

JUDICIAL COUNCIL  
OF THE FIRST CIRCUIT

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IN RE  
COMPLAINT NO. 01-14-90021

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BEFORE  
Howard and Kayatta, Circuit Judges  
Saylor, McConnell and Delgado Hernández, District Judges

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ORDER

ENTERED: AUGUST 27, 2015

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Petitioner is an employee of a court in the First Circuit. She filed a complaint under the court's Employment Dispute Resolution (EDR) Plan alleging that the chief judge engaged in racial and age discrimination when the judge did not promote her to a position for which she had applied. Pursuant to the EDR Plan, the complaint was referred to then Chief Judge Lynch for disposition under the judicial conduct and disability procedure.<sup>1</sup> After engaging in a thorough inquiry, the Chief Judge dismissed the complaint as lacking factual foundation, pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules for the Judicial Conduct and Judicial-Disability Proceedings (Rules for Judicial-Conduct), Rule 11(b) (authorizing the chief judge to conduct an inquiry), and Rule 11(c)(1)(D) (providing for the dismissal of a misconduct complaint that "is based on allegations lacking sufficient evidence to raise an inference that misconduct has

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<sup>1</sup> EDR Plans in the First Circuit provide, in part, that claims that a judge violated any rights granted under the Plans will be referred to the Chief Circuit Judge who will administer the claim[s] pursuant to the Judicial Conduct and Disability Act, 28 U.S.C. § 351 et. seq., and the Rules for the Judicial Conduct and Judicial-Disability Proceedings.

occurred."). Petitioner filed a timely petition for Judicial Council review of the Chief Judge's order of dismissal. See 28 U.S.C. § 352(c), and Rules of Judicial-Conduct, Rule 18. For the reasons explained below, then Chief Judge Lynch's order of dismissal is affirmed. See id., at Rule 19(b)(1).

### Complaint

Petitioner originally alleged that she was wrongfully denied a promotion because of her race and age. She also asserted that she has been "systematically discriminated" against during her many years of service, as evidenced by unfair discipline for "insignificant reasons," and told that she is "no one in this Court."

Petitioner identified other employees who have allegedly received promotions and/or salary increases based only on their race, though they have "equal or fewer qualifications" than petitioner. Stating that she intended to prove two types of discrimination (disparate treatment and disparate impact), petitioner argued that she has been "labeled as having interpersonal relations issues in order to help these [other] employees succeed."

Petitioner added that she has been assigned "supervisory duties without the pay nor the title," only to later be "punished and belittled," and accused of being untrustworthy. Concluding that the failure to promote her to the sought after position demonstrates the court's "blunt patterns of racial discrimination," petitioner requested corrective action, including placement in the denied position or a comparable position.

### Investigation and Order of Dismissal

Pursuant to Rule 11(b) of the Rules of Judicial-Conduct, then Chief Judge Lynch investigated the complaint. The Chief Judge requested and received responses to the allegations from the subject judge and the clerk of court. These responses described the hiring process for

the position petitioner wanted and included all of petitioner's performance evaluations, as well as other records of her promotions, awards and any discipline. At the direction of the Chief Judge, staff interviewed a number of relevant court staff, including the specific judges for whom the promoted employees were hired. Staff also had multiple conversations with petitioner concerning the allegations in her complaint, obtained her permission to conduct the interviews, and spoke with several people she recommended as having relevant information.

Based on the information obtained through the investigation, Chief Judge Lynch dismissed the misconduct complaint. The Chief Judge found no evidence to support petitioner's claims that she was denied the recent promotion due either to her race or age, or had otherwise been subjected to discrimination during her many years with the court.

Then Chief Judge Lynch first reviewed the hiring process for the sought after promotion. She explained that petitioner was one of a number of current employees who applied for three positions that were created as part of an internal reorganization of the clerk's office. The new positions involved working directly and continuously with a particular judge, training and supervising staff, and engaging in regular contact with counsel, other staff and the public. The Chief Judge noted that the human resource specialist and operations manager conducted initial screening and interviews and referred a number of top applicants, including the petitioner, to the clerk for final selection. The clerk then selected the "three candidates who [were] considered to best fit the needs of the three individual judges and the court." In doing so, the clerk had had the opportunity to observe the applicants in court and had communicated with each of the judges concerning the specific qualities they sought in the successful candidate.

The Chief Judge took note of petitioner's many years of successful service, as well as her promotions to the highest classification level for the position and to the top of the grade. She

noted that petitioner had received commendations from the chief judge and supervisors concerning her technical competence, as well as many training opportunities.

That being said, however, then Chief Judge Lynch observed that petitioner's numerous performance evaluations, completed over many years by various supervisors, contained independent reports that petitioner's interpersonal and communication skills were in need of improvement. Petitioner's relative performance in these areas, including conflict resolution, adapting to change, working in a team and overall attitude, was consistently identified as weaker than petitioner's technical and operational competencies. The Chief Judge noted that the performance evaluations and statements offered by petitioner's supervisors and colleagues during the investigation were consistent in this respect.

Because the Chief Judge found no information - either in the reviewed record or during her investigation - that suggested that any comments of staff and supervisors were "labels" used as a pretext to conceal discrimination against petitioner, based on race, age or any other factor, the Chief Judge dismissed these claims. She determined that petitioner was not promoted because the three successful applicants were each a better fit for the available positions, which, as the Chief Judge explained, involved working closely with an individual judge, his or her staff, counsel and the public, in the courtroom environment. The Chief Judge also found no support in the record for petitioner's much belated claims of generalized discrimination over the years, or for her remaining claims of mistreatment or improper discipline. Accordingly, the complaint was dismissed as lacking factual foundation, pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct, Rule 11(c)(1)(D).

### Petition for Review

In the petition for review, petitioner first asserts that the "overwhelming evidence" she presented of her "excellent performance and interpersonal relationship skills" was never considered by the Chief Circuit Judge. The petitioner maintains that the order improperly relies only on "hearsay evidence" provided by "anonymous witnesses . . . without any supporting documentation." She contends that the order contains "no facts, no investigation" and fails to "review all the written evidence" provided by petitioner.

Petitioner next contends that she was "not afforded due process nor due notice" during the Chief Judge's review of the complaint, and was wrongfully denied access to the judge's written response to the complaint and the names of the witnesses. Petitioner asserts that she was not interviewed and "given due notice" before the order issued.

Petitioner reiterates her claims of disparate treatment and disparate impact due to her race. She insists that she has "always been treated differently than other employees with similar or fewer qualifications," and that the court "intentionally allows the majority of its employees . . . to enjoy job benefits that [petitioner has] been denied (promotions/wage increase)."

For the first time, petitioner identifies the names of two supervisors who allegedly called petitioner "nicknames that have racial overtones." Petitioner maintains that, regardless of her birth certificate or the Fair Employment Practices (FEPS) report, the contention that she is the same race as the other candidates is false. Petitioner notes that she is a member of a protected class under federal law ("complexion or varying shades of a person's skin") and is "certain that the selected candidates and all the other promoted personnel have NOT been called black nor consider themselves as being black (emphasis added)."

Petitioner continues that the court's "justification" for denying her request for a promotion has shifted from the pretext that they are "positions of trust," to petitioner being "untruthful," to her having a "history of interpersonal relations issues," to her "hold[ing] onto grudges and [being] loud." Petitioner argues that these latter terms are "racial stereotypes . . . used as a pretext to discriminate."

As an initial matter, the procedure employed by the then Chief Judge in reviewing the complaint was fully consistent with the governing statute and rules. Under her direction, staff reviewed the complaint and attachments, petitioner's employment records, the structure of the court and the hiring process for the position at issue, written responses from the judge and court clerk, and had multiple conversations both with petitioner and with judges and staff in the court who were identified by petitioner and the clerk as having relevant information. See Rules of Judicial-Conduct, Rule 11(b). The purpose of this investigation was to determine if there was a factual basis sufficient to move forward with the complaint notwithstanding the lack of facts presented by complainant to support the critical aspect of her largely conclusory and speculative complaint. The investigation was not an attempt to resolve issues posed by conflicting evidence. The anonymity of all persons involved, including the petitioner, the judge and the witnesses, was maintained in the final order to preserve the confidentiality of the proceeding, as required by both the EDR Plan and the judicial conduct complaint procedure. See 28 U.S.C. § 360, and Rules of Judicial-Conduct, Rules 23 and 24.<sup>2</sup> Accordingly, petitioner's objections to the sufficiency of

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<sup>2</sup> Since the final orders are, by law, made public, they do not, except in certain enumerated circumstances, contain personally identifying information. See 28 U.S.C. § 360, and Rules of Judicial-Conduct, Rule 24.

the Chief Judge's investigation and to the absence of identifying information in the order are without merit.<sup>3</sup>

The petition for review, like the underlying complaint, fails to provide the type of evidence that is critical to support the claim that petitioner was denied the promotion because of her race or skin tone.<sup>4</sup> Petitioner's contention that the Chief Judge ignored the "overwhelming evidence" presented of petitioner's "excellent performance" is erroneous. The Chief Judge recognized that petitioner was "commended repeatedly for her technical competence," and was awarded "monetary promotions," commendations, "over a dozen performance awards," as well as numerous travel and training opportunities. The Chief Judge observed that petitioner's skills are "valued, and have been recognized by the court."

However, the Chief Judge also noted that the documented record was replete with references to petitioner's relative weaknesses in interpersonal and communication skills, particularly over recent years. Over a dozen of petitioner's performance evaluations contained comments by various supervisors indicating that petitioner's weak points or areas in need of improvement included her "attitude," "interpersonal relationship(s)," "skills related to team based management such as conflict management, team coordination, etc.," "stress management, building relationship, dealing with conflicts and trust and patience," "communication and role importance [sic] in a team relationship," "focus on relationship management," and "interpersonal relationship and adaptability." The Chief Judge appropriately determined that any assertion that, over the course of more than a decade, multiple supervisors have independently reviewed

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<sup>3</sup> We note that misconduct complaints filed against chief judges for actions taken purely in an administrative capacity, absent evident of bias or wrongdoing by the judge, may be dismissed on that basis alone. See Order, Lynch, C.C.J., In Re: Complaint No. 01-08-90035, December 18, 2008, at 3.

<sup>4</sup> While, as petitioner argues, bias based on skin tone or complexion would be covered under the EDR/judicial conduct complaint procedures, the Chief Judge correctly found no evidence of such bias.

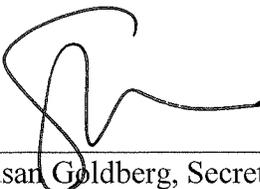
petitioner as weaker in these areas solely as a "cover" or "pretext" for racial bias is wholly unsupported by actual evidence.

The Chief Judge's review of the court's hiring process demonstrated that the position for which petitioner applied was filled based on merit alone. Despite petitioner's many recognized competencies, she was not found to be the most suitable of the final candidates for the available positions. The interviews with court staff who had been identified by both petitioner and the clerk failed to provide support for petitioner's claim of racial discrimination, either with regard to the position for which petitioner applied or more generally in the court.<sup>5</sup> The petitioner's belated identification of two employees who have allegedly called her "nicknames that have racial overtones" does not undermine this conclusion.<sup>6</sup>

Accordingly, the petitioner's claims that the chief judge of the court in which petitioner was denied the promotion exhibited racial bias when this decision was made, or that petitioner was otherwise subjected to racial bias in connection with other employment decisions during her years of service, were appropriately dismissed as unfounded, pursuant to 28 U.S.C. § 352(b)(1)(B).

For the reasons stated, the order dismissing Judicial Misconduct Complaint No. 01-14-90021 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).

8/27/15  
Date

  
Susan Goldberg, Secretary

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<sup>5</sup> The interviewed staff included individuals who identified themselves as having skin tone like that of petitioner.

<sup>6</sup>Petitioner did not identify these individuals or their comments when, during the Chief Judge's investigation, she was asked for permission to speak with other staff and for the names of persons with relevant information. There is also no suggestion that they played any role in the filling of the position at issue.