment due to his race, subjecting him “to what could reasonably be defined as ‘constructive discharge.’” *Id.* at 4, 6. At

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<sup>1</sup> Canon 2A provides, “A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Code of Conduct for United States Judges, *Guide to Judiciary Policy*, Vol. 2, Pt. A (Mar. 12, 2019). Canon 3(B)(4) provides, “A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not retaliate against those who report misconduct. A judge should hold court personnel under the judge’s direction to similar standards.” *Id.*

<sup>2</sup> Although this judge no longer serves as Chief Judge, this opinion will refer to him as Chief Judge because this title applied at the time of the events in question.

bottom, Complainant alleges that the Subject Judges: (1) abused their judicial authority in instituting their investigation and preparing the report about Complainant, and (2) acted with racial bias. Complainant requests a public reprimand of the Subject Judges. *Id.* at 6.

The Subject Judges each submitted a statement in response to the complaint on August 20, 2020. The Judicial Council of the Subject Judges' Circuit contacted United States Supreme Court Chief Justice John Roberts to request that Complainant's complaint be transferred to another Circuit. In response, Chief Justice Roberts assigned the complaint to the Judicial Council of the Third Circuit on August 31, 2020. Complainant and the Subject Judges were advised of the transfer on September 3, 2020.

After a review of the complaint and the accompanying materials, Chief Judge D. Brooks Smith determined that the allegations warranted a limited inquiry under 28 U.S.C. § 352(a). *See also* Rule 11(b). As part of the limited inquiry, Chief Judge Smith offered the Subject Judges an opportunity to supplement their previous responses to the complaint. The Subject Judges declined to supplement their prior statements. Chief Judge Smith also met with the Chief Judge of the Subject Judges' Circuit.

Chief Judge Smith thereafter determined that disputed issues of material fact remained. The Act and the applicable rules prohibit 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 must be a special-committee investigation.”). Accordingly, Chief Judge Smith determined that the Act and the applicable rules required referral of the complaint to a Special Committee. *See* 28 U.S.C. § 353(a); Rule 11(f).

Pursuant to 28 U.S.C. § 353(a) and Rule 11(f), Chief Judge Smith appointed the Special Committee on December 3, 2020. The Special Committee was comprised of D. Brooks Smith, Chief Judge, United States Court of Appeals for the Third Circuit, presiding; Theodore A. McKee, Circuit Judge, United States Court of Appeals for the Third Circuit; Michael A. Chagares, Circuit Judge, United States Court of Appeals for the Third Circuit; Juan R. Sánchez, Chief Judge, United States District Court for the Eastern District of Pennsylvania; and Gerald A. McHugh, District Judge, United States District Court for the Eastern District of Pennsylvania.<sup>3</sup>

On the same day that he appointed the Special Committee, Chief Judge Smith certified the record to the Special Committee. *See* 28 U.S.C. § 353(a)(2); Rule 12(d). The Special Committee retained a law firm to assist with its investigation pursuant to Rule 13(c).<sup>4</sup> The Subject Judges and Complainant were notified of the retention of counsel.

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<sup>3</sup> Pursuant to Rule 12(a), the Special Committee was comprised of the chief judge and equal numbers of district and circuit judges.

<sup>4</sup> In order to differentiate between the investigation conducted by the law firm at the direction of the Special Committee and the Subject Judges’ own investigation into Complainant’s treatment of employees, the attorneys will be referred to as the “Attorney Investigators.”

Complainant subsequently submitted an amended request for relief on January 29, 2021, in which he sought damages in the form of “compensation for service time through [his] 62nd birthday,” which he estimates to be \$330,000. Complainant’s amended complaint alleges that “the subject judges’ unwarranted, ill-conceived, and biased actions initiated a chain of events that compromised my performance in a leadership role and deprived me of a lifetime income benefit that I would have otherwise reasonably expected to receive and enjoy.” *Id.* Those actions, Complainant alleges, resulted in his being unable to achieve additional, continued service. Had he been able to do so, he claims, he would have received a 20% increase in monthly retirement payments.

The amended complaint was transmitted to the Subject Judges and provided to the Attorney Investigators. The Special Committee’s Investigation is discussed in detail below.

## **II. THE SPECIAL COMMITTEE’S INVESTIGATION**

At the direction of the Special Committee, the Attorney Investigators completed a thorough investigation. The Attorney Investigators conducted multiple interviews, transcribed four audio recordings that Complainant had surreptitiously made of his conversations with various Circuit judges, and reviewed a considerable volume of documents.

### **A. Review of Materials from Complainant**

Complainant furnished the Attorney Investigators with a collection of materials in support of his complaint. The documents he provided included: court grievance and

disciplinary procedures; emails and letters related to his retirement announcement; minutes and letters related to Complainant's work with a judge; emails between Complainant and the Administrative Office of the United States Courts ("AO"); an email and tentative schedule for the Subject Judges' interviews; emails related to the review of applications for Complainant's successor; and a letter and email sent to Subject Judge I's former assistant.

Complainant also submitted a USB memory stick containing recordings of four in-person conversations he had with various Circuit judges: (1) a conversation with the Chief Judge in his chambers on April 6, 2018; (2) a conversation with the Chief Judge in his chambers on April 24, 2018; (3) a conversation with a judge from the Circuit's Workplace Conduct Committee, in her chambers on May 3, 2018; and (4) a meeting of the Workplace Conduct Committee, comprising various Circuit judges and the Chief Judge on July 10, 2018.

The judges did not consent to Complainant's recording of these conversations, nor did they learn that they had been recorded until the Attorney Investigators contacted each of the judges to advise them of it. Each was asked to maintain the confidentiality of that information. The Attorney Investigators prepared transcripts of the four recordings and the judges interviewed were provided with a copy of the transcript of the conversation in which he/she participated. Complainant was provided with a copy of all four transcripts. No one disputed the accuracy of the contents of the transcripts.

## **B. Interviews and Review of Supplemental Materials from Judicial Interviews**

The interviews conducted by the Attorney Investigators included the Chief Judge, Complainant, the Subject Judges, members of the Workplace Conduct Committee, and various current and former employees. Complainant retained his own counsel, who participated in his interview. The Attorney Investigators also interviewed an attorney from the AO. The interviews were conducted via Zoom videoconference due to restrictions imposed because of the COVID-19 pandemic, and were neither recorded nor transcribed. After the Attorney Investigators' interviews, some of the judges interviewed offered to share additional relevant materials from their personal files. All of these materials were reviewed as well.

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At the conclusion of their investigation, the Attorney Investigators prepared a report (the "Attorney Investigators' report"), which they presented to the Special Committee. The Attorney Investigators discovered no evidence of racial bias or improper motive exhibited by the Subject Judges, and found that the Subject Judges' employee interviews had been approved in advance by the Chief Judge.<sup>5</sup> Upon reviewing the Attorney Investigators' report, and after meeting with them to discuss the results of this investigation, the Special Committee determined there was not "sufficient evidence to warrant a formal fact-finding proceeding." Commentary on Rule 14. The

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<sup>5</sup> A copy of the Attorney Investigators' report was not provided to Complainant or the Subject Judges. *See* Commentary on Rule 15.

Subject Judges and Complainant were informed of this decision on June 1, 2021. In accordance with Rule 15, the Subject Judges were provided an opportunity to present written and oral argument. Both declined. Complainant was informed that he could provide written argument pursuant to Rule 16. Complainant provided written argument on June 8, 2021. Complainant's submission repeated and summarized his allegations regarding the Subject Judges' putative bias towards him, and what he considers their intimidation of staff to secure their cooperation.

On July 6, 2021, 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 Judges in accordance with Rule 15. Complainant was provided with notice of the filing of the Report pursuant to Rule 16(a).<sup>6</sup> Although the Subject Judges were offered an opportunity to file a response to the Report and to present argument pursuant to Rule 20(a), they chose not 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 Council's reasoning for dismissing the complaint. Rule 20(f).

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<sup>6</sup> Complainant is not entitled to a copy of the Special Committee's Report. Rule 16(a). In exercising our discretion, we decline to release a copy of the Report to Complainant. *See id.*

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

Upon consideration of the Special Committee's Report, the Judicial Council agrees with the Special Committee that the evidence does not support a conclusion that the Subject Judges engaged in judicial misconduct. The Council, therefore, dismisses the complaint pursuant to Rule 20(b)(1)(A).

#### **A. The Subject Judges' Alleged Racial Bias and Motivation**

Complainant alleges that the employee interviews conducted by the Subject Judges, along with their report – and, more generally, what he describes as their effort to push him out of his position – were motivated by racial bias.

Attempting to support this assertion, Complainant notes that: he was the only African American senior staff member; his successor was a Caucasian male whose application was solicited by Subject Judge I; and he was treated disrespectfully by court security. Compl. at 4, 5. Complainant also refers to the Chief Judge's comment that some individuals might have had problems being supervised by a Black person. *Id.* at 6. During his interview, Complainant and his counsel argued that a Caucasian employee in the office was not subject to any disciplinary action or investigation even though the Subject Judges' report included negative comments made by employees about him.<sup>7</sup>

The foregoing allegations were examined with heightened concern on the part of the Special Committee, which sought at all times to assure that they were investigated

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<sup>7</sup> The Subject Judges would not have been responsible for disciplining the employee in question. That responsibility would have rested with the unit executive.

thoroughly. The Attorney Investigators identified no evidence that the Subject Judges' conduct was motivated by racial bias, or that Complainant was the victim of any form of racial discrimination by the Subject Judges. Indeed, the Attorney Investigators specifically asked Complainant during his interview whether he could present any evidence or examples of the Subject Judges' racial bias or discrimination. Complainant was unable to identify any negative interaction with either of the Subject Judges, nor could he point to any experience with either of them that was racially motivated.

For their part, the Subject Judges adamantly denied that any actions on their part were racially motivated. Other judges who were interviewed said that they had no reason to believe that the Subject Judges were motivated by race. Nor did employees who were interviewed suggest Complainant had been subjected to racial discrimination. Rather, as detailed below, the investigation revealed that Subject Judge I was genuinely concerned about the treatment of Circuit employees, in particular those under Complainant's supervision. It was also revealed that Subject Judge II participated in this review at the Chief Judge's request.

These conclusions are borne out by the relevant timeline. The Attorney Investigators determined that, at some point in 2017, Subject Judge I approached the Chief Judge multiple times with concerns about the manner in which staff were being treated by Complainant. As a result of casual conversations Subject Judge I had with employees, he became concerned about how Complainant was treating certain people working for him. The Chief Judge undertook an effort to understand Subject Judge I's

concerns. He spoke with unit executives who generally described Complainant as remote, private, unfriendly, and controlling, yet none described mistreatment. The Chief Judge also consulted another employee who was aware of issues involving Complainant. Nearly all of the employees interviewed said that by 2017, there was consensus among employees that Complainant was unpopular, was a poor manager, and that morale issues were pervasive.

In late 2017, Subject Judge I became concerned about the treatment of three employees. To keep faith with these employees' requests for confidentiality, they will be referred to as Employee #1, Employee #2, and Employee #3. In the fall of 2017, Employee #1 was involved in an administrative project with Complainant. All those with knowledge of the working relationship between Complainant and Employee #1 who were interviewed by the Attorney Investigators described it as difficult and strained. Complainant said he offered to handle the project because Employee #1 had too much work at the time. Subject Judge I believed Complainant intentionally excluded Employee #1 from the process. The plans for action on the project fell apart due to a miscommunication or misunderstanding which caused significant delay.

On November 6, 2017, Subject Judge I wrote to the Chief Judge and expressed concern about how employees were treated and stated that employees "are seriously if not totally demoralized." The Chief Judge encouraged Subject Judge I to continue to raise his concerns. On November 29, 2017, Subject Judge I again wrote to the Chief

Judge about Complainant and referenced a discussion Subject Judge I had with another judge. The three judges discussed their concerns.

By December 2017, Subject Judge I learned of details about other employees' experiences working for Complainant. Employee #2 sent a memo and various emails about Complainant. This document described various issues, treatment of district court employees, and, overall, an unproductive, inefficient workplace. Employee #2 also sent a document describing Complainant as engaging in favoritism and causing poor morale and anger. The document also described poor communication. On December 4, 2017, in response to an email from the Chief Judge, Subject Judge I shared that Employee #2 applied for another job because of the way Complainant treated this person. On December 5, 2017, the Chief Judge met with Complainant and discussed the issues concerning Complainant's management of his staff.

Based upon the results of the investigation, the Judicial Council agrees with the view of the Special Committee that by December 2017 – immediately before the employee interviews began in January 2018 – Subject Judge I had reason to be concerned about employee issues involving Complainant. Subject Judge I repeatedly shared these concerns with the Chief Judge, who in turn attempted to address these concerns with Complainant. A thorough investigation revealed no evidence of racial discrimination or bias or, more generally, any improper motive on the part of the Subject Judges. Indeed, Subject Judge II became involved with the interviews only because the Chief Judge requested it. Complainant's inability to identify any negative or racially-motivated

experience with either of the Subject Judges substantially undermines his racial bias claim.

A few other points raised by Complainant merit further discussion here. Although Complainant is correct that a Caucasian employee was not subject to any disciplinary action as a result of negative employee comments in the Subject Judges' report, this has no relevance to the gravamen of the complaint against the Subject Judges. The Subject Judges lacked authority to discipline that employee. Complainant also views the fact that the individual selected as his successor is Caucasian as evidence of bias against him. However, all of the applicants for the position were Caucasian and, as discussed above, no evidence has been presented to support Complainant's allegations of racial bias. Furthermore, the individual who was ultimately hired for the position was identified and came highly recommended by the AO. There is, therefore, no evidence before us to support a finding that Complainant's successor was selected pursuant to a process tainted by racial bias.<sup>8</sup>

The Judicial Council thus concludes that the facts on which this portion of the complaint are based fall well short of establishing racial bias. *See* Rule 20(b)(1)(A)(iii) (allegations may be dismissed by the Judicial Council because "the facts on which the

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<sup>8</sup> Complainant's allegations of improper treatment by court security are not cognizable in these proceedings as the Judicial Conduct and Disability Act applies only to federal judges. Rule 1.

complaint is based have not been established”). Accordingly, this portion of the complaint is dismissed. *Id.*

### **B. The Subject Judges’ Alleged Unauthorized Conduct**

Complainant alleges that the Subject Judges’ interviews and the Subject Judges’ report were conducted without the knowledge, authorization, or consent of the Chief Judge. We find no evidence that the Subject Judges engaged in unauthorized conduct.

Following an exchange of emails in November and early December 2017 regarding Complainant and his treatment of employees, Subject Judge I met with the Chief Judge. Because, at the time, there was no established process for handling the concerns about Complainant, Subject Judge I volunteered to interview employees and report back to the Chief Judge. The Chief Judge approved Subject Judge I’s undertaking the interviews and suggested that Subject Judge II join Subject Judge I in conducting them. Subject Judge II confirmed that the Chief Judge asked him to participate in the interviews.

Later that month, the Chief Judge communicated via email with Subject Judge I regarding the plan for the interviews. The Chief Judge stated in that email that he did not personally need to be involved in the meetings nor did he see a need to announce the plan to the full court. He intended to tell Complainant about the interviews once Subject Judges I and II had developed their plan.

Subject Judge I decided to interview all employees in Complainant’s office, as well as other court employees. Subject Judges I and II did not interview Complainant as

part of this process. The Chief Judge approved Subject Judge I's proposed approach and encouraged Subject Judge I to get feedback as to all the units and morale within each unit.

The Chief Judge later made a statement to Complainant that gave the latter the misimpression that the Subject Judges' inquiry was unauthorized. But the Chief Judge expressly confirmed during the Special Committee's Investigation that he approved Subject Judge I to conduct the interviews and asked Subject Judge II to participate.

Thus, there is no evidence that the Subject Judges conducted the interviews or prepared their report without the knowledge, authority, or consent of the Chief Judge. The Judicial Council therefore finds that the facts regarding Complainant's allegations of unauthorized conduct "have not been established" and dismisses them under Rule 20(b)(1)(A)(iii).

### **C. Subject Judges' Alleged Abuse of Authority and Unfair Process**

Complainant alleges that the Subject Judges employed an unfair process because they compelled employees to sit for interviews, did not interview Complainant, authored a biased report, and, in doing so, forced Complainant out of his role. He alleges that this conduct constitutes an abuse of the Subject Judges' authority.

The Judicial Council finds no evidence that the Subject Judges abused their authority or engaged in an unfair process. The Subject Judges did not interview Complainant. Their report also failed to include certain positive comments from a few employees. Yet the Judicial Council nonetheless finds that these omissions do not

constitute conduct prejudicial to the expeditious administration of the business of the courts.

### 1. The Subject Judges' Interviews

The Judicial Council finds that the Subject Judges did not intimidate, pressure, or threaten any employee who participated in the interview process.

Subject Judge I's judicial assistant scheduled the Subject Judges' interviews of employees in early January by sending a group email. The email explained that the interviews were being scheduled to gain insight into how employees feel about their court experience. Most of the employees understood that the interviews would be about workplace morale generally.

The interviews were held between January 31 and February 2, 2018. Each interview lasted approximately 30 minutes, with only the two Subject Judges and the interviewee present. The Subject Judges took notes throughout the interviews and generally followed a prepared list of questions about the employee's role, interactions and relationship with their supervisor, performance evaluations and feedback, advancement and goals within their role, staff meetings, and morale. The Subject Judges asked questions about Complainant, and most employees felt that the questions were open-ended and not leading. Two employees felt differently, though, believing that the questions were designed to elicit negative information about Complainant.

The Subject Judges promised the interviewees confidentiality and asked for confidentiality in return. None of the interviewed employees reported feeling

intimidated, pressured, or threatened by the Subject Judges. Only one employee expressed feeling any discomfort with the process.

## 2. The Subject Judges' Report

The Subject Judges relied on their interview notes in preparing their co-authored report. Subject Judge I submitted the Subject Judges' report to the Chief Judge on February 26, 2018. The Subject Judges' report summarized the interviews and provided selected quotes from the interviewed employees. For instance, in concluding that Complainant "lacks basic people skills and leadership ability," the report cited employee comments describing him as "vindictive," "smug," "remote," and "a bad person." Employees also described his tendency to "play favorites" and his highly controlling management style. The report described a perception that Complainant's former office suffers from a lack of communication and teamwork and that newer employees received preferred treatment over more senior "legacy" employees (*i.e.*, employees that pre-dated Complainant's tenure). The Subject Judges' report quoted employees describing the workplace conditions in terms such as "frustrating" and "disturbing," and as viewing Complainant as "controlling," "demeaning," and engaging in retaliation and exclusion. The Subject Judges' report also described what the employees' perceived as an absence of any structure for reporting their workplace-related concerns.

The Subject Judges' report also outlined a series of recommendations. First, the Subject Judges recommended that an interview with Complainant be scheduled "to get his point of view." They then presented six additional recommendations aimed at

restricting Complainant's authority over both the employees in his office and the selection of his successor, as well as creating new employee grievance procedures. Most notably, the Subject Judges' report states that Complainant's conduct would be grounds for termination in the private sector. The Subject Judges did not believe it was within their authority to terminate Complainant, leaving that decision to the Chief Judge.

Complainant did not receive a copy of the Subject Judges' report until just before the Special Committee's Investigation in March 2021.<sup>9</sup> During the Special Committee's Investigation, Complainant claimed that there were some limited inaccuracies or discrepancies in the Subject Judges' report. The Judicial Council has considered these claims and concludes that, although a few minor points could have been clarified, no material errors appeared in the Subject Judges' report.

The Subject Judges' notes from their employee interviews reflected descriptions of Complainant that were accurately captured in their report and that were reiterated by the employees during the Special Committee's Investigation. Likewise, nearly all of the employees who were interviewed during the Special Committee's Investigation said they told the Subject Judges about negative experiences with Complainant and his poor leadership.

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<sup>9</sup> The Subject Judges told the Attorney Investigators they believed that the Chief Judge was going to provide Complainant with a copy of their report early in the process so that the latter would be aware of the allegations against him. Because the Chief Judge did not think it was best for the court or the employees who were interviewed for Complainant to receive a copy of the Subject Judges' report at the time it was made, he decided not to provide it.

According to the Subject Judges' interview notes and in the Attorney Investigators' sampling of interviewees, certain employees shared moderately positive feedback about their experiences and Complainant that was not relayed or documented in the Subject Judges' report. A few employees described being treated well and having a respectful relationship with Complainant. For example, Complainant could be appreciative, supportive of scheduling accommodations, and sensitive to family health needs. In addition, one employee described a long-standing friendship with Complainant.

Yet most of the positive feedback was coupled with negative information as well. For instance, one employee described a better working relationship with Complainant, but told the Subject Judges that her morale was not good at the time of the interview and she was unhappy with Complainant's management. Similarly, some of the individuals who provided positive feedback also told the Subject Judges about Complainant's favoritism, potential disparate treatment of employees, lack of regular meetings, his remote style, and/or his lack of communication.

### 3. Complainant's Retirement, Image in the Court, and Constructive Discharge Claim

The Judicial Council concludes that the Subject Judges did not force Complainant to retire or cause his constructive discharge, nor did they engage in conduct intended to damage his image in the Court.

On January 26, 2018 – 22 days after the Subject Judges' employee interviews were announced but five days before they were set to begin – Complainant informed the

Chief Judge of his intent to retire in September 2019. On January 29, 2018 – two days before the interviews were set to begin – Complainant announced his planned retirement to the staff and judges of the court.

During the Special Committee’s Investigation, Complainant explained that he announced his retirement in anticipation of the interviews to “protect” himself, Compl. at 4, and believed he could have rescinded his retirement plan if the process had unfolded differently. Complainant told the Attorney Investigators that he did not rescind the retirement announcement given how things transpired and complained that he never regained a sense of job security before he ultimately retired in September 2019.

All those who spoke with the Attorney Investigators assumed that Complainant’s retirement announcement was connected to the Subject Judges’ employee interviews. One employee spoke to Complainant about his retirement announcement and Complainant acknowledged that he was retiring to avoid being fired. That employee thought the Subject Judges were “gunning” for Complainant and warned him to be careful. That employee was also the only employee who believed Complainant’s reputation was harmed as a result of the Subject Judges’ interviews. Although that employee described gossip in the workplace, he did not offer any specific information about how Complainant’s reputation was harmed.

The Subject Judges did not think that the retirement announcement warranted cancelling the employee interviews. They believed that there was still a benefit in conducting the interviews because they were checking in on the staff. Moreover, they

thought it would be prudent to proceed because Complainant's retirement would not be effective for twenty months, and the mere fact of a forthcoming retirement would not necessarily address the concerns about the staff working under Complainant.

#### 4. Post-Interview Response

The Subject Judges' memories were unclear about their communications with the Chief Judge concerning the report, but they believed that a response to their report would be left to the Chief Judge. As previously noted, the Subject Judges' report recommended a meeting with Complainant to get his point of view on the matters addressed in their report. In early April 2018, the Chief Judge informed the Subject Judges that they had provided important and valuable information, but that he would handle the situation going forward. He expressed gratitude to them for conducting the employee interviews.

The Chief Judge contacted an attorney at the AO about Complainant and the Subject Judges' report. After consulting with the attorney, the Chief Judge decided not to hold a meeting with Complainant as the Subject Judges' report recommended. The Chief Judge and the AO attorney consulted on several occasions through at least May 2018. In particular, they discussed the possibility of a temporary assignment for Complainant elsewhere in the federal judiciary so that he could remain employed but not supervising court employees any longer. Those efforts were unsuccessful.

Later in April 2018, Subject Judge I followed up with the Chief Judge to find out what actions would be taken in response to the Subject Judges' report. The Chief Judge said he contemplated terminating Complainant and also considered some form of

probation. During our Special Committee’s Investigation, the Chief Judge said he would have resolved the question of termination differently had Complainant not announced his retirement. Given the retirement announcement, the Chief Judge felt he could take alternative remedial actions and keep an eye on Complainant’s conduct, including by handling certain personnel matters for Complainant.

The Chief Judge spoke with Complainant at least twice in April 2018.

Complainant surreptitiously recorded these two conversations without the Chief Judge’s knowledge or consent. During those conversations, Complainant expressed his concerns to the Chief Judge, and the Chief Judge described, at a general level, the nature of the employee complaints described in the report. He also told Complainant that he intended to focus on workplace issues more broadly in the circuit and create a workplace conduct committee. The Chief Judge encouraged Complainant to make his remaining tenure as positive as possible. Complainant also proposed that he retire earlier than September; the Chief Judge was supportive of the idea if Complainant could maintain his full benefits.

#### 5. Workplace Conduct Committee

In the spring of 2018, the Chief Judge created a Workplace Conduct Committee (or the “Committee”) comprised of circuit court, district court, magistrate, and bankruptcy court judges. It was chaired by a Circuit Court Judge (the “Chair”) and included three other Circuit Judges.

The Chief Judge assigned a response to the Subject Judges’ report to the Workplace Conduct Committee – a decision he shared with Complainant in April 2018

and with the Subject Judges on May 2, 2018. The Chair decided that only Circuit Judge members of the Committee should handle this matter.

Complainant asked to meet with the Chair in May 2018 to discuss the situation. When they met, Complainant recorded the conversation without the Chair's knowledge or consent. During their meeting, the Chair attempted to reassure Complainant. Complainant said these assurances gave him no comfort, and he did not feel a sense of job security for the duration of his time at the court.

The Workplace Conduct Committee discussed this matter at a meeting on June 27, 2018, and decided to meet with Complainant on July 10, 2018. In advance of that meeting, the Chair and the Chief Judge would have separate conversations with Complainant about the contents of the Subject Judges' report. The Committee decided, however, that they would not share a copy of the report with Complainant.

The Chair spoke with Complainant on July 2 and relayed her conversation to the Committee. The Committee's July 10, 2018, meeting with Complainant lasted approximately an hour and a half. Complainant secretly recorded this meeting as well. No judge was aware of or consented to the electronic interception of the discussions. The meeting focused on changes that Complainant might make to improve the workplace he supervised and to increase communication and accessibility with both his staff and the judges.

At multiple times throughout the meeting, Complainant expressed an eagerness to implement the changes that were discussed so as to make the duration of his tenure as

positive as possible. The Chair briefed Subject Judge I following the July 10 meeting, and Subject Judge I expressed his view that the Committee's approach was reasonable. The Committee never formally met with or consulted the Subject Judges regarding their interviews or their report.

#### 6. Complainant's Remaining Tenure

On July 2, 2018, prior to Complainant's meeting with the Workplace Conduct Committee, the Chief Judge informed the Committee that he was skeptical that Complainant's treatment of his employees had improved. Following the Committee meeting, Complainant sent the judges a draft email he intended to send to his staff designed to increase engagement and cultivate more frequent staff meetings. The Chair of the Workplace Conduct Committee thought he seemed interested in doing what the Committee asked and planned to check in with him regularly. The Chief Judge also expressed his intention to follow up on Complainant's progress, yet he continued to have concerns.

After the meeting, Complainant said he worked on improving staff communication and the frequency of staff meetings. However, the Special Committee's Investigation revealed that Complainant remained remote, uninvolved, and uninterested in court affairs for the duration of his tenure. In the fall of 2018, the Workplace Conduct Committee conducted a circuit-wide survey for all court employees to provide feedback on their workplace experience. The results from this survey were mixed. Like the Subject Judges' interview notes, there were many negative comments made about working in

Complainant's former office, as well as some positive comments suggesting some improvement by Complainant.

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On balance, the evidence demonstrates that the Subject Judges' interviews were not conducted in an improper, targeted, or threatening manner. The Subject Judges' notes and the interviews conducted by the Attorney Investigators verified the contents of the Subject Judges' report. While there were a limited number of omissions of some moderately positive feedback from employees, as well as a few minor discrepancies that could have been clarified, the Subject Judges' report overall accurately encapsulates information shared by employees with the Subject Judges.

In addition, the Subject Judges recommended meeting with Complainant to get his point of view and believed their report would be provided to him. After the Subject Judges' report was transmitted to the Chief Judge, he and the Workplace Conduct Committee handled the response to the report and any further communications with Complainant. Ultimately, the majority of the decisions Complainant found objectionable were not made by the Subject Judges – and none were made with the intention of undermining Complainant. Indeed, in many ways, the course of events following the interviews and the report occurred in direct response to Complainant's own announcement that he planned to retire.

There is, therefore, no credible evidence that the Subject Judges abused their authority, engaged in an unfair process, caused Complainant to be constructively

discharged, or intentionally harmed Complainant’s reputation in the court. The Judicial Council therefore finds that the facts regarding these allegations “have not been established” and dismisses them under Rule 20(b)(1)(A)(iii). To the extent certain allegations are true – for instance, that the Subject Judges did not interview Complainant and did omit certain positive comments from their report – the Judicial Council finds that the allegations do not constitute “conduct prejudicial to the effective and expeditious administration of the business of the courts” and are therefore subject to dismissal on that basis. Rule 20(b)(1)(A)(i).

#### **D. Recordings of Federal Judges**

Before concluding this Memorandum Opinion, the Judicial Council considers it necessary to discuss Complainant’s secret recording of meetings with federal judges. As indicated above, Complainant voluntarily submitted a USB memory stick containing recordings of four in-person conversations he had with various Circuit judges. As emphasized above, Complainant recorded these conversations without the judges’ knowledge or consent. Notably, three of the conversations occurred in judges’ private chambers. The Judicial Council concludes that, under the circumstances presented here, the making of these recordings by itself constitutes a violation of the *Code of Conduct for Judicial Employees*.

Canon 1 of the *Code of Conduct for Judicial Employees* provides that, “A judicial employee should personally observe high standards of conduct so that the integrity and independence of the Judiciary are preserved and the judicial employee’s office reflects a

devotion to serving the public.” Canon 1, *Code of Conduct for Judicial Employees*, § 320. The making of these secret recordings by a unit executive falls far short of the high standard of conduct expected of all employees in the Judicial Branch. As a high-ranking executive, Complainant had access to highly confidential information and the judges of the court trusted him to make decisions on a wide range of complex and sensitive matters. Complainant’s decision to make surreptitious recordings of the judges he worked for was an egregious betrayal of that trust.

The Judicial Council has no information that suggests Complainant has made other recordings of judges or judicial employees. It bears emphasizing that none of the recordings he submitted in these proceedings were of meetings or conversations with the Subject Judges. Furthermore, the recordings provided no support for Complainant’s claims of racial or any other type of improper bias on the part of the Subject Judges.

There may be extremely rare circumstances where the making of a secret recording of a federal judge by a judiciary employee might be justified.<sup>10</sup> But the circumstances presented here are a far cry from anything suggesting a need for unconsented to electronic interception of conversations. Even assuming *arguendo* that the recordings were permissible under the applicable state law, we repudiate Complainant’s surreptitious actions in the strongest terms.

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<sup>10</sup> Depending on applicable state law, there could be criminal liability for making nonconsensual recordings.

### **E. Request for Damages**

Finally, apart from the merits of the claims of judicial misconduct presented in the complaint, the Judicial Council concludes that Complainant's request for damages is outside the scope of a judicial misconduct proceeding. Accordingly, the request for damages was not considered.

Even if a complaint of judicial misconduct is not dismissed, the Act suggests that the Judicial Council may take only remedial action. Where an Article III judge is involved, potential responses by the Judicial Council may include public or private censure or reprimand, ordering that, on a temporary basis, no further cases be assigned to the judge in question, and requesting a voluntary retirement. 28 U.S.C. § 354(a)(2)(A), (B); *see also* JC&D R. 20(b)(1)(D) (same). Although the Act does not provide an exhaustive list, the focus is on judicially-oriented corrective action, discipline, and sanctions.

No provision of the Act or Rules permits an award of monetary damages. *See* 28 U.S.C. § 354(a)(2); *see also* Commentary to Rule 11 (“Where a subject judge’s conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future.”); *Ponton v. U.S. Court of Appeals*, No. 10-2213 (JBS), 2011 WL 1045035, at \*3 (E.D. Pa. Mar. 22, 2011) (“The Court notes that under 28 U.S.C. § 351, a complainant such as Plaintiff is not entitled to any individual

relief upon the filing or consideration of such a complaint.”). As the Judicial Council of the Ninth Circuit has observed, “[t]he sole purpose of the misconduct complaint procedure is to identify and investigate allegations of misconduct against federal judges. The only possible outcome of the proceedings, should misconduct be shown, is corrective or disciplinary action against the judge. Complainant may not obtain any kind of personal relief . . . even if misconduct is ultimately shown.” *In re Judicial Misconduct*, 630 F.3d 1262 (Jud. Council 9th Cir. 2011).

Accordingly, the Judicial Council concludes that Complainant’s request for monetary damages is not cognizable in this proceeding.

#### **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/ D. Brooks Smith  
Chief Judge

Dated: July 27, 2021

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

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J.C. Nos. 03-20-90043 and 03-20-90044

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IN RE: COMPLAINT OF JUDICIAL MISCONDUCT  
OR DISABILITY

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

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ORDER

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(Filed: July 27, 2021)

PRESENT: MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN,  
SÁNCHEZ, HORNAK, WOLFSON, JONES, AND CONNOLLY  
*Members of the Judicial Council of the Third Circuit*

SMITH, *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*.<sup>1</sup>

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<sup>1</sup> All Rules cited are to the *Rules for Judicial-Conduct and Judicial-Disability Proceedings*.

Complainant and the Subject Judges 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 42 days after the date of the order for which review 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](mailto: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](http://www.ca3.uscourts.gov).

s/ D. Brooks Smith  
Chief Judge

Dated: July 27, 2021