Harper v. Office of Disciplinary Counsel, Supreme Court of Ohio
C.A.6 (Ohio),1997.
NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a " Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Sara J. HARPER, Plaintiff-Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL, SUPREME COURT OF OHIO, et al., Defendants-Appellees.

No. 96-3186.

May 2, 1997.

On Appeal from the United States District Court for the Northern District of Ohio, No. 96-00087; Sam H. Bell, Judge.
N.D.Ohio

AFFIRMED.

Before: SILER, COLE, and Van GRAAFEILAND,FN* Circuit Judges.

FN* The Honorable Ellsworth A. Van Graafeiland, Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

PER CURIAM.

***1** Plaintiff appeals the district court's dismissal of her complaint seeking to restrain and enjoin Defendants from conducting disciplinary proceedings against her for violating Ohio's Code of Judicial Conduct. For the reasons that follow, we AFFIRM the decision of the district court.

I.

At all times relevant to this appeal, Plaintiff-Appellant Sara J. Harper (" Harper") served as a judge on the Ohio Court of Appeals for the Eighth Appellate District. Accordingly, she was subject at all such times to Ohio's Code of Judicial Conduct.

In 1994, Harper ran against incumbent Justice Alice Robie Resnick for a seat on the Supreme Court of Ohio. In one of her campaign commercials, Harper noted that Resnick had received substantial financial contributions from various trial lawyers and suggested that Resnick would necessarily be beholden to them in deciding issues before the Ohio Supreme Court.FN1

FN1. The audio portion of the television commercial stated:
On Ohio's Supreme Court, one Justice has a problem. It's money. Most of Resnick's money comes from just one place, the plaintiffs' lawyers who sue, sue, sue. Over $300,000 just from them. This small group of suing lawyers wants Resnick with her liberal rulings to make it easier for them to collect millions in fees. It's time for a change to Judge Sara Harper. Recommended, endorsed, highly rated, 20 years as a Judge, Marine Corps Lieutenant Colonel. Judge Sara Harper.
While the audio is playing, the video portion of the campaign commercial stated, " Resnick's Liberal Rulings Help Lawyers Collect Millions," and showed telephone directory advertisements from two Ohio lawyers who contributed to Justice Resnick's campaign. The video portion also contained an image of a check, with the words " Trial Lawyers" and " Sue & Sue" in the upper left corner of the check. On another portion of the check, where the dollar amount would normally appear, were the words " Over $300,000.00." The check was then signed by " Cheatem Good." Harper states that the check was presented in a fashion to indicate that it was not a real check, but merely a characterization of the $300,000 in campaign contributions that Justice Resnick received from the Ohio Academy of Trial Lawyers (OATL), the families of OATL members, and political action committees associated with OATL.

On May 1, 1995, the Ohio Supreme Court's Office of Disciplinary Counsel (" Office of Disciplinary

Counsel") submitted a formal complaint against Harper to the Board of Commissioners on Grievances and Discipline (" Board of Commissioners").[FN2] This complaint charged Harper with violating five provisions of the Ohio Code of Judicial Conduct, including (1) Canon 2A, for failing to conduct herself so as to promote public confidence in the integrity and impartiality of the judiciary; and (2) Canon 7B(1)(a), for failing to maintain the dignity appropriate to judicial office.[FN3] On November 22, 1995, Harper filed a motion for summary judgment with the Board of Commissioners. On January 11, 1996, the Board of Commissioners denied her motion, and scheduled a full hearing on the complaint against Harper for January 18-19, 1996.

FN2. The Office of Disciplinary Counsel and the Board of Commissioners are entities created by the Supreme Court of Ohio to monitor the behavior of attorneys and judges and to prosecute complaints of impropriety before the Board of Commissioners.

FN3. Because the charges against Harper for violating Canons 1, 7B(1)(c) and 7C(9) were ultimately dismissed by the Board of Commissioners, and because Harper was never disciplined for their alleged violation, Harper's constitutional challenges to those Canons are now moot and will not be discussed. *See In re Harper,* 673 N.E.2d 1253 (Ohio 1996).

On January 16, 1996, Harper filed the present suit in the United States District Court for the Northern District of Ohio to enjoin the disciplinary proceedings against her. In her complaint, Harper contended that Canons 2A and 7B(1)(a) of the Ohio Code of Judicial Conduct could not be enforced against her because they violate her First Amendment right to freedom of speech and her Fourteenth Amendment right to due process. On January 19, 1996, Harper amended her original complaint to include as defendants the individual members of the Board of Commissioners and the Office of Disciplinary Counsel. After receiving the briefs of the parties and entertaining oral argument, the district court determined on January 24, 1996 that it would abstain from interfering in Harper's pending disciplinary proceedings and dismissed her complaint.[FN4]

FN4. In order to allow the district court an opportunity to consider Harper's motion for a temporary restraining order, the Board of Commissioners issued an order temporarily postponing the January 18, 1996 hearing on her disciplinary complaint.

Harper has timely appealed the district court's decision.

II.

We review de novo a district court's decision to abstain from hearing a plaintiff's complaint. *Fieger v. Thomas,* 74 F.3d 740, 743 (6th Cir.1996); *Berger v. Cuyahoga County Bar Ass'n,* 983 F.2d 718, 721 (6th Cir.1993).

III.

The United States Supreme Court has established a three-part test for determining whether a federal court should abstain from interfering in a state's bar disciplinary proceeding. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982) (citing *Younger v. Harris,* 401 U.S. 37 (1971)). Specifically, a federal court should abstain if:
***2** (1) the bar disciplinary proceeding is currently ongoing;
(2) this proceeding implicates an important state interest; and
(3) the disciplinary proceeding provides an adequate opportunity for the respondent to raise constitutional challenges.

See Middlesex, 457 U.S. at 432, 433-35; *Younger,* 401 U.S. at 43-55. Nevertheless, the Supreme Court has noted that " extraordinary circumstances" could exist which would permit a district court to exercise jurisdiction in a case even though the three prongs of the test are satisfied. *Middlesex,* 457 U.S. at 435; *Younger,* 401 U.S. at 53. For example, a federal court can exercise jurisdiction over a case if the state rules at issue are " flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *See Younger,* 401 U.S. at 53-54 (citation and quotations omitted), *cited with approval in Middlesex,* 457 U.S. at 437. However, the United States Supreme Court did not actually apply this exception in either *Younger* or *Middlesex. See Middlesex,* 457 U.S. at 435; *Younger,* 401 U.S. at 53.

Harper concedes that the three prongs of the *Younger/Middlesex* test are met, but contends that the district court should have exercised jurisdiction because Canons 2A and 7B(1)(a) are " flagrantly and patently" violative of her First and Fourteenth Amendment rights. *See Middlesex,* 457 U.S. at 437; *Younger,* 401 U.S. at 53. Thus, it is to these claims that we now turn.

IV.

Harper first contends that Canons 2A and 7B(1)(a) flagrantly violate her First Amendment right to free speech because the language used in those canons is overbroad. She argues that these canons " generally require that a judge must conduct herself in a manner that makes the judiciary look good" and prohibit not only false statements but also truthful statements that portray Ohio's judiciary in a negative light. Accordingly, she argues that the canons are overbroad because they may be used to punish constitutionally protected speech. We disagree.

In *Grayned v. City of Rockford,* 408 U.S. 104 (1972), the United States Supreme Court addressed the basis for bringing an overbreadth challenge and stated that " [a] clear and precise enactment may nevertheless be ' overbroad' if in its reach it prohibits constitutionally protected conduct." *Id.* at 114. In addressing the merits of an overbreadth challenge, " [t]he crucial question ... is whether the [enactment] sweeps within its prohibitions what may not be punished under the First ... Amendment[ ]." *Id.* at 114-15.

However, overbreadth may be avoided if the rule, regulation or legislation in question is reasonably susceptible of a narrow construction or has, in fact, been narrowly interpreted by the agency responsible for its enforcement. *See, e.g., United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548, 580 (1973) (rejecting overbreadth and vagueness challenges to a prohibition against employees actively taking part in a political campaign because the Civil Service Commission had narrowly construed the statute and had made available to its employees advice as to the statute's meaning); *see also Stretton v. Disciplinary Bd.,* 944 F.2d 137, 144 (3d Cir.1991) (interpreting Canon 7 narrowly and rejecting overbreadth challenge).

***3** In Ohio, the state supreme court has long held that a candidate for judicial office may criticize the judgments and conduct of the incumbent during an election campaign, but has emphasized that the criticism must be made in a fair and truthful manner. *See, e.g., In re Thatcher,* 89 N.E. 39, 88 (Ohio 1909) (rejecting free-speech claims of an attorney " of more than 20 years' standing at the bar [who] must be presumed to know the difference between respectful, fair, and candid criticism and scandalous abuse of the courts...."). Similarly, the Board of Commissioners issued an advisory opinion in 1989 that answered the question: " How much negative criticism of an incumbent judge is permissible before such comments infringe on the dignity appropriate to that judicial office?" 1989 Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 89-15. In its opinion, the Board stated:

Some criticism of an opponent may be justifiable, as the Washington Supreme Court has held: " [a] candidate for judicial office has a right to challenge an incumbent judge's ability, decisions and judicial conduct, but it must be done fairly, accurately and upon facts, not false representations."

Id. (citing *In re Donohoe,* 580 P.2d 1093, 1097 (Wash.1978)).

Canons 2A and 7B(1)(a) are not " flagrantly and patently" overbroad because the Ohio Supreme Court and its Board of Commissioners, the division charged with enforcing the Canons, have interpreted the Canons' language narrowly. *See In re Harper,* 673 N.E.2d 1253, 1265 (Ohio 1996); 1989 Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 89-15. Specifically, the Ohio Supreme Court and the Board of Commissioners have limited a judicial candidate's right to criticize the incumbent during an election only by requiring the criticism to be truthful and accurate. *See, e.g., Harper,* 673 N.E.2d at 1265 (holding that " the Canons do not prohibit truthful criticism, so long as the criticism is done fairly, accurately, and upon facts, not false representations"); *Thatcher,* 89 N.E. at 88; 1989 Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 89-15. Because First Amendment protection does not adhere to statements that imply false assertions of fact, *see Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 18 (1990), the Canons' prohibition of false campaign statements is not flagrantly overbroad and does not require the district court's intervention in Harper's disciplinary proceedings. *See Younger,* 401 U.S. at 51 (" [A] ' chilling effect,' even in the area of First Amendment rights, has never been considered a

sufficient basis, in and of itself, for prohibiting state action."). Accordingly, the district court correctly abstained from hearing Harper's complaint.

V.

Harper next contends that Canons 2A and 7B(1)(a) flagrantly violate her Fourteenth Amendment right to due process and her First Amendment right to free speech because the language used in those Canons is too vague to have reasonably informed her of what speech or conduct was prohibited. Again, we believe Harper's claims to be meritless.

***4** The vagueness doctrine impacts an individual's guarantees of both due process and freedom of speech. *See Grayned*, 408 U.S. at 108, 109. In the context of due process, the United States Supreme Court has explained that a statute is void for vagueness when it fails to sufficiently identify the conduct that is prohibited. *See id.* at 108, 109; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Thus, in order to survive a due process challenge on the basis of vagueness, a statute's provisions must be specific enough to " give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. In the context of free speech, the Court has more strictly applied this specificity requirement in order to prevent an enactment's inhibition of the exercise of First Amendment rights. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Grayned*, 408 U.S. at 109.

Harper argues that the language of Canons 2A and 7B(1)(a) are impermissibly vague because they do not indicate that the conduct expressed in those Canons is mandatory, rather than merely advisory. Specifically, Harper notes that the Canons state that a judge should conduct herself in a manner that promotes public confidence in the judiciary (Canon 2A) and should maintain the dignity appropriate to her judicial office (Canon 7B(1)(a)). She argues that the use of the word " should," rather than the word " shall," provides " no indication to the reader that the canons are anything but hortatory." In support, she relies on proposed changes to the Ohio Code of Judicial Conduct, recommended by the Board of Commissioners in 1993, that would amend the Code to indicate mandatory standards with the word " shall" and advisory standards with the word " should."

However, Harper's argument that the Code's use of the word " should" is unconstitutionally vague is meritless, for both the Code itself and the decisions of the Ohio Supreme Court indicate that the word " should" establishes a mandatory standard of conduct. First, the proposed amendments upon which Harper relies for her interpretation of the Code have never been adopted by the Ohio Supreme Court. Second, the preface to the Ohio Code of Judicial Conduct states that the Canons " establish mandatory standards unless otherwise indicated." Considering that all of the Canons use the word " should" except for Canon 4, which uses the word " may," only Canon 4 is advisory. *See Harper*, 673 N.E.2d at 1261. Third, the Ohio Supreme Court has consistently held that a judge may be disciplined for violating Ohio's judicial canons, indicating that the Canons establish mandatory, rather than merely hortatory, standards for conduct. *See Harper*, 673 N.E.2d at 1261 (holding that " all of the Judicial Canons in the Code of Conduct, except Canon 4, establish mandatory standards of conduct for Ohio judges"); *see, e.g., Office of Disciplinary Counsel v. Campbell*, 623 N.E.2d 24 (Ohio 1993); *Mahoning County Bar Ass'n v. Franko*, 151 N.E.2d 17, 21 (Ohio 1958). Contrary to Harper's arguments, the Code's use of the word " should" clearly established a mandatory standard of conduct.

***5** Harper next argues that Canons 2A and 7B(1)(a) are impermissibly vague because they provide no concrete guidance to Ohio's judiciary as to which specific activities are prohibited. Harper contends that the exhortations in Canon 2A that a judge " promote[ ] public confidence in the integrity and impartiality of the judiciary" and in Canon 7B(1)(a) that a judge " maintain the dignity appropriate to judicial office" deny her fair notice of the standard of conduct to which she is to be held accountable, leaving enforcement of the Canons to the discretion of the Board of Commissioners. *See United States v. Wunsch*, 84 F.3d 1110, 1119-20 (9th Cir.1996) (holding that a provision of California's Code of Business and Professional Conduct that required attorneys to " abstain from all offensive personality" was void for vagueness because it failed to give sufficient notice of what conduct was prohibited).

Harper's arguments notwithstanding, the United States Supreme Court has upheld provisions similar to the commands in the Ohio Code of Judicial

Conduct to " maintain the dignity" of judicial office and to " promote public confidence" in the judiciary. *See* *Parker v. Levy*, 417 U.S. 733 (1974). In *Parker*, the United States Supreme Court held that a provision of the Uniform Code of Military Justice authorizing punishment of officers for conduct " unbecoming an officer and a gentleman" was not unconstitutionally vague. *Id.* at 757. Although the Court observed that the language of the regulation provided a " seemingly imprecise" standard for military officers' behavior, the Court noted that prior constructions of the Uniform Code of Military Justice had partially narrowed the broad language used in the regulation and had " supplied considerable specificity by way of examples of the conduct which they cover." *Id.* at 746-47, 754. Also, the Court observed that the military's development of customs and usages had imparted meaning to many of the standards in the regulations. *Id.* at 746-47. Thus, the Court held that the regulation proscribing conduct " unbecoming an officer and a gentleman" was not unconstitutionally vague. *Id.* at 757; *see also* *Davis v. Williams*, 617 F.2d 1100, 1105 (5th Cir.1980) (upholding constitutionality of a fire department regulation prohibiting " conduct prejudicial to good order").

In the present case, Canons 2A and 7B(1)(a) of the Ohio Code of Judicial Conduct are not impermissibly vague because the " seemingly imprecise" standards in the Code have been narrowed by opinions of the Ohio Supreme Court and its Board of Commissioners. *See* *Parker*, 417 U.S. at 746-47, 754. The Ohio Supreme Court and the Board of Commissioners have limited the broad language of Canons 2A and 7B(1)(a) to constitutional bounds by explaining that a judicial candidate can advance any criticism of an incumbent that she wishes as long as the criticism is truthful and accurate. *See, e.g.*, *Thatcher*, 89 N.E. at 88; 1989 Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 89-15. Additionally, judges in Ohio are provided with guidance as to what conduct is and is not appropriate under the Code. *See, e.g.*, 1989 Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 89-15 (explaining what campaign conduct is consistent with the " dignity" of judicial office under Canon 7B(1)(a)). Considering that Canons 2A and 7B(1)(a) had been narrowed by Ohio case law and an interpretive opinion, Harper had a reasonable opportunity to know that false and misleading criticism was prohibited and to act accordingly. *See* *Grayned*, 408 U.S. at 108. Thus, the district court correctly abstained from hearing Harper's complaint.

VI.

***6** For the above reasons, we AFFIRM the decision of the district court to abstain from interfering in Harper's disciplinary proceedings.

C.A.6 (Ohio),1997.
Harper v. Office of Disciplinary Counsel, Supreme Court of Ohio
113 F.3d 1234, 1997 WL 225899 (C.A.6 (Ohio))

END OF DOCUMENT