

**[J-80-2006]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

**CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.**

IN RE: ALLAN CLIFFORD BERKHIMER, : No. 25 WAP 2005  
DISTRICT JUSTICE IN AND FOR :  
MAGISTERIAL DISTRICT 47-3-06 : Appeal from the final Order of the  
CAMBRIA COUNTY : Pennsylvania Court of Judicial Discipline  
: dated June 28, 2005 at No. 4 JD 2004.  
:  
: ARGUED: May 9, 2006

**OPINION**

**MR. JUSTICE EAKIN**

**DECIDED: AUGUST 20, 2007**

Appellant, Allan Clifford Berkhimer, previously a Magisterial District Judge for Magisterial District 47-3-06 in Cambria County, appeals the decision of the Court of Judicial Discipline removing him from office.<sup>1</sup> For the reasons discussed below, we hold appellant's conduct warrants his removal from office.

Appellant became a Magisterial District Judge in January, 1988. In re: Berkhimer, 877 A.2d 579, 582 (Pa. Ct. Jud. Disc. 2005). In August, 2002, Daphne Moot applied for employment in appellant's office, which employed two other women; Karen Roberts and Diane Weaver. During her job interview, which Roberts attended, appellant said to Moot, "I am not a political whore. I don't kiss anybody's ass unless

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<sup>1</sup> This matter is directly appealable to this Court by virtue of Article V, § 18(c)(1) of the Pennsylvania Constitution. Appellate review of the Court of Judicial Discipline is governed pursuant to rules the Supreme Court promulgated, 207 Pa. Code, Rule 506.

pussy's involved." Id. Appellant made an equally offensive and inappropriate statement during Moot's second interview.<sup>2</sup> Moot accepted a job offer despite appellant's conduct.

Moot was not the only target of appellant's sexually charged comments. In 2003, appellant told Weaver, in front of her colleagues, that he relayed her sexual interest in a police officer to that officer at an official function. Weaver made no such request and was embarrassed. On more than one occasion, appellant invited the three women to look at pornographic images on his computer. In one instance, the image was evidence from a child pornography case before his court. When Moot refused to view the image, appellant described it to her in graphic detail, despite her protests.

Appellant also instructed his staff to scour the local weekly newspaper to look for constituents mentioned for their achievements. The staff then prepared and sent congratulatory notes, called "Quickie Notes." The notes included a photograph of appellant in his robe and bore the court's address. Appellant did not always know the constituents, nor were they related to the court's business. Appellant admitted the notes' purpose was to "get votes." Although appellant's retention election was several years away, this practice effectively constituted a continuous re-election campaign.

Moot quit in June, 2003, citing appellant's vulgarity, sexual connotations, and frequent use of expletives as part of her reason for leaving. Weaver also left the office in October, 2004. Roberts continued her employment.

In June, 2004, the Judicial Conduct Board charged appellant under Article V, § 18 of the Pennsylvania Constitution.<sup>3</sup> The Board's complaint consisted of two parts.

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<sup>2</sup> Appellant's conduct is fully described in the Court of Judicial Discipline's opinion. In re: Berkheimer, 877 A.2d 579 (Pa. Ct. Jud. Disc. 2005).

<sup>3</sup> The record does not explain how the Board became aware of these incidents, but that is not essential to our review of the decision.

Part A, titled “Indecorous Language and Behavior Unbecoming a Judicial Officer,” arose from complaints that appellant used inappropriate and offensive language with his staff and others. Part B, titled “Improper Use of County Employees, Equipment and Funds,” concerned appellant’s practice of using office resources to send “Quickie Notes.”

Pursuant to Article V, § 18 of the Pennsylvania Constitution and Rule 501 of the Court of Judicial Discipline Rules of Procedure, a three-judge panel was appointed and conducted a trial in December, 2004. The court examined eight instances of offensive language and inappropriate conduct. It heard from Moot, Weaver, and Roberts, as well as witnesses testifying on appellant’s behalf. The court determined Moot’s, Weaver’s, and Roberts’ testimony to be wholly consistent, credible, and believable. While appellant denied and minimized the allegations, the court found his denials unbelievable, and his minimizations to show a remarkable lack of taste and integrity. Appellant admitted to showing pornographic images on his computer, but he did not consider doing so offensive, inappropriate, or embarrassing. Appellant attempted to cast his language and sexually charged statements as not offensive. However, the court found the statements to be “boldly disrespectful [and] pointedly designed to embarrass ....” Id., at 587. Appellant presented medical testimony of his affliction with sleep apnea and argued this constituted a mitigating factor.

The Court of Judicial Discipline determined the Judicial Conduct Board, by clear and convincing evidence, proved the allegations occurred, that they were highly offensive, and that appellant exhibited inappropriate conduct. Id., at 588. The court concluded appellant’s behavior violated Article V of the Pennsylvania Constitution and the Code of Judicial Conduct. The court held appellant’s conduct brought the judicial office into disrepute, a violation of Article V, § 18(d)(1) of the Pennsylvania Constitution.

The court also held appellant failed to be patient, dignified, and courteous to his staff, violating Rule 4C of the Rules Governing Standards of Conduct of District Justices.

Additionally, the court found appellant violated Rule 3B of the Rules Governing Standards of Conduct of District Justices when he required his staff to look for opportunities to send congratulatory notes to constituents. The court noted, and appellant admitted, that sending the notes constituted an ongoing re-election campaign, done solely to “get votes.” Id., at 596. The court found appellant’s use of court-appointed staff constituted partisan political activity and violated the Supreme Court’s guidelines on unapproved political activities. Id. The court added the “Supreme Court did not intend to approve the conduct of political campaigns out of magisterial offices with court-appointed employees.” Id.

The court found appellant violated both statutory and constitutional standards of judicial conduct. “[A] finding by [the Court of Judicial Discipline] that a judicial officer has violated the Constitution of Pennsylvania or the Code of Judicial Conduct subjects that judge to the full range of appropriate discipline, [including removal].” In re: Zupsic, 893 A.2d 875, 896 (Pa. Ct. Jud. Disc. 2005). Pursuant to Article V, § 18 and 42 Pa.C.S. § 3331, a seven-judge panel reviewed the court’s findings and removed appellant from office. Appellant appealed to this Court.

Article V, § 18 of the Pennsylvania Constitution governs our review of a determination of the Court of Judicial Discipline. We “review the record of the proceedings of the [Court of Judicial Discipline] as follows: on the law, the scope of review is plenary; on the facts, the scope of review is clearly erroneous; and, as to sanctions, the scope of review is whether the sanctions imposed were lawful.” Pa. Const. art. V, § 18(c)(2); In re Melograne, 812 A.2d 1164, 1166 (Pa. 2002).

Judicial conduct proceedings have been held to be quasi-criminal in nature; thus, the defendant is granted constitutional rights afforded to criminal defendants. In re Chiovera, 570 A.2d 57, 61 (Pa. 1990). The Judicial Conduct Board is responsible for investigating and bringing charges, and at trial, the board must prove the charges by clear and convincing evidence. In re Cicchetti, 743 A.2d 431, 443 (Pa. 2000). In considering whether the evidence presented is clear and convincing, the court must find the witnesses to be credible, and the facts and details to be distinctly remembered. Id. The witnesses' testimony must be sufficiently clear, direct, weighty, and convincing. Id.

Appellant does not dispute the court's fact-finding; the only question is whether the court committed a legal error. The Pennsylvania Constitution expresses the importance of integrity in the judicial system. Article V provides:

A justice, judge or justice of the peace may be suspended, removed from office or otherwise disciplined for conviction of a felony; violation of section 17 of this article; misconduct in office; neglect or failure to perform the duties of office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute, whether or not the conduct occurred while acting in a judicial capacity or is prohibited by law; or conduct in violation of a canon or rule prescribed by the Supreme Court.

Pa. Const. art. V, § 18(d)(1). The Court of Judicial Discipline defined disrepute as "necessarily incorporat[ing] some standard with regard to the reasonable expectations of the public of a judicial officer's conduct." In re Strock, 727 A.2d 653, 657 (Pa. Ct. Jud. Disc. 1998). Whether particular conduct brings the judicial office into disrepute is determined on a case-by-case basis. In re McCarthy, 828 A.2d 25, 29 (Pa. Ct. Jud. Disc. 2003).

This Court upheld decisions that found disrepute was brought upon the judicial office when actions took place in or outside court proceedings. Zupsic (disrepute onto judicial office found in attempts to influence trial outcomes); Cicchetti (disrepute onto

judicial office found when judge behaved improperly to litigants and female staff). Here, appellant's conduct occurred in the office, during working hours, and his staff had no choice but to endure his conduct. Appellant's offensive conduct cannot be separated from his judicial position.

In Zupsic, the court noted a judge's conduct reflects not only upon the judge but also upon the judicial office itself:

[T]he conduct of a judge which results in a decline in the public esteem for that judge, may not support the conclusion that the conduct has brought the judiciary as whole into disrepute, absent a persuasive showing by the Board that the conduct is so extreme as to have brought the judicial office itself into disrepute.

Zupsic, at 888. When appellant interviewed Moot, he did not just elicit information from her as a potential employee; he represented the judicial office to a member of the public. Appellant's unwarranted and offensive statement during an interview reflected poorly on the judiciary as a whole. This event was disrespectful to the judiciary and public; combined with his offensive behavior, it brought disrepute on the entire judiciary.

Moot, Weaver, and Roberts were subjected to expletive-filled language on a daily basis, as well as offensive comments intended to embarrass. To Moot, Weaver, and Roberts, appellant was not a colleague with bad taste and behavior; he was their boss, robed with the official stamp of approval from the judicial branch.

In addition to the Pennsylvania Constitution, the Code of Judicial Conduct, promulgated by this Court, guides judicial conduct. This Court described the fundamental purpose of the Code of Judicial Conduct as ensuring the judiciary's independence and integrity. Cicchetti, at 441. The first canon of judicial conduct provides "An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing, and should themselves observe, high standards of conduct so that the integrity and

independence of the judiciary may be preserved....” Code of Judicial Conduct, Canon 1. Just as the public expects judicial servants to exhibit appropriate and respectful behavior, so too may employees of court. The public would not find appellant’s behavior acceptable and neither do those working in a small office under a boss who wields the power of employment.

Appellant argues this Court should reduce the sanction of removal from office because medical testimony of his affliction with sleep apnea represented a mitigating factor, justifying a less severe sanction. In In re Timbers, 674 A.2d 1221 (Pa. Ct. Jud. Disc. 1996), the court considered charges of misconduct in office, neglecting the duties of office, prejudicing the proper administration of justice, and bringing the judicial office into disrepute. It found alcohol abuse and alcoholism underlying the judge’s conduct. While not condoning alcoholism as an excuse for misconduct, the court recognized alcoholism as a disease, which could be considered a mitigating factor. It suspended the judge for six months without pay and required him to attend a sobriety-monitoring program.

As the trier-of-fact, the Court of Judicial Discipline considered this medical testimony and discovered sleep apnea could possibly contribute to appellant’s offensive statements and behavior, but found the suggestion fell short of linking actual causation to his behavior. The court also distinguished between a diagnosed medical condition, and the suggestion that sleep apnea could contribute to or cause aberrant behavior.

Appellant also argues the court did not give mitigating factors, such as medical evidence and good character letters, sufficient weight. However, appellant misapprehends our standard of review. The existence of good character evidence does not undo appellant’s offensive behavior. Disciplinary sanctions focus beyond the one who is charged, to the message sent to the public and the effect on the expectation of

standards of behavior. “[D]isciplinary sanctions ... are intended to protect the public ... and maintain the integrity of the legal system.” In re Melograne, 888 A.2d 753, 755 (Pa. 2005). While some similarities exist between the behavior in Timbers and this matter, the purpose of our review is not to re-weigh the sanction against aggravating or mitigating circumstances, but to determine whether the sanction is lawful. The Court of Judicial Discipline is charged with protecting the integrity of the judiciary and upholding public confidence in the judicial branch of government. Melograne, 812 A.2d at 1168-69. “In disciplining a judicial officer for his misconduct, that tribunal not only punishes the wrongdoer, but also repairs the damaged public trust and provides guidance to other members of the judiciary regarding their conduct.” Id., at 1168.

The Pennsylvania Constitution, art. V, § 18, sets forth removal as an available sanction for bringing disrepute upon the judicial office. Here, removal is a permissible sanction for appellant’s conduct, and the findings are supported by clear and credible evidence. Thus, the sanction is lawful.<sup>4</sup>

Order affirmed. Jurisdiction relinquished.

Madame Justice Baldwin did not participate in the consideration or decision of this case.

Former Justice Newman did not participate in the decision of this case.

Mr. Justice Saylor joins the opinion.

Mr. Chief Justice Cappy files a concurring opinion.

Mr. Justice Castille files a concurring opinion.

Mr. Justice Baer files a concurring opinion in which Mr. Justice Castille joins.

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<sup>4</sup> In light of this finding, we conclude it unnecessary to review whether appellant’s practice of using his staff to send congratulatory notes to constituents violated Rule 3B of the Rules Governing Standards of Conduct of District Justices.