JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 08-24-90036

In re Complaint of John Doe*

This is a judicial complaint against a district judge who has participated in a hiring boycott against graduates of Columbia University in an effort to influence the university's administration. The subject judge was one of thirteen federal judges who signed a letter in May 2024 to the president of the university.

The letter asserted that "[s]ince the October 7 terrorist attacks by Hamas, Columbia University has become ground zero for the explosion of student disruptions, anti-semitism, and hatred for diverse viewpoints on campuses across the Nation." The letter stated that the signatories, as "judges who hire law clerks every year to serve in the federal judiciary," had "lost confidence in Columbia as an institution of higher education." The letter then set forth three "steps" that the university would take if it "were serious about reclaiming its once-distinguished reputation," to wit: (1) "Serious consequences for students and faculty who have participated in campus disruptions and violated established rules," (2) "Neutrality and nondiscrimination in the protection of freedom of speech and the enforcement of rules of campus conduct," and (3) "Viewpoint diversity on the faculty and across the administration—including the admissions office."

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*Under Rule 24(a) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, the names of the complainant and the subject judge are not disclosed. Citations or references herein to a "Rule" refer to these Rules.

The letter informed the university president that "[c]onsidering recent events, and absent extraordinary change, we will not hire anyone who joins the Columbia University community—whether as undergraduates or law students—beginning with the entering class of 2024." An essay published around the same time by one of the judges characterized the effort as a boycott aimed at the university, and explained that "[t]he purpose of any boycott is to change the behavior of the target."

The judicial complaint alleges that the action of the subject judge in joining the boycott is "prejudicial to the effective and expeditious administration of the business of the courts," and is therefore cognizable misconduct under Rule 4(a). In particular, the complaint asserts that the judge (1) used his office "to obtain special treatment for friends" and to engage "in partisan political activity" and to make "inappropriate partisan statements," *see* Rule 4(a)(1)(A), (D); (2) engaged in "abusive behavior in that his statements demonstrate that he presently is and will be treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner," *see* Rule 4(a)(2)(B), (3) "used the 'Columbia University community' as a proxy to discriminate against various races, religions, and national origins that may share in the views of his targeted community," *see* Rule 4(a)(3), and (4) engaged in conduct outside the performance of his official duties and was "reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people." *See* Rule 4(a)(7).

The subject judge was invited to make a written response to the complaint. The judge acknowledged that he signed the letter, and that the intent of the letter "was to utilize the slight influence judges have to positively impact our educational institutions." The judge responded to the specific allegations in the complaint. The judge also expressed his view that "judges have an obligation to encourage the very best in the legal academy," and that the substance of the letter would promote confidence in the judiciary.

Several of the specific allegations in the complaint are insubstantial and are unsupported by sufficient evidence to raise an inference that misconduct has occurred. *See* Rule 11(c)(1)(D); 28 U.S.C. § 352(b)(1)(A)(iii). There is no showing that the judge's action was taken to obtain special treatment for friends, and the complaint does not specify any "friends" of the judge who might benefit from the judge's refusal to hire Columbia graduates or from changes in the university's policies. The judge's activity and statements were not taken in association with a political organization or made on behalf of, or against, a political party or candidate. They were thus not "partisan" actions or statements within the meaning of the rules. There is no reasonable inference that the judge's criticism of Columbia University and effort to encourage change at the institution functions as a "proxy" to discriminate on the basis of race, religion, or national origin. The letter does not plausibly constitute mistreatment of litigants, attorneys, or judicial employees, as it was directed only to the university. The complaint does not establish that the signing of the letter would lead to frequent disqualification.

More substantial is the question whether a federal judge's participation in a hiring boycott is "reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people."

Participation in a public hiring boycott designed to promote social change is activity protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911-13 (1982). Judges are expected, however, to forego the exercise of certain rights in order to promote confidence in the courts and the judicial process. A judge "should act at all time in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Code of Conduct for United States Judges, Canon 2A. A judge should not lend the prestige of the judicial office to advance the judge's private interests. *Id*., Canon 2B. A judge should refrain from political activity, which includes acting as a leader in a political organization,

publicly endorsing or opposing a candidate for public office, soliciting funds for a political organization or candidate, and "any other political activity." *Id.*, Canon 5. But a judge may "engage in extrajudicial activities" and "may speak, write, lecture, and teach on both law-related and nonlegal subjects," so long as the activity does not "detract from the dignity of the judge's office, reflect adversely on the judges impartiality, lead to frequent disqualification," or violate other specified limitations. *Id*., Canon 4.

A judge's participation in a hiring boycott against graduates of a private university does not fit the ordinary meaning of "political activity," because the boycott is not directed at governmental actions or policies that are the focus of the political process. A boycott may be seen, however, as raising similar problems where judges seek through the allocation of publicly-funded employment opportunities (or other allocations of public funds) to influence the behavior of private institutions on matters of public concern. The boycott at issue here involves only thirteen federal judges and one private institution, but the practice—if approved and widely accepted—could proliferate. Judges will have different views on what causes are righteous and which institutions or entities should be targeted. Widespread judicial boycotting based on issues of the day may well have the potential to embroil the judiciary in extrajudicial public controversies and to lower public confidence in the courts among reasonable people. There is thus a substantial question whether judges cross an important line when they go beyond expressing their personal views in an effort to persuade and begin using their power as government officials to pressure private institutions to conform to the judges' preferences. *See* Orin Kerr, *Boycotting Law Schools in Clerk Hiring as a Way to Influence Law School Culture*, Reason Magazine Online (Sept. 29, 2022).

Despite this concern, I conclude that the judicial complaint should be dismissed under the present circumstances. Judges subjected to judicial-conduct proceedings are entitled to fair notice of what constitutes cognizable misconduct. When the

subject judge signed the letter declaring his participation in the hiring boycott, there was no guidance declaring that such activity was forbidden for federal judges. The Code of Conduct does not address boycotting by judges in their capacity as government officials. Research has located no guidance on boycotting that was readily available from ethics authorities within the federal judiciary or in published treatises.

The governing rules define cognizable misconduct as "conduct prejudicial to the effective and expeditious administration of the business of the courts," a phrase that is "not subject to precise definition" and is illuminated primarily by examples. *See* Commentary on Rule 4; 28 U.S.C. § 351(a). The examples do not speak to boycotting. Some conduct not enumerated may be so obviously prejudicial to the business of the courts that it could properly be sanctioned, but the conduct at issue is not of that character. The Code of Conduct identifies other conduct protected by the First Amendment from which judges should abstain, but does not specify that a judge should refrain from the conduct that is the subject of this complaint. Three chief judges in other jurisdictions have concluded that participation in the same hiring boycott was not cognizable misconduct. Even assuming for the sake of analysis that this circuit's judicial council might reach a different conclusion under the imprecise standard of Rule 4(a), it would unfair to hold the subject judge to such a standard without fair notice before the conduct was undertaken. The matter may be appropriate for study by those who revise and interpret the Code of Conduct, but a judicial-conduct proceeding is not the appropriate forum for developing or advising on the ethical canons.

For these reasons, the judicial complaint is dismissed.

/s/ Steven M. Colloton
Chief Judge

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