



Judicial Discipline & Disability Commission

JUDGE KIRK JOHNSON
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DAVID J. SACHAR
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PRESS RELEASE

POINT OF CONTACT: JDDC

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FOR IMMEDIATE RELEASE

August 20, 2018

The Arkansas Judicial Discipline and Disability Commission has today announced in JDDC Case No. 17-172, Pulaski County Circuit Judge Wendell Griffen, two orders. A copy of each order follows this press release.

Contact information for Judge Griffen is as follows: Michael Laux, 400 W. Capitol Ave, Suite 1700, Little Rock, AR 72201; Austin Porter Jr., 323 Center Street, Suite 1035, Little Rock, AR 72201; Michael Matthews, 100 North Tampa Street, Suite 2700, Tampa, FL 33602.

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IN THE ARKANSAS JUDICIAL DISCIPLINE & DISABILITY COMMISSION AND
DISABILITY COMMISSION

IN RE: CIRCUIT COURT JUDGE WENDELL I. GRIFFEN JDDC
CASE NO. 17-172

ORDER

On this 17th day of August, 2018, came on for consideration Respondent's Motion to Compel Production of Documents.

Respondent propounded Request for Production of Documents on the Arkansas Judicial Discipline and Disability Commission on May 18, 2017, which was immediately after the commencing of the investigation of the complaint filed against Respondent. Respondent requested the following documents:

Request No. 1. All communications received by the Commission's members and their staffs regarding the Complaint, including voicemail, electronic mail, or any other communications from all persons who contacted them about instituting a disciplinary complaint, including, without limitation, members of the Arkansas Supreme Court, Attorney General Leslie Rutledge or any member of her staff, members of the Arkansas General Assembly or any member of their staff, Governor Asa Hutchinson or any member of his staff and/or executive branch agencies, and members of the Judicial Discipline and Disability Commission.

Request No. 2. All communications concerning the issues and events surrounding JDDC Case No. 17-712 made prior to May 1, 2017 by David Sachar to any person, including without limitation members of the Arkansas Supreme Court, Attorney General Leslie Rutledge or any member of her staff, members of the Arkansas General Assembly or any member of their staff, Governor Asa Hutchinson or any member of his staff and/or executive branch agencies, and members of the Judicial Discipline and Disability Commission.

Request No. 3. All legal authorities considered by Mr. Sachar – and now also Special Counsel Michel and the members of the Commission Investigation Panel – related to the Complaint in Case No. 17-172 against Judge Griffen (and now the Statement of Allegations based on that Complaint), including all consultations with scholars concerning judicial ethics and discipline.

Request No. 4. All other investigatory records, files, and reports of the Commission relating to Case No. 17-172.

After review and consideration of the filings supporting and objecting to the production of the requested documents and the Judicial Discipline and Disability Rules, the Commission finds the following:

1. Respondent's Request for Production of Documents was premature because in accordance with Judicial Discipline and Disability Rule 8(C), which sets out the procedure for investigation of complaints assigned to an Investigation Panel, there is no requirement for documents such as those requested to be produced prior to the filing of a Formal Statement of Allegations. Once a Formal Statement of Allegations is filed by the Investigation Panel finding probable cause that the judge has violated the Code of Judicial Conduct, the matter ripens into a controversy, at which time written discovery becomes appropriate and discovery motions may be pursued.

2. With respect to Respondent's Request for Production Nos. 1 and 2, the Commission finds the documents and information requested therein are discoverable, and that Special Counsel should produce such documents that are responsive, if any.

3. With respect to Respondent's Request for Production No. 3, the Commission finds the documents and information requested therein, if any, are not discoverable because they are protected by the attorney work product privilege.

4. With respect to Respondent's Request for Production No. 4, the Commission finds the documents and information requested therein are discoverable, but only upon Respondent giving a written waiver of his right to confidentiality pursuant to Judicial Discipline and Disability Rule 7(C) (1). Upon receiving Respondent's written waiver, Special Counsel shall produce the requested documents in accordance with this Order.

5. Notwithstanding the foregoing, Special Counsel may assert attorney-client privilege, attorney work product, confidentiality, and/or any other applicable privilege with respect to the documents required to be produced hereunder. In so doing, Special Counsel shall submit to Respondent and the Commission a privilege log identifying with particularity the document in question and the basis for asserting any privileges. The Commission will then make a determination if any privilege is applicable and whether an appropriate protective order may be necessary.

6. Special Counsel shall produce the documents and information identified in paragraph 2 above within ten (10) days of the date of the entry of this Order. Special Counsel shall produce the documents and information identified in paragraph 4 above within ten (10) days after the date upon which Special Counsel receives the Respondent's written waiver as identified therein.

AT THE DIRECTION OF THE COMMISSION: IT IS SO ORDERED.

/s/ Marie-Bernarde Miller
Judicial Commission Counsel

DATED August 20, 2018

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IN THE ARKANSAS JUDICIAL DISCIPLINE & DISABILITY COMMISSION

JUDICIAL DISCIPLINE
DISABILITY COMMISSION

IN RE: CIRCUIT COURT JUDGE WENDELL I. GRIFFEN JDDC
CASE NO. 17-172

ORDER DENYING MOTION TO DISMISS

On this 17th day of August, 2018, there came on for consideration Respondent's Renewed Motion to Dismiss. From the pleadings filed herein, the arguments presented to the Commission during the hearing held on August 17, 2018, and all other things and matters properly before the Commission, the Commission makes the following findings:

1. Based on Respondent's claim that the complaint should be dismissed because it "is not based on any act or omission by Judge Griffen that violated any part of the Arkansas Code of Judicial Conduct" (Renewed Motion to Dismiss at 3), the Commission treats Respondent's motion to dismiss as a Rule 12(b)(6) motion pursuant to the Arkansas Rules of Civil Procedure.

2. When considering a motion to dismiss under Rule 12(b) (6), the facts must be viewed in the light most favorable to the plaintiff and liberally construed in the plaintiff's favor. *Born v. Hosto & Buchan, Pllc*, 2010 Ark. 292, 372 S.W.3d 324; *Dollarway Patrons for Better Schools v. Morehead*, 2010 Ark. 133, 361 S.W.3d 274. In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complainant, and the pleadings are to be liberally construed. *Id.*

3. After investigating a complaint against Respondent alleging violations of the Arkansas Code of Judicial Conduct due to certain actions by Respondent, a Formal Statement of Allegations was filed by the Investigation Panel pursuant to Judicial Discipline and Disability Rule 8E finding probable cause that Respondent violated the Code of Judicial Conduct, citing specific provisions

of the Code of Judicial Conduct alleged to have been violated and specific facts offered in support of the alleged violations. Upon consideration of the Statement of Allegations under the Rule 12(b)(6) analysis described above, the Commission finds that the Statement of Allegations clearly states an entitlement to relief and a recommendation for relief pursuant to Judicial Discipline and Disability Rule 9J and Ark. Code Ann. § 16-10-410.

3. The Commission further finds that, contrary to Respondent's assertions regarding the sufficiency of the allegations against Respondent, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) is limited in its application to restrictions on judicial candidate's speech. *Id.* at 2546 (Justice Kennedy, concurring). Respondent is a sitting judge and, therefore, *White* is not controlling authority in this case. Respondent's citing of *White* in his argument that "promoting the 'appearance' of impartiality and independence is not a compelling state interest" related to limitations on speech of judicial candidates that the Supreme Court determined were not narrowly tailored to serve a compelling state interest. Federal courts, however, in subsequent cases, have established that promoting the appearance of impartiality and independence in the judiciary is a compelling state interest. "Arkansas has compelling interests in the impartiality of the judiciary and in public perception of an impartial judiciary." *In re: Kemp, et al. v. Griffen*, 894 F.3d 900, 908 (8th Cir. 2018) citing *Platt v. Board of Comm'rs on Grievances & Discipline of Ohio Supreme Court*, 2018 WL 3097582, at *12 (6th Cir. June 25, 2018) (holding that "maintaining judges' actual independence and impartiality, and maintaining the public's trust in the judiciary's independence and impartiality" are "compelling" interests); *French v. Jones*, 876 F.3d 1228, 1237 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1598 (2018) (holding that "an interest in both actual and perceived judicial impartiality" is a "genuine and compelling" interest); *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656, 1666 (2015), a case in which a judicial candidate was disciplined for personally soliciting campaign funds in violation of the State's Code of Judicial Conduct, the Court found that "[s]tates

have a compelling interest in preserving confidence in their judiciaries.” The Court went on to state that “[t]he importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. . . . The judiciary’s authority therefore depends in large measure on the public’s willingness to respect and follow its decisions. . . . It follows that public **perception** of judicial integrity is a state interest of the highest order.” *In re: Kemp* at 908 (emphasis added). The Arkansas Supreme Court in *Griffen v. Arkansas Jud. Discip. & Disab. Comm’n*, 355 Ark. 38, 57 (2003), cited by Respondent, also held “that judicial independence is a fundamental principle to which the people of this state and members of this court have subscribed. We have no hesitancy in adding that judicial independence is a compelling interest of the State.”

4. Respondent argues that the Statement of Allegations violates his First Amendment rights to Freedom of Speech and Freedom of Religion. Yet, the United States Court of Appeals for the Eighth Circuit in *In re: Kemp, supra*, which was based on the same facts alleged in the Statement of Allegations, and in which Respondent raised the same defense of First Amendment violations, held that Respondent failed to plausibly allege a free speech or free exercise claim.

5. Finally, Respondent’s argument that because he committed to follow Arkansas Supreme Court precedent, and not his religious beliefs against the death penalty, in *McKesson Medical-Surgical Inc. v. State of Arkansas*, Case No. 60CV-17-1921 (Pulaski County Circuit Court), the Statement of Allegations, essentially, fails to state a claim that he violated the Code of Judicial Conduct. The Commission finds that the Statement of Allegations alleges that Respondent in his conduct failed to uphold and promote the independence, integrity, and impartiality of the judiciary, and failed to avoid not only impropriety, but the **appearance** of impropriety. Actual bias is not necessary.

6. Thus, based on the findings herein, the Commission finds that the Statement of Allegations meets all the requirements of Ark. R. Civ. P. Rule 8 (a) for the claim to proceed.

AT THE DIRECTION OF THE COMMISSION: IT IS SO ORDERED.

/s/ Marie-Bernarde Miller
Judicial Commission Counsel

DATED August 20, 2018