Order

Michigan Supreme Court
Lansing, Michigan

June 23, 2023

161134

In re KAHLILIA Y. DAVIS, JUDGE
36TH DISTRICT COURT

SC: 161134
Formal Complaint No. 101

BEFORE THE JUDICIAL TENURE COMMISSION
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On March 1, 2023, this Court held oral argument concerning the findings of fact and recommendation of the Judicial Tenure Commission (the Commission) in this matter. Judicial tenure cases are presented to this Court on recommendation of the Commission, but the authority to discipline judicial officers rests solely with this Court. Const 1963, art 6, § 30. The Commission's findings of fact, conclusions of law, and recommendations for discipline against respondent Kahlilia Davis, former 36th District Court judge, are reviewed de novo. *In re Gorcyca*, 500 Mich 588, 613 (2017).

We adopt in part the recommendations made by the Commission. We impose a six-year conditional suspension without pay on respondent effective on the date of this decision. Should respondent be elected or appointed to judicial office during that time, she "will nevertheless be debarred from exercising the power and prerogatives of the office until at least the expiration of the suspension." *In re Probert*, 411 Mich 210, 237 (1981). See also *In re Konschuh*, 507 Mich 984 (2021). We reject as moot the Commission's recommendation that we remove respondent from office because respondent no longer holds judicial office as of January 1, 2023.[1]

I. FINDINGS OF MISCONDUCT

The Commission has set forth several allegations of misconduct in its second amended complaint. A preponderance of the evidence[2] supports our findings that respondent engaged in the following misconduct:

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[1] The Secretary of State removed respondent from the 2022 general election ballot because she incorrectly stated on her affidavit of identity that she had paid all outstanding late fees. See *Davis v Secretary of State*, unpublished order of the Court of Appeals, entered August 22, 2022 (Docket No. 362455); *Davis v Secretary of State*, opinion and order of the Court of Claims, issued June 1, 2022 (Case No. 22-000072-MB).

[2] See *In re McCree*, 495 Mich 51, 68-69 (2014) (" 'Findings of misconduct must be supported by a preponderance of the evidence.' "), quoting *In re Haley*, 476 Mich 180, 189 (2006).

- Count I: Respondent abused her contempt powers in at least two cases, *Detroit Real Estate v Hayes*, 17-307300-LT and *Sanders v Thomas*, 17-321869-LT. Respondent failed to engage in proper contempt hearings, forced parties to pay illegal punitive sanctions in civil actions, and unlawfully put a process server in jail based on a civil-contempt finding. Respondent violated MCR 9.104(1); MCR 9.202(B); Code of Judicial Conduct, Canon 3(A)(1); Code of Judicial Conduct, Canon 3(A)(3); Code of Judicial Conduct, Canon 3(A)(12); and Code of Judicial Conduct, Canon 3(A)(14).

- Count II: Respondent summarily dismissed or adjourned multiple cases because a party used a certain process server respondent believed was dishonest without making factual findings that process had not been served. When admonished to stop taking these actions by the Chief Judge of the 36th District Court, respondent instead pretextually dismissed cases, misapplying the law to get to the result she wanted—not the result that was just or required. Respondent violated MCR 9.104(1) and (2); MCR 9.202(B); Code of Judicial Conduct, Canon 2(A) and (B); Code of Judicial Conduct, Canon 3(A)(1); Code of Judicial Conduct, Canon 3(A)(4); and Code of Judicial Conduct, Canon 3(A)(14).

- Count III: Respondent obstructed court administration by failing to comply with a performance-improvement plan issued to her by the Chief Judge, by intentionally refusing to follow the orders of the Chief Judge; and by sending ominous Bible verses to the Chief Judge, the court administrator, and the regional court administrator that, when read in the context of respondent's e-mails, were insulting, discourteous, disrespectful, and threatening.[3]

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[3] For example, respondent sent e-mails to her supervisors and colleagues that stated the following:

1. "Sovereign Lord, my strong deliverer, you shield my head in the day of battle. Do not grant the wicked their desires, Lord; do not let their plans succeed. Those who surround me proudly rear their heads; may the mischief of their lips engulf them. May burning coals fall on them; may they be thrown into fire, into miry pits, never to rise. Psalm 140:7-10."

2. "But the cowardly, the unbelieving, the vile, the murderers, the sexually immoral, those who practice magic arts, the idolaters and all liars – they will be consigned to the fiery lake of burning sulfur. This is the second death. Revelation 21:8."

Respondent violated MCR 9.202(B)(2); Code of Judicial Conduct, Canon 3(A)(3); Code of Judicial Conduct, Canon 3(A)(14); and Code of Judicial Conduct, Canon 3(B)(1).

- Count IV: Respondent intentionally disconnected the videorecording equipment in Courtroom 340 and purposefully failed to maintain a record of proceedings in her courtroom for a period of weeks. Respondent violated MCR 9.104(1) and (2); MCR 9.202(B); Code of Judicial Conduct, Canon 2(A) and (B); Code of Judicial Conduct, Canon 3(B)(1); and MRPC 8.4(c).

- Count V: Respondent created unauthorized recordings of the proceedings in her courtroom on her personal cell phone. Respondent violated Code of Judicial Conduct, Canon 3(A)(11).

- Count VI: Respondent parked in a handicap loading zone at a gym[4] and placed a placard in her window to convey that she was there on the authority of the Detroit Police Department and Mayor Mike Duggan. The placard conveyed that she was there "On Official Business," stating that "[t]his vehicle shall not be cited or impounded under penalty of law." Respondent did not have authority to display the placard and was not at the gym on official business for the Detroit Police Department. After a third-party's car was blocked in and the police were called, respondent attempted to use her status as a judge to avoid any citation—flashing her judge's badge at the responding officer. Respondent violated MCR 9.104(2) and (3); MCR 9.202(B); and Code of Judicial Conduct, Canon 1.

- Count VII: Respondent made material misrepresentations to the Commission as it investigated her misconduct by lying about disconnecting the video equipment in her courtroom. Respondent violated MCR 9.104(2) and (3); MCR 9.202(B); MCR 9.230(B)(2); Code of Judicial Conduct, Canon 2(A); Code of Judicial Conduct, Canon 2(B); and MRPC 8.4(b).

We do not find, as the Commission did, that respondent published the illicit recordings of her courtroom proceedings to Facebook Live (Count V). We agree with

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Moreover, after the Regional Court Administrator met with respondent and her attorney and asked that she stop sending these messages, she sent him an e-mail that stated, in part, "You brood of vipers, how can you who are evil say anything good?"

[4] The parking area at issue was the striped area immediately adjacent to the parking spaces reserved for individuals with disabilities. It is intended to be a loading and unloading zone for those in wheelchairs or with other mobility-assistive equipment. It is not a parking space.

respondent that this allegation was not proven by a preponderance of the evidence. See *In re McCree*, 495 Mich 51, 68-69 (2014).

II. ANALYSIS

A. THE *BROWN* FACTORS FAVOR SUSPENSION

Misconduct is not viewed in a vacuum. The cumulative effect and pervasiveness of respondent's misconduct convinces this Court to accept the Commission's recommendation of the appropriate sanction to the extent it is consistent with this order. This Court uses—among other tools—the seven factors enunciated in *In re Brown*, 461 Mich 1291, 1292-1293 (2000), to determine appropriate sanctions for misconduct. Those factors are:

> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
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> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
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> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
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> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
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> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
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> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
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> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship. [*Id*.]

Six of the seven *Brown* factors favor a severe sanction here. To begin, the misconduct was part of a pattern or practice. This was shown by the continued abuse of contempt powers in two different cases, the multiple summary dismissals of cases in which

a particular process server respondent did not trust was used (even after being instructed to stop doing so by her Chief Judge), the intentional disconnection of the authorized recording equipment, and the recording of the proceedings in respondent's courtroom on her personal cell phone.

With regard to the second *Brown* factor, much of respondent's misconduct was done while she was "on the bench." Her abuse of contempt powers; summary dismissals; menacing, discourteous, and disrespectful e-mails to colleagues; disconnection of the recording equipment; and impermissible recording of court proceedings on a personal device all constitute "on the bench" conduct. Whether something occurs "on the bench" is not literal, but rather depends on whether the conduct occurs in that person's capacity as a judge. See *In re Barglind*, 482 Mich 1202, 1203 (2008); *In re Chrzanowski*, 465 Mich 468, 469-470, 490 (2001).

Further, respondent's misconduct actually impacted and prejudiced the administration of justice (*Brown* factors 3 and 4), because it involved the dismissal of potentially meritorious claims; the inability of parties to properly appeal decisions simply because there was no transcription or recording from which to generate a transcript; the failure to conduct proper contempt proceedings, including unlawfully jailing a party; and the improper recording of proceedings before the court on respondent's personal cell phone. The misconduct additionally undermined the ability of the justice system to discover the truth of what occurred in a legal controversy or to reach the most just result (*Brown* factor 6) in those cases for the same reasons.

Much of respondent's misconduct was premeditated, as shown by the multiple witnesses who testified that she purposefully engaged in conduct directly contrary to the Chief Judge's instructions and contrary to the interests of justice. As just one example, when told specifically that she could not dismiss cases simply because the process server was someone she did not particularly trust, respondent stated: "I don't care what the chief judge or anybody else at this court says. This is my courtroom. And if you have a problem, anybody can take it to the JTC . . . ." This conduct was not spontaneous; it was premeditated (*Brown* factor 5). Respondent also purposefully engaged in further premeditated misconduct by recording proceedings on her personal cell phone.

The only *Brown* factor not at issue in this case is the seventh factor: unequal application of justice based on protected characteristics. There are no allegations that respondent treated individuals unequally on the basis of any protected characteristics.

B. THE FIRST AMENDMENT DOES NOT PRECLUDE A SANCTION FOR RESPONDENT'S CONDUCT

As a final matter, respondent argues that she was exercising her rights to free speech and religion when she sent Bible verses to her supervisors, fellow judges, and court staff,

purportedly as a means of complying with the Chief Judge's order that she report her arrival to the courthouse every day, and therefore, she should not be disciplined for this behavior. The Special Master in this case referred to the e-mails as "Biblical passages" without addressing their contents and found that the incendiary e-mails were excusable due to "high conflict" relationships between respondent and the Chief Judge and the other recipients of the e-mails. We disagree. The Bible verses quoted by respondent were, in the context of respondent's e-mails, clearly intended to be insulting, discourteous, disrespectful, and menacing toward the recipients. The e-mails also reflect a failure to demonstrate the professionalism demanded of judges.

The right of free speech generally entitles a person to, among other things, protection from government persecution based on speech. See *Stromberg v California*, 283 US 359, 368-369 (1931).[5] The goal of disciplinary proceedings is not punitive; rather, it is to "restore and maintain the dignity and impartiality of the judiciary and to protect the public." *In re Ferrara*, 458 Mich 350, 372 (1998). Freedom of speech is not the freedom from all consequences for one's actions. Moreover, a "judge must . . . accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Code of Judicial Conduct, Canon 2(A). The First Amendment does not provide government employees carte blanche to engage in conduct that amounts to "insubordination" that "interfere[s] with working relationships." See *Connick v Myers*, 461 US 138, 151-152, 154 (1983); see also *id*. at 163 n 3 (Brennan, J., dissenting). This type of conduct is certainly beyond the pale for a member of our judiciary. Respondent's refusal to simply convey that she had arrived at work as required by the Chief Judge's order amounted to insubordination and clearly interfered with multiple working relationships.

III. CONCLUSION

For the foregoing reasons, we conclude that respondent engaged in repeated, deliberate misconduct that besmirched the judiciary's reputation and prejudiced the administration of justice. The nature and pervasiveness of respondent's misconduct requires the highest condemnation and harshest sanction. Given respondent is no longer on the bench, we hold that a six-year conditional suspension without pay is an appropriate sanction, with the suspension barring respondent from serving in a judicial office during that period.

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[5] Of course, the right is not "absolute," and the government may exercise its police power to punish those who "abuse" their freedom of speech. *Stromberg*, 283 US at 368-369.

CAVANAGH, J. (*concurring*).

I agree with the majority's factual findings and conclusions regarding misconduct. Moreover, as I have said before, I recognize that this Court held in *In re Probert*, 411 Mich 210 (1981), that it has the authority to impose a conditional suspension on one who is no longer a judge, and I agree with the majority that assuming the Court has such authority, a six-year conditional suspension without pay is a proportionate sanction for respondent's misconduct. However, this practice has dubious foundations, and I remain open to reconsidering it. See *In re Brennan*, 504 Mich 80, 121-123 (2019) (CLEMENT, J., concurring); *In re Konschuh*, 507 Mich 984 (2021) (CAVANAGH, J., concurring).

CLEMENT, C.J., joins the statement of CAVANAGH, J.