

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-21-90022

**Before TYMKOVICH, Chief Circuit Judge, EID, BACHARACH, PHILLIPS,
Circuit Judges, SHELBY, CRABTREE, MARTINEZ, PALK, District Judges***

ORDER

Four complainants, two named and two anonymous, filed a complaint against District of New Mexico Magistrate Judge Carmen E. Garza alleging that she violated the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364 (the Act), by engaging in abusive conduct.¹ Chief Judge Tymkovich appointed a Special Committee to investigate the complainants' allegations. *Id.* § 353(a).² After the Special Committee concluded

* The Honorable Joel M. Carson is a member of the Judicial Council but has recused from the matter.

¹ Rules for Judicial-Conduct and Judicial-Disability (RJCD) Proceedings, RJCD 24(a)(2) (Jud. Conf. of the U.S. 2019) (requiring the “judicial council [to] determine whether the name of the subject judge should be disclosed” if a “complaint is concluded because of intervening events”); *see also* Cmt. to RJCD 24(a)(2) (“it may be in the public interest – particularly if a judicial officer resigns in the course of an investigation – to make the identity of the subject judge known”).

² The members of the Special Committee are Circuit Judges Timothy M. Tymkovich, Michael R. Murphy (presiding), Nancy L. Moritz, and District Judges Julie A. Robinson and Robert J. Shelby.

most of its investigation, but before it could interview Judge Garza, the district court voted not to reappoint her to another eight-year term. Judge Garza's term has since expired. Because she is no longer a federal judge, the Judicial Council concludes the misconduct proceeding due to "intervening events." RJCD 20(b)(1)(B). Nonetheless, the Council, consistent with the standards and procedures set forth in the RJCD, believes it is important to identify any "potential institutional issues" related to misconduct matters that it found during the course of the proceeding. Cmt. to RJCD 20. Accordingly, this order concludes the matter but summarizes institutional issues related to the complaint.

I. Complaint

Two former law clerks and two anonymous individuals (who had also worked for Judge Garza) filed a misconduct complaint, essentially alleging that Judge Garza's behavior created an abusive and hostile work environment. Judge Garza responded to the allegations, denying that she created a hostile work environment but also indicating her willingness to take appropriate corrective action. Because the hostile-work-environment issue was reasonably in dispute, Chief Judge Tymkovich appointed a Special Committee to determine the veracity of the allegations. RJCD 11(b) ("[T]he chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee . . . and to the judicial council . . .").

The Special Committee's investigation was extensive. Its investigators interviewed every full-time employee who had ever worked for Judge Garza, which included law clerks, judicial assistants, and courtroom deputies; four of her judicial colleagues; and three other individuals with knowledge relevant to the

Committee's investigation. Virtually all of the employees interviewed requested anonymity. The Special Committee also considered documents provided by the interviewees and by Judge Garza, along with other relevant information.

The source, nature, and consistency of the evidence from those witnesses who worked for Judge Garza spanning 16 years, the entirety of her tenure, gave the Special Committee reason to believe that she had engaged in sanctionable misconduct. Nearly all of the witnesses, from those who worked for Judge Garza early in her tenure to those who worked for her near the end of her appointment, consistently described similar patterns of conduct. Relying on the RJCD, the Code of Conduct for United States Judges, and analogous standards found in case law applying Title VII of the Civil Rights Act, the Special Committee determined that Judge Garza created what appeared to be an abusive and hostile work environment through a pattern of conduct. That conduct included: unpredictable and hypercritical outbursts; manipulation of staff to undermine judges and employees; frequent threats of termination or actual terminations; and derogatory and egregious statements about her own staff, other court employees, and judges. This behavior caused harm to the judges' and employees' reputations. However, before the Special Committee could make any final determinations or recommendations, it sought to interview Judge Garza and give her an opportunity to respond to the Committee's investigation.

To that end, the Special Committee's investigators informed Judge Garza of the Committee's preliminary views and scheduled a time to interview her. Coincidentally, Judge Garza's term was set to expire shortly after the scheduled interview. After Judge

Garza met with the investigators, she contacted them again and told them that she had reconsidered and did not want to proceed with the Committee's interview and would withdraw her request to be reappointed. Before Judge Garza withdrew her request, she advised the District of New Mexico's district court judges of the Special Committee's preliminary views. The district judges subsequently voted not to reappoint Judge Garza. Because she declined an interview with the Special Committee,³ the Committee proceeded with the evidence that had been developed.

There was some evidence that Judge Garza engaged in retaliatory conduct following the decision not to reappoint her. However, there was insufficient time to undertake a full investigation before her departure, and no formal complaint had been filed. This situation raised institutional concerns discussed in more detail below.

Because of timing constraints mandated by the RJCD, the Judicial Council was unable to issue a final order on the merits of the misconduct complaint before the expiration of Judge Garza's term. Accordingly, the Judicial Council concludes the matter due to intervening events. *See* RJCD 20(b)(1)(B) (stating that judicial council may conclude a proceeding where intervening events have made the proceeding unnecessary); *In re: Complaints Under the Judicial Conduct and Disability Act*, Nos. 10-18-90038, et

³ Pursuant to the RJCD, Judge Garza had several opportunities to challenge and rebut the allegations and evidence against her. *See* RJCD 15, 20. Generally, in judicial conduct matters, the subject judge has the following rights: to answer the complaint, to counsel, to appear before the special committee and present evidence, to respond to the special committee's report to the judicial council and to present argument to the judicial council. *See* RJCD 15, 20.

al. at 6 (10th Cir. Dec. 18, 2018) (observing that the Act and the RJCD provide that a misconduct proceeding may “be concluded because of intervening events, namely, circumstances where an individual is no longer a . . . judge” covered by the Act) (internal quotation marks omitted)).

After concluding its investigative efforts, the Special Committee turned its focus to identifying and addressing, where possible, any institutional issues raised by this complaint. The Special Committee has completed this institutional review, and provided its recommendations to the Judicial Council. On consideration of the Special Committee’s determinations and recommendations, the Judicial Council has identified several institutional issues related to this matter and offers curative steps, discussed below.

II. Institutional Issues

Even when action on a complaint has been concluded due to intervening events, Judicial Councils retain the authority to identify and act on potential institutional issues related to the complaint. Cmt. to RJCD 20. Judicial Councils can assess what conditions may “have enabled misconduct or prevented its discovery,” and determine “what precautionary or curative steps could be undertaken to prevent its recurrence[.]” *Id.*

In this matter, two conditions allowed the apparent misconduct to continue and prevented its discovery: 1) a lack of awareness about what constitutes abusive conduct and/or a hostile work environment, and 2) widespread fear of retaliation that deterred reporting.

Nearly all of Judge Garza's employees indicated that she: engaged in hostile behavior, including unpredictable outbursts, manipulation, threats of termination (or actual termination), and harmful statements. Several employees said that they had never reported her conduct because they did not know if her behavior would constitute abusive conduct or a hostile work environment. The Special Committee's investigators also interviewed other judges as part of its investigation and discovered that many, if not all, were unaware of the breadth and nature of Judge Garza's conduct. Many of them questioned whether what little information they had rose to the level of misconduct or implicated their reporting obligations.

Perhaps more problematic, several of Judge Garza's employees indicated that even though they thought her behavior could constitute misconduct, they did not report the conduct because they feared retaliation. Many of the employees indicated that they have relied on, and continue to rely on, Judge Garza's reference to secure other positions, and that her recommendations have helped advance their careers. Several of these witnesses were also very reluctant to participate in the misconduct investigation for the same reasons. Some had not worked in Judge Garza's chambers for years, and had even moved out of state, but were still reticent to participate. The Special Committee made several efforts to reassure concerned employees about the misconduct process. All of Judge Garza's current and former employees eventually agreed to speak with the Committee's investigators, but most on the condition of anonymity, and most employees

later indicated that they did not want their experiences reflected in the Special Committee's report.⁴

The Special Committee considered why employees were so reluctant to report misconduct and to participate in the investigation. The Committee determined that some employees were unaware of the safeguards the Judiciary had implemented to prevent retaliation. Others, it found, lacked confidence in the system and its ability to protect them.

The employees' fears may not have been unfounded. The Committee's investigators periodically contacted employees who were still working directly with Judge Garza to ensure that the judge was not further engaging in misconduct. The employees reported concerns that Judge Garza was attempting to retaliate against one or more of them in her final days on the bench. Judge Garza told the Chief District Judge that some of the witnesses in the misconduct investigation had engaged in inappropriate conduct against one of her law clerks. Without realizing the potential for retaliation, the Chief District Judge sent a letter to all employees warning them that such conduct would not be tolerated. A few of the witnesses reported their concerns that Judge Garza used both her law clerk and the Chief District Judge as a veiled path for retaliation against them. As noted earlier, there was not an official complaint filed, nor was there sufficient time to fully investigate the allegations of retaliation; however, both the Chief Circuit

⁴ RJCD 15(b) requires that the Special Committee's report be provided to the subject judge. The Special Committee found it difficult to balance the requests for anonymity with Judge Garza's due process rights, which lengthened and complicated the misconduct process.

Judge and the Chief District Judge communicated with all employees in the affected courthouse to remediate any possible harm stemming from Judge Garza's actions. This was important both to allay the fears of the employees who had participated in the misconduct process, and also to preserve the integrity of the Judiciary.

In its institutional review, the Judicial Council considered the issue of retaliation. The Council determined that if it had found evidence of retaliation, there would have been limitations on its ability under the RJCD to take meaningful action to address the concerns in the final days of Judge Garza's tenure.⁵ Given the significance of this question, the Judicial Council, as part of its institutional review, has asked the Office of Judicial Integrity and the Judiciary's Workplace Conduct Working Group to study this issue and provide further guidance.

III. Curative Steps

A. Defining Abusive Conduct and Hostile Work Environment

To guide its investigation, the Special Committee had to apply standards for abusive conduct and hostile work environment to complainants' allegations of misconduct. The Committee determined that standards were not clearly defined in any one place and that definitions varied somewhat among the RJCD, Code of Conduct for United States Judges, and the Tenth Circuit's Employment Dispute Resolution (EDR)

⁵ Addressing these new allegations of retaliation would have required identification of a new complaint, investigation of reasonably disputed facts, providing Judge Garza with an opportunity to respond at various points in the process as noted earlier, and the ability to impose meaningful consequences before Judge Garza's term ended. *See* RJCD 11(f), 13-17, 20.

Plan. Consequently, relying on these sources and caselaw applying Title VII, the Special Committee fleshed out standards by which to assess Judge Garza’s behavior.

Under the RJCD, it has been cognizable misconduct for some time for a judge to treat “litigants, attorneys, or others in a demonstrably egregious and hostile manner,” RJCD 3(h)(1)(D) (Jud. Conf. of the U.S. 2015). *See also* Report of the Federal Judiciary Workplace Conduct Working Group, June 1, 2018, at 23 (noting that “[t]he Working Group does not doubt that judges and judiciary employees should be able to discern that harassment and other inappropriate workplace behavior is impermissible in any setting”). In 2019, the Judicial Conference amended the RJCD to explicitly prohibit judges from treating court personnel in such a manner. RJCD 4(a)(2) (Jud. Conf. of the U.S. 2019). Thus, cognizable misconduct includes “[a]busive or [h]arassing [b]ehavior,” which also incorporates “treating . . . judicial employees, or others in a demonstrably egregious and hostile manner” and “creating a hostile work environment for judicial employees.” RJCD 4(a)(2)(B)-(C). The relevant terms, however, are not defined in this context. Nevertheless, “abusive conduct” and “hostile work environment” are terms that are more thoroughly discussed in the Code of Conduct for United States Judges, in the Tenth Circuit’s EDR Plan, and in analogous, albeit imperfectly so, “hostile work environment” Title VII case law, all of which the Special Committee found instructive.

The Code of Conduct for United States Judges states that “[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges, including harassment and other inappropriate workplace behavior.” Cmt. to Canon 2A. Similar guidance is provided by Canon 3B(4): “[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.” The Commentary to Canon 3B(4) elaborates: “[a] judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct[,]” and clarifies that under Canon 3(B)(4), “harassment encompasses a range of conduct having no legitimate role in the workplace, including . . . abusive, oppressive, or inappropriate conduct directed at judicial employees or others.” Cmt. to Canon 3B(4).

The first Model Employment Dispute Resolution (EDR) Plan was adopted in 1997 and has prohibited a “hostile work environment” based on an employee’s race, gender, or religion—what Title VII of the Civil Rights Act calls “protected classes.” The Model EDR Plan and the Tenth Circuit’s EDR Plan were amended in 2019 to add a prohibition on “abusive conduct” in the workplace. This expansion had the effect of providing protection for employees who were not necessarily members of a protected class. Borrowing from RJCD 4(a)(2), the Tenth Circuit’s EDR Plan, like the Model Plan, defines abusive conduct as “a pattern of demonstrably egregious and hostile conduct . . . that unreasonably interferes with an Employee’s work and creates an abusive working environment.” Employment Dispute Resolution Plan of the United States Court of Appeals for the Tenth Circuit, § II(D) at 2 (Dec. 13, 2019). The Tenth Circuit’s EDR Plan describes “[a]busive conduct [a]s threatening, oppressive, or intimidating.” *Id.*

The Council is unaware of any existing law that defines abusive conduct or a hostile work environment under the RJCD. Although not a perfect comparison, Title VII

case law can provide further guidance. Even though Title VII claims must be based on bad behavior resulting from a discriminatory intent, discriminatory intent is not required to make a valid claim of judicial misconduct. Bad behavior is enough. Nonetheless, Title VII concepts can be used to help determine the types and extent of bad behavior that can constitute abusive conduct and/or create a hostile work environment.

Under Title VII, a plaintiff may recover for a hostile work environment claim if their “workplace is permeated with . . . intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citation and internal quotation marks omitted). The environment must have been “both objectively and subjectively hostile.” *Payan v. United Parcel Serv.*, 905 F.3d 1162, 1171 (10th Cir. 2018). The “objective severity” of the harassment is assessed “from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances.” *Id.* (emphasis and internal quotation marks omitted). To be actionable as an abusive work environment under Title VII, the conduct need “not seriously affect employees’ psychological well-being.” *Harris*, 510 U.S. at 22. An “abusive work environment . . . can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.” *Id.* Rather than applying an exact test, “[t]he ‘totality of the circumstances’ is ‘the touchstone of a hostile work environment analysis.’” *Hernandez v. Valley View Hosp. Ass’n*, 684 F.3d 950, 959 (10th Cir. 2012) (brackets omitted) (quoting *E.E.O.C v. PVNF, L.L.C.*, 487 F.3d 790, 799 (10th Cir. 2007)). “Courts consider a variety of factors in this holistic

analysis, including the frequency of the . . . conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Lounds v. Lincare*, 812 F.3d 1208, 1222 (10th Cir. 2015) (brackets and internal quotation marks omitted).

The Tenth Circuit has cautioned that courts should not assess “hostile-workplace allegations in a vacuum.” *Id.* at 1223. “Indeed, the Supreme Court has emphasized that [the] inquiry must involve ‘careful consideration of the social context in which particular behavior occurs and is experienced by its target.’” *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)). “The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” *Oncale*, 523 U.S. at 81-82. Thus, even under Title VII, which requires a discriminatory motive, the Tenth Circuit has “long held that facially neutral abusive conduct can support a finding of . . . a hostile work environment claim when that conduct is viewed in the context of other, overtly . . . discriminatory conduct.” *Hernandez*, 684 F.3d at 960 (brackets and internal quotation marks omitted). ““This is because what is important in a hostile environment claim is the *environment*, and [discriminatorily]-neutral harassment makes up an important part of the relevant work environment.”” *Id.* (emphasis in original) (quoting *Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005)).

“We have similarly underscored that the word pervasive is not simply a counting measure . . . and requires a broader contextual analysis that carefully considers each

instance as a component of the overall workplace milieu.” *Lounds*, 812 F.3d at 1223 (brackets and internal quotation marks omitted). “[T]here is a qualitative dimension to the pervasiveness inquiry (as well as the one for severity); . . . the workplace environment is likely to become more readily permeated by . . . ridicule, insult, and the like, insofar as the repeated harassing acts approach the level of severe.” *Id.*

Because the critical inquiry in a hostile-work-environment claim is the environment, it is well-established that “[e]vidence of a general work atmosphere therefore—as well as evidence of specific hostility directed toward the [victim]—is an important factor in evaluating the claim.” *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987). “[D]erogatory comments need not be directed at or intended to be received by the victim to be evidence of a hostile work environment.” *Hernandez*, 684 F.3d at 959. Although animus directed at a complainant provides the strongest support for a hostile work environment claim, evidence “of a general work atmosphere, including evidence of harassment of other[s] . . . may be considered in evaluating a claim, as long as [the victim] presents evidence that” she or he “knew about the offending behavior.” *Id.* (internal quotation marks omitted).

B. Educating Judges and Employees

The Tenth Circuit has provided training and other educational opportunities to judges and employees in the circuit, including in the District of New Mexico, on the 2019 amendments to the Code of Conduct for United States Judges, the Tenth Circuit’s EDR Plan, and the RJCD. Indeed, because of law clerk outreach, the complainants in this matter learned about, and contacted, the Tenth Circuit Director of Workplace

Relations (DWR), from whom they received confidential advice and guidance about the Judiciary's prohibitions on abusive conduct and their options to report and seek resolution for such conduct. In order to address the continuing lack of awareness of what specifically constitutes abusive conduct and a hostile work environment, the Special Committee recommended that the Circuit conduct additional training on the practical application of these terms.

The Council agreed with this recommendation and will issue an order indicating that trainings on these topics be provided for all judges and staff in the circuit. The Council believes this will make judges more mindful of their conduct and their colleagues' conduct and give employees confidence in what behavior should be reported.

The DWR will educate judges about appropriate and inappropriate workplace conduct, standards and definitions of abusive conduct and hostile work environment, judges' reporting obligations under the RJCD and the Code of Conduct for United States Judges, the prohibition against retaliation, and the need to be aware of possible retaliatory efforts by a colleague. The DWR will educate employees on the same topics but also include the many ways an employee can report wrongful conduct and retaliation. The DWR will continue providing annual trainings on these topics in all districts and at the circuit level.

The Judicial Council found it more challenging to overcome employees' fears of retaliation. The Special Committee recommended that the DWR educate judges and employees on retaliation as a form of reportable, cognizable misconduct, RJCD 4(a)(4), the avenues of reporting, and the consequences of a judge's retaliatory conduct. The

DWR has also implemented law clerk outreach measures, including providing every law clerk in the circuit with a brochure on reporting avenues and the creation of a law clerk advisory group, which advises the Tenth Circuit's Workplace Conduct Committee and is made up of law clerks from every district and court-type in the circuit. Based on its investigation, however, the Special Committee determined that the most effective way to assuage employees' fears of retaliation is to demonstrate that the Judiciary's reporting systems are effective at addressing misconduct. The Council agrees. It acknowledges that this will take time and hopes that further guidance from the Office of Judicial Integrity and the Judiciary's Workplace Conduct Working Group and the conclusion of this matter will be a step toward developing that trust.

IV. Conclusion

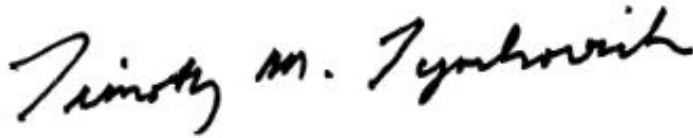
Although the District of New Mexico voted not to reappoint Judge Garza before the Judicial Council could take remedial action on the complaint, the district judges' vote was a direct result of the complainants' courage in reporting the alleged misconduct, the DWR's guidance, and the Special Committee's investigation. The Judiciary, including this Circuit, has made progress in the area of workplace conduct, but it is clear that there is more work to do. The Judicial Council will work with the Tenth Circuit's Workplace Conduct Committee to determine what other measures should be taken to make this circuit an exemplary place to work.

The Circuit Executive is directed to transmit this Order to the complainants, Judge Garza, and the Judicial Conference Committee on Judicial Conduct and Disability. *See* RJCD 20(f). The requirements for filing a petition for review are set out in RJCD 22.

The petition must be filed with the Committee on Judicial Conduct and Disability within 42 days after the date of the Judicial Council order. RJCD 22(c). This Order shall be made publicly available. *See* RJCD 24. All other materials related to this matter shall remain confidential pursuant to 28 U.S.C. § 360.

So **ORDERED**, September 14, 2022, and
Entered on behalf of the Judicial Council
Of the Tenth Circuit

By:

A handwritten signature in black ink that reads "Timothy M. Tymkovich". The signature is written in a cursive style with a large, stylized initial 'T'.

Honorable Timothy M. Tymkovich
Chief Circuit Judge