

MAR 20 2025

David J. Smith
Clerk

Before the Chief Judge of the
Eleventh Judicial Circuit

Judicial Complaint No. 11-25-90043

ORDER

Michael R. Davis has filed a Complaint against District Judge M. Casey Rodgers under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States.

Under the Judicial Conduct Act, “all papers, documents, and records” in judicial-conduct proceedings are confidential save a few exceptions. 28 U.S.C. § 360(a). Although final orders are published, the orders omit the name of a subject judge unless the subject judge consents to disclosure. RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. R. 24(a)(1). In a similar vein, the orders will not identify the complainant unless the chief circuit judge finds disclosure appropriate. *Id.* R. 24(a)(5). Judge Rodgers has consented to the disclosure of her name. 28 U.S.C. § 360(a)(3). Davis publicly released his complaint and his organization, The Article III Project, published articles about the complaint on its website. So disclosing both the complainant’s and subject judge’s names is appropriate.

I. BACKGROUND

In February 2025, the Judicial Panel on Multidistrict Litigation consolidated and transferred products-liability actions about an injectable contraceptive, Depo-Provera, to Judge M. Casey Rodgers for pretrial proceedings. On February 21, 2025, Judge Rodgers held a case-management conference to discuss the appointment of lead counsel. She stated that she was “not opposed . . . to a [leadership] slate being proposed to the Court” and explained the characteristics that she sought for “plaintiff leadership structure.” In her view, the slate needed to “fairly and efficiently lead the Plaintiffs’ side of the [multidistrict litigation],” provide “balance[],” and “reflect diversity.” She then elaborated on the need for diversity—specifically female representation—in the leadership slate:

I think diversity is still an important thing to strive for, so diversity, you know, of all types, but particularly in this litigation, because of the Plaintiffs, I want that particular diversity reflected in the leadership. Now, that doesn’t mean I’m looking for every single leader[] to be a female, but females need to be adequately represented in your leadership.

On February 23, 2025, Judge Rodgers entered an order that described the case-management conference and reiterated the need for female representation on the leadership slate. The order stated that “the Court prefers a balanced leadership team that reflects diversity of all types and, in particular, leadership should reflect the diversity of the individual Plaintiffs that comprise this litigation.”

The order added that the diversity requirement did “not by any means suggest that every single position requires female counsel, but simply that females should be adequately represented within leadership.”

On February 27, 2025, Michael R. Davis filed a complaint of misconduct against Judge Rodgers. The complaint alleges that Judge Rodgers “made statements that improperly suggested that sex would be a relevant factor in selecting leadership counsel for the multidistrict litigation.” It highlights her statement that “females need to be adequately represented in [plaintiffs’] leadership.” “This remark,” the complaint states, “reflect[s] an explicit preference for females in the allocation of professional roles and responsibilities.” The complaint alleges that “[b]y implying that sex—rather than qualifications, experience, or merit—should influence selection for MDL leadership, Judge Rodgers engaged in conduct that constitutes impermissible bias and judicial misconduct.”

The complaint alleges that Judge Rodgers’s statement amounted to discrimination based on sex and constituted misconduct. It cites Judicial-Conduct Rule 4(a)(3), which defines judicial misconduct to include “[i]ntentional discrimination on the basis” of several characteristics, including “sex, gender, [and] gender identity.” The complaint alleges that Judge Rodgers “openly endorsed sex-based decision-making, which constitutes improper judicial favoritism and violates the principle of impartiality.” It also alleges that Judge Rodgers violated the Due Process Clause of the Fifth Amendment to the United States Constitution, which “prohibits

government officials, including federal judges, from engaging in sex-based discrimination.” The complaint requests that “appropriate corrective action be taken to ensure that all attorneys, regardless of sex, are afforded equal treatment in these proceedings.”

On February 28, 2025, Judge Rodgers entered a pretrial order that invited all the plaintiffs’ attorneys involved in the multidistrict litigation to apply for a leadership position. The order omitted any reference to the applicants’ sex. Instead, it listed other qualifications, including “MDL experience, mass tort experience, trial experience, settlement experience, . . . issue-specific experience, . . . [and] the ability to make the necessary time and financial commitments to effectively serve as leadership.” The order also stated that “[t]he Court w[ould] consider any further relevant information an Applicant wishes to disclose” before “appoint[ing] a leadership team with members whose talents, experience, and knowledge make them uniquely situated to effectively, fairly, and efficiently represent the interests of the Plaintiffs as a whole throughout the litigation.” The application form attached to the order asked the applicant to provide various information but omitted any reference to the applicant’s sex.

On March 13, 2025, Judge Rodgers allowed nearly 70 applicants for lead counsel to give presentations. During the hearing, she stated on the record that her appointment decisions would not “give any preference to female attorneys in order to avoid the appearance of any impermissible sex discrimination.” Instead, the

appointments would be “based solely on individual merit.” The case remains pending.

As specified in the Judicial Conduct Act and under the Judicial-Conduct Rules, I reviewed the complaint and conducted a “limited inquiry.” *See* 28 U.S.C. § 352(a); RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. R. 11(a), (b). This inquiry included inviting Judge Rodgers to respond in writing to the complaint and speaking with her personally.

Judge Rodgers acknowledged the concerns created by her statements at the case-management conference. As she explained in the attached letter, she “acknowledged that [her] statements could be construed as creating a preference for female attorney representation in leadership positions during the selection process.” Judge Rodgers’s letter explains that she has taken actions to “assure the parties and public that it was not [her] intention to discriminate against anyone.” To that end, she explained that her February 28, 2025 order inviting applications for leadership positions provides “that all applicants will be considered individually on their merits and without reference to sex or any other immutable characteristic.” Judge Rodgers pointed to her on-the-record statement, made during the hearing on March 13, 2025, that she “will not give any preference to female attorneys” and that each appointment will be based on “individual merit.” She “believe[s] these steps have ameliorated the concerns raised” and “regret[s] any misunderstanding.”

II. DISCUSSION

The Judicial Conduct Act defines judicial misconduct as “conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a). The Judicial-Conduct Rules further define “[c]ognizable misconduct” to include “intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability.” RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. R. 4(a)(3). This rule reflects a judge’s duty to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and “avoid comment[s] or behavior that could reasonably be interpreted as . . . prejudice or bias.” See CODE OF CONDUCT FOR UNITED STATES JUDGES, Canons 2A, 3A(3) cmt.

Canon 2A of the Code of Conduct for United States Judges also states that a “judge should respect and comply with the law.” The Due Process Clause of the Fifth Amendment, as applied to the federal government, includes a guarantee of equal protection. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). This guarantee of equal protection encompasses the right to be free from sex discrimination. *Davis v. Passman*, 442 U.S. 228, 234–35 (1979).

Together, the Judicial-Conduct Rules, the Code of Conduct, and the Constitution prohibit federal judges from engaging in discrimination based on sex. This prohibition includes statements that encourage attorneys to give preferences based on sex to candidates for leadership positions. The Rules’ prohibition on discrimination

based on “sex, gender, [or] gender identity” contains no exception for the appointment of lead counsel in multidistrict litigation based on the identity of the plaintiffs. Likewise, the Code’s requirement that a “judge should respect and comply with the law” contains no carveout for “diversity” requirements that turn on the consideration of impermissible characteristics like sex, race, or religion.

Justice Alito reached a similar conclusion in a statement respecting the denial of the petition for writ of certiorari in *Martin v. Blessing*, where he reviewed a district judge’s “unique[]” practice of requiring counsel in class-action cases to ensure that the lawyers on the case “fairly reflect[ed] the class composition in terms of relevant race and gender metrics.” 571 U.S. 1040, 1040–41 (2013). Justice Alito explained that the Supreme Court “has often stressed that racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.” *Id.* at 1042 (citation and internal quotation marks omitted). And he added that “[c]ourt-approved discrimination based on gender is similarly objectionable, and therefore it is doubtful that the practice in question could survive a constitutional challenge.” *Id.* For these reasons, he stated, “[i]t seems quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race and gender of counsel mirror the demographics of the class.” *Id.* at 1043.

What Justice Alito described in 2013 as the “unique[]” practice in *Blessing* has since been touted as a “best practice” in multidistrict litigation. Commentators openly encourage judges who preside over these actions to consider impermissible characteristics

like sex or race when they appoint leadership counsel. *See, e.g.*, Ralph Chapoco, *Calls for Lawyer Diversity Spread to Complex Class Litigation*, BLOOMBERG L. (July 30, 2020, 3:45 AM) <https://news.bloomberglaw.com/social-justice/calls-for-lawyer-diversity-spread-to-complex-class-litigation> (presenting scholar’s view that “[t]he lack of diversity” in multidistrict-litigation leadership “is a particular problem because having the same group of attorneys, often white males, can harm litigants”); Stephen R. Bough & Elizabeth Chamblee Burch, *Collected Wisdom on Selecting Leaders and Managing MDLs*, 106 JUDICATURE 69, 69–72 (2022) (collecting “case-management wisdom” that encourages judges to consider “identity diversity”—like “race, ethnicity, age, gender, [and] physical limitations”—when appointing “[multidistrict litigation] leadership”); Barbara J. Rothstein & Catherine R. Borden, *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES* 12 n.14 (Fed. Jud. Ctr. 2011) (describing with approval a district judge in a multidistrict litigation action who “was proactive in considering qualified women and minorities for leadership positions” and who “directed the Plaintiffs’ Steering Committee to do so as well”).

Classifications for appointed counsel based on sex violate the Constitution, the Code of Conduct, and the Judicial-Conduct Rules. To be sure, district judges managing multidistrict-litigation should account for diversity in the form of “experience[], skill, knowledge, geographical distributions, . . . backgrounds, . . . [and] the nature of the actions and parties” when they select lead counsel for plaintiffs. *See* COMMITTEE ON RULES OF PRACTICE AND

PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CIVIL PROCEDURE 130 (Aug. 2023) (quoting the committee note to proposed Federal Rule of Civil Procedure 16.1(c)(1)). And in class actions, judges “may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.” FED. R. CIV. P. 23(g)(1)(B). But notions of counsel’s “ability to fairly and adequately represent the interests of the class” must exist within the bounds of the rules that govern judicial conduct, and those bounds prohibit discrimination based on sex.

The Judicial-Conduct Rules permit a chief judge to “conclude a complaint proceeding” if he “determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.” RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. R. 11(d)(2); *see also* 28 U.S.C. § 352(b)(2). The commentary states that “[b]ecause the [Judicial Conduct] Act deals with the conduct of judges, the emphasis is on the correction of the judicial conduct that was the subject of the complaint.” RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. R. 11 cmt. So “[t]erminating a complaint based on corrective action”—including “a pledge to refrain from similar conduct in the future”—“is premised on the implicit understanding that voluntary self-correction . . . may be preferable to sanctions.” *Id.*

Judge Rodgers’s voluntary corrective actions warrant the conclusion of this proceeding. Her written response makes clear to the parties and the public that her appointments in this case and others will consider “individual merit” alone and “will not give any preference to female attorneys.” Her recent order in the litigation and the application for a leadership position both omit any reference to sex. And her on-the-record statements during the March 13, 2025, hearing confirm that she does not intend to encourage the attorneys to discriminate based on sex or to engage in discrimination herself. In the light of these developments, I conclude that Judge Rodgers has taken appropriate voluntary corrective action that acknowledges and remedies the problems created by her statements. For this reason, this Complaint proceeding is **CONCLUDED**.

The public nature of the complaint warrants immediate release of this order. Ordinarily, a chief circuit judge must wait to publish an order until the 42-day period to petition for review expires or the subject judge exhausts the review process. RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROC. R. 18(b). But the public disclosure of this complaint generated significant media attention and interest from the bar, which makes immediate release appropriate. Judge Rodgers agrees. *Id.* R. 23(b)(7)–(8).


Chief Judge

United States District Court

NORTHERN DISTRICT OF FLORIDA

UNITED STATES COURTHOUSE

ONE NORTH PALAFOX STREET

PENSACOLA, FLORIDA 32502

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

March 14, 2025

The Honorable William H. Pryor, Jr.
Chief United States Circuit Judge
Eleventh Circuit Court of Appeals
1729 Fifth Avenue North, Suite 900
Birmingham, AL 35203

Dear Chief Judge Pryor,

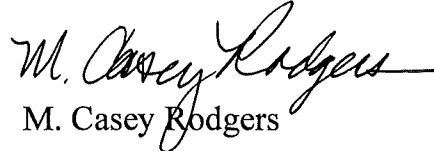
I appreciate the opportunity to respond to the judicial misconduct complaint filed against me by Michael R. Davis of the Article III Project.

On February 7, 2025, the Judicial Panel on Multidistrict Litigation centralized and transferred the *Depo-Provera (Depot Medroxyprogesterone Acetate) Products Liability Litigation*, MDL No. 3140, to my court (and me as presiding judge) for pretrial proceedings. During and immediately following the inaugural case management conference on February 21, 2025, I made oral and written statements that I intended to appoint a well-rounded slate of attorneys to a plaintiffs' leadership team based—first and foremost—on merit, skill, and experience, while also taking into consideration whether the leadership team adequately reflected the unique and exclusively female character of the *Depo-Provera* plaintiff population. Those statements are the subject of Mr. Davis's complaint.

Although I have never engaged in impermissible discrimination when selecting attorneys for MDL leadership positions or in any other facet of my work, I acknowledge that my statements could be construed as creating a preference for female attorney representation in leadership positions during the selection process. To avoid any further confusion, and to assure the parties and public that it was not my intention to discriminate against anyone, I entered a pretrial order on February 28, 2025 giving all attorneys an opportunity to directly apply for a leadership position, in lieu of receiving a leadership slate proposed by the parties, and scheduling in-person oral presentations in support of those applications for March 13, 2025. Importantly, I re-emphasized in this order that all applicants will be considered individually on their merits and without reference to sex or any other immutable characteristic. Likewise, during the leadership presentations

yesterday, which featured presentations from nearly 70 well-qualified attorneys, I stated on the record that my appointment decisions “will not give any preference to female attorneys in order to avoid the appearance of any impermissible sex discrimination,” and that each appointment will be based solely on “individual merit.” I believe these steps have ameliorated the concerns raised, and I sincerely regret any misunderstanding.

Respectfully,

A handwritten signature in cursive script that reads "M. Casey Rodgers". The signature is written in black ink and is positioned above the printed name and title.

M. Casey Rodgers
United States District Judge