

21-90142-jm, 21-90143-jm
December 22, 2021
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re

CHARGE OF JUDICIAL MISCONDUCT

Docket Nos. 21-90142-jm
21-90143-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

On November 19, 2021, the Acting Chief Judge of another circuit identified a complaint pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351(b) (the “Act”), and Rule 5(a) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the “Rules”), against a Chief Circuit Judge and District Judge of that Circuit (the “Judges”). The complaint was prompted by a November 10, 2021, letter issued by seven members of the United States House of Representatives expressing concern over the hiring of a law clerk (“the candidate”) by the two Judges. The letter cites media reports from several years ago that alleged that the candidate had engaged in racist and hateful conduct, including by sending racist text messages and making other racist remarks, while employed by a nonprofit organization.

On December 9, 2021, the Chief Justice transferred the proceeding to the Second Circuit Judicial Council. *See* Rule 26.

BACKGROUND

From 2012 to 2017, the candidate worked for a nonprofit organization. During most of this period, the candidate, who is now in law school, was a college student. In December 2017 and September 2018, two separate articles in the media alleged that the candidate engaged in racist behavior while employed by the nonprofit organization. The articles provided specific examples of racist text messages and other racist conduct, which were attributed to anonymous sources. In two instances, screenshots of racist messages allegedly sent by the candidate were shown to journalists by an anonymous source. There have been several follow-up reports which reference the earlier articles to decry the fact that the candidate secured an internship, was accepted to law school, and has now been hired as a law clerk by the Judges to begin employment in 2022 and 2023.

On November 10, 2021, seven members of the United States House of Representatives wrote a letter to the Chief Justice and the Acting Chief Judge of the sister circuit expressing concern over the Judges' hiring of the candidate. The letter states that if the Judges were aware of the media reports in advance, the hiring decision could be perceived as approval of invidious discrimination,

thereby diminishing public confidence in the integrity and impartiality of the judiciary. The letter further states that if the Judges were unaware of the media reports, this could call into question their hiring processes.

In this proceeding the Judges were given an opportunity to respond. They wrote letters providing information about their hiring processes and their hiring decisions in this case. The information in these letters was corroborated by letters from references and a law school professor of the candidate.

DISCUSSION

The complaint is dismissed. There is no reasonably disputed issue to be resolved in this matter because, as set forth herein, the record lacks any evidence supporting the allegation that the Judges engaged in misconduct. *See* Rule 11(c)(1)(D) (providing for dismissal of complaint “based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred”).

At the start, both Judges state that they were aware of the allegations contained in media reports before they interviewed the candidate. At the same time, they state that they were also in possession of information that the allegations were false—that the anonymous sources relied on in the media accounts were not trustworthy. Both Judges explain that during the hiring process and since that time, they have spoken with numerous people with knowledge of the candidate

and the allegations, and they have been repeatedly informed that the allegations of racist text messages and remarks are not true.

One of these people held a leadership role at the nonprofit organization. That individual stated, based on first-hand knowledge, that the candidate treated everyone with kindness, respect, and fairness while at the organization and that the media accounts are not accurate. The individual explained that the organization had determined that the source of the allegations against the candidate was a group of former employees. One of these employees was fired after the organization learned that this person had created fake text messages to be used against co-workers, to make it appear that those co-workers had engaged in misconduct when they had not.

The Judges indicate that they closely reviewed the candidate's law school performance. At the time of this review, the candidate was attending law school on a full merit scholarship and was in the top five percent of the law school class. A letter in the record from one of the candidate's professors, a former Dean, states that the candidate is an outstanding student and an exemplary member of the law school community. Another letter, from a judge for whom the candidate interned as a law student, attests that this judge spoke at length with one of the Judges during the hiring process and recommended the candidate without reservation.

None of the references gave any indication that the candidate is racist or bigoted; to the contrary, they extolled the candidate's good character. Both Judges also interviewed the candidate and concluded that the candidate was a person of exceptional talent and good character.

Based on their reported due diligence, both Judges determined that 1) the allegations of racist behavior by the candidate were untrue and 2) the candidate was highly qualified to serve as a law clerk in their chambers. Both Judges have affirmed, in substance, that they "abhor invidious discrimination" and "do not tolerate racism" in their workplaces. As one put it, "I take my role as a mentor seriously, so I take my hiring decisions seriously. I would never knowingly harbor a racist or a bigot."

In sum, the undisputed record shows that the Judges carefully reviewed the allegations in the media, thoroughly considered the candidate's record, received strong references attesting to the candidate's qualifications and character, and interviewed the candidate to assess the candidate's temperament, judgment, and abilities. In other words, the Judges performed all the due diligence that a responsible Judge would undertake. After completing this due diligence, the Judges made a considered judgment, based on the information before them, that the media allegations were not true. Only then did they offer the candidate a

position as a law clerk. There is nothing in the record to dispute any of this. The Act is not designed to second-guess such decisions. Accordingly, the complaint is dismissed as “lacking sufficient evidence to raise an inference that misconduct has occurred.” Rule 11(c)(1)(D).¹

The Act and the Rules ensure the confidentiality of misconduct proceedings. *See* 28 U.S.C. § 360; Rule 23(a) (“Confidentiality under these Rules is intended to protect the fairness and thoroughness of the process[.]”). Moreover, where a complaint is dismissed under Rule 11(c) as here, “the name of the subject judge must not be disclosed.” Rule 24 cmt. Nevertheless, Rule 23(b)(9) provides that “[n]othing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.”

The Clerk is directed to transmit copies of this order to the Judges.

¹ For the same reason, nothing in the record supports an allegation that the Judges’ “impartiality might reasonably be questioned” or otherwise provides a basis for disqualification under 28 U.S.C. § 455.