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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF THE HON. PAUL H. SENZER,

Petitioner.

NO. 31

20 Eagle Street
Albany, New York
June 2, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN (TELEPHONICALLY)

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: This is appeal number 31 on
2 the calendar, Matter of Paul H. Senzer.

3 Counsel?

4 MR. BLAKEY: May it please the court, my name is
5 Michael Blakey. I'm of counsel to Dave Besso, who is the
6 attorney of record for the petitioner, the Honorable Paul
7 Senzer.

8 The question before this court, simply put, is
9 whether removal is the only possible sanction upon the
10 facts that were sustained by the Commission below. It
11 seems that the CJC and their counsel have jumped
12 illogically from the use of vulgar language to, apparently,
13 an obvious finding of gender bias. I have to say that
14 that's a little bit too far, and in fact, they go further
15 than that.

16 JUDGE RIVERA: But Counsel, it depends on the
17 type of language, right? Whether or not it reflects - - -

18 MR. BLAKEY: It depends - - -

19 JUDGE RIVERA: - - - gender bias, because
20 certainly, if I may, in the employment discrimination
21 context, particular type of language may indeed reflect - -
22 - may - - - may be the basis for a finding of sex
23 discrimination and gender bias.

24 MR. BLAKEY: Of course, word choice is a factor,
25 as is context. But they go further than saying there's



1 obvious gender bias. They say there's a pattern of gender
2 bias, so that's another logical leap, which I can't join
3 them in.

4 We don't think the gender bias is obvious, and we
5 don't concede it, and we - - - we would - - - we could go
6 into multiple interpretations of the words used. I don't
7 think that's necessary. I mean, I can just point out the
8 worst one. The use of the C word, but it's not the C word
9 by itself. It's a term of art. "C on wheels", which
10 obviously refers to the aggressiveness of that attorney.
11 It's a left-handed compliment is one way to look at it.
12 It's obviously inappropriate.

13 Let me take a timeout quickly to say, that we're
14 not offering a defense or a valid excuse for these words
15 that were used. But they are - - - it's still relevant for
16 us to discuss the context of the words used for purposes of
17 mitigating the punishment. I would note that the referee
18 report had a finding that the legal profession and - - -
19 was brought into disrepute by the use of vulgar language.
20 He didn't jump to the gender-bias conclusion, and he didn't
21 jump to a pattern of gender-bias conclusion.

22 JUDGE WILSON: So you - - - Counsel, your view is
23 that the language itself, putting aside gender bias,
24 wouldn't be sufficient for removal; is that right?

25 MR. BLAKEY: The - - - the language use - - - the



1 choice of words is not sufficient. We - - -

2 JUDGE FAHEY: But can I - - - Counselor, can I
3 just follow up on the judge's question? Is it fair to say
4 that you don't contest the fact that - - - that this
5 conduct violated the judicial - - - the - - - the conduct
6 rules?

7 MR. BLAKEY: I - - - I have to put an asterisk -
8 - -

9 JUDGE FAHEY: If they're really talking - - -

10 MR. BLAKEY: - - - on my answer because - - -

11 JUDGE FAHEY: The reason I asked this - - - let
12 me this way. I - - - I'm not trying to trick you into
13 something or - - - or have you admit something that's
14 contrary to your client's interest. Is your argument
15 really that the penalty is too harsh - - -

16 MR. BLAKEY: Yes.

17 JUDGE FAHEY: - - - for the conduct? That's your
18 argument, isn't it?

19 MR. BLAKEY: That is my argument.

20 JUDGE FAHEY: Your argument isn't that - - - that
21 he didn't do this, or that - - -

22 MR. BLAKEY: No, no, he conceded all this.

23 JUDGE FAHEY: All right. So - - - so - - -

24 MR. BLAKEY: He was - - - candor and contrition
25 are part of the record.



1 JUDGE FAHEY: So we don't really need to really
2 spend a lot of time on whether or not there was - - - you
3 met the legal threshold for - - - for these rules to be
4 imposed in this situation. It's really a question of does
5 the punishment fit the crime?

6 MR. BLAKEY: Exactly, Judge.

7 JUDGE FAHEY: I see, okay.

8 MR. BLAKEY: So we have a situation where - - -
9 removal must be based on someone who is found unfit to be a
10 judge, and the case law says that it's not enough to
11 exhibit poor judgment, and it's not enough to exhibit
12 extremely poor judgment. You have to go further. And - -
13 - but someone - - -

14 JUDGE STEIN: But what about when it impacts
15 respect for the court system and the judiciary and - - -
16 and - - - and lawyers and - - - and that sort of thing?
17 Does - - - does that make a difference?

18 MR. BLAKEY: Yeah, that's just one factor among
19 many that should determine what the appropriate sanction
20 is.

21 JUDGE STEIN: But if it's serious - - -

22 MR. BLAKEY: It's not controlling.

23 JUDGE STEIN: If it's serious enough that one
24 factor - - - I - - - I guess I'm asking - - - could that
25 one factor be enough to warrant removal?



1 MR. BLAKEY: I would say, no, it's a multifactor
2 analysis.

3 Look, I - - - I want to go to - - -

4 JUDGE RIVERA: But Counsel, it wasn't said once,
5 right?

6 MR. BLAKEY: What?

7 JUDGE RIVERA: It was said - - - it was said
8 multiple times.

9 MR. BLAKEY: No, no, different words were used in
10 different times. The C word was used that one time.

11 JUDGE RIVERA: I know, but - - - but the various
12 words were used. When you say there's no pattern, but
13 there is, at a minimum, a - - - a recurrence of the conduct
14 - - -

15 MR. BLAKEY: I'll give you a recurrence.

16 JUDGE RIVERA: - - - of using - - - excuse me - -
17 - of using words that are disparaging to females, and using
18 other words that are also problematic because of their
19 profanity or body parts that they're referring to, correct?

20 MR. BLAKEY: Right. But in context, they were
21 all towards one client and her husband, and they were all
22 by email.

23 I would like to bring up a case that I think is
24 very important. It's called Cunningham. It's cited in the
25 brief, and it's discussed by both sides. In that case, one



1 judge wrote to another judge in a private correspondence
2 twice and promised him he would never reverse him. It was
3 conceded that that was improper to do. However, those
4 letters only came to public attention after bizarre
5 circumstances which could not have been anticipated.

6 And I would say that that factor applies to Judge
7 Senzer. He had no idea that this was going to go on beyond
8 that. You could say a - - - you send an email; therefore
9 it's public. But that's not the end of the analysis. This
10 is not on the bench conduct - - -

11 JUDGE RIVERA: I know, but I don't know that the
12 best position is to say, he didn't think he'd get caught.

13 MR. BLAKEY: No, but I'm saying that you have to
14 look at how the conduct was intended.

15 JUDGE WILSON: An important - - - an important -
16 - -

17 MR. BLAKEY: He did not intend for it to be
18 public and that's relevant.

19 JUDGE WILSON: Excuse me, Counsel. An important
20 different in Cunningham is that there was factual evidence
21 demonstrating that the judge actually reversed the other
22 judge, right? So that you could tell - - -

23 MR. BLAKEY: Oh, in Cunningham, that did happen -
24 - -

25 JUDGE WILSON: Right.



1 MR. BLAKEY: - - - so maybe the words - - -

2 JUDGE WILSON: So the - - - the analogy here
3 would be if we had evidence that - - - that Judge Senzer
4 was not gender biased, then maybe it comes in - - - it's
5 sort of parallel. But we're missing that here, aren't we?

6 MR. BLAKEY: Wait, did you just ask me if there
7 was any evidence that he was not gender biased? I would -
8 - -

9 JUDGE WILSON: Correct.

10 MR. BLAKEY: I'd say yes. In - - - in the
11 record? Almost twenty years of no problems. I will point
12 out that that 2001 situation was a letter of caution with
13 dismissal for lack of judicial decorum. Did not get into
14 gender bias. They've inflated it to be gender bias because
15 the people he talked about were women, but the statements
16 that he made were not specific to female women - - - the -
17 - - the persons that he was addressing.

18 So it - - - his intent can be found relevant to
19 what his appropriate sanction is. This is not on the
20 bench. This is not in chambers. This is not off the
21 record, as far as in courtroom. And it's not in a public
22 bar, for some - - - some of the cases that were cited by
23 the - - - my opposition in - - - involved judges in - - -
24 in public, outrageous displays. And that's not what
25 happened here.



1 CHIEF JUDGE DIFIORE: Counsel - - - Counsel, I
2 guess the problem I'm having is, is that Judge Senzer, in
3 his representation of this client, denigrated every
4 stakeholder in the system: the litigant, the litigant's
5 lawyer, the court attorney referee. He disparaged the
6 entire system. And he was making those statements as an
7 officer of the court and as a person who is a
8 representative of the very system that he, over the course
9 of his representation, continued to denigrate and
10 disrespect.

11 How do we fall short - - - how - - - how do we
12 justify continuing his - - - his service on the bench?

13 MR. BLAKEY: We're not justifying it. We're
14 saying what's the appropriate penalty.

15 CHIEF JUDGE DIFIORE: Oh, and I think - - - I
16 think, Mr. - - -

17 MR. BLAKEY: I'm saying that conduct's wrong and
18 should be censured publicly.

19 CHIEF JUDGE DIFIORE: How - - - but how do we
20 keep a person who has engaged in that conduct on the bench?
21 What - - - what - - - what would we - - - we say censure is
22 enough to erase all of the damage that's been done? Is
23 that what we say? And then - - - and put him back on the
24 bench to preside in a public courtroom over hundreds and
25 hundreds of litigants' cases?



1 MR. BLAKEY: Well, I would welcome an ad hominem
2 analysis. This person came before the - - - the ref - - -
3 the - - - the hearing. He was - - - he was contrite. He -
4 - - he exhibited candor. He has a long record of being a
5 great judge. There was character witnesses that impressed
6 the referee. All that's in the record. We're not - - -
7 this is not a vacuum.

8 So we have the bad use of language, which he
9 regrets, and now the question is, is public censure
10 sufficient? And I would imagine that it is. So the
11 factors that would lead anyone to - - - to - - - well,
12 particularly you Judges to reduce the recommended sanction
13 of removal down to censure, come down to four elements, it
14 seems to me.

15 One is - - - this is mitigating factors - - -
16 career as a whole. He has a great career as a whole, and
17 the character witnesses established that as well.

18 Two, his motivation for using these bad words.
19 He did - - - he didn't do this to make money or - - - or
20 anything like pecuniary. He - - - he - - - I mean, his - -
21 - his explanation, weak as it was, was that he was trying
22 to speak in a vernacular for emphasis, for persuasion.
23 There are no good reasons, but they're reasons. And
24 they're not monetary reasons.

25 Three, candor. Now, the fact that he didn't want



1 to accept removal does not mean that he lacked contrition.
2 So candor and contrition are two sides of the same coin.
3 He was both.

4 So all of those factors are - - - are in his
5 favor.

6 You know, you - - - I did forget to ask for one
7 minute of rebuttal. Is that still available?

8 CHIEF JUDGE DIFIORE: I reserved you a rebuttal
9 minute.

10 MR. BLAKEY: Thank you.

11 CHIEF JUDGE DIFIORE: We'll give you a minute.
12 Thank you, Counsel.

13 Counsel?

14 MR. LINDNER: Thank you, Your Honor. Good
15 afternoon, Chief Judge DiFiore; good afternoon, Your
16 Honors, may it please the court.

17 I'd like to begin by addressing counsel's point
18 with regard to gender bias, because I think the record
19 fully supports the Commission's determination in that
20 regard.

21 JUDGE FAHEY: Counselor, I'm just having a hard
22 time hearing you. Pull that mic a little towards you.
23 Thanks. Yes, yes.

24 MR. LINDNER: That's not usually a problem for
25 me.



1 JUDGE FAHEY: No, I know. I know.

2 MR. LINDNER: So I wanted to discuss the gender
3 bias determination by the Commission, and I ask the court
4 to start at page 398 of the record, which is a portion of
5 the petitioner's testimony during the Commission's
6 investigation. And he was specifically asked whether or
7 not he thought the words that he used in the November 25th
8 email might suggest that he harbors a bias towards women or
9 women lawyers. And he testified that he certainly
10 understood that it did. And I think it's obvious that
11 that's true. This isn't one of - - -

12 JUDGE STEIN: But Mr. Lindner, how much weight
13 should we give to his - - - his reputation and his - - -
14 and his career as a whole in this regard and to the
15 character witnesses, all of whom said that he - - - they
16 had never seen him act in a gender bias fashion - - -

17 MR. LINDNER: Well, if I may, Judge Stein - - -

18 JUDGE STEIN: - - - and that this was very
19 uncharacteristic of him. Well, how - - - how much weight
20 is that entitled to?

21 MR. LINDNER: It's always a factor. This - - -
22 this court has to look at every factor. But in terms of
23 his career, I don't think that it's enough to overcome the
24 obvious gender bias in these emails.

25 With respect to the character witnesses, though,



1 I have to say that I be- - - and we argued this below - - -
2 that the testimony was largely improperly admitted. It was
3 not reputational witness of - - -or testimony. It was
4 testimony that these witnesses had never heard the
5 petitioner use these kinds of words.

6 And - - - and I suppose it's laudable that he
7 didn't use this kind of language when he was sitting in
8 court, which is the only two - - - place that two witnesses
9 saw him, or that he used it in front of his monsignor in
10 religious class. But it obviously doesn't prove that he
11 didn't use this language because we have the emails. And
12 so I don't think that it was particularly probative, and
13 should have been disregarded, and it was disregarded by the
14 Commission.

15 But I wanted to get back to the gender bias, if I
16 could, for just a minute. Because it's not just that word.
17 That word is certainly significant. This court has called
18 it vile and reprehensible. The Eleventh Circuit called it
19 the essence of a gender-specific slur. But there are more,
20 as Judge Rivera was pointing out. There are three emails
21 in which he uses a gender-based slur, profanity, to refer
22 to the Colemans' daughter.

23 And then there's an email, a fifth email, in
24 which he refers to his opposing counsel as "eyelashes".
25 Now it's admittedly not on the same par as the profanity in



1 the other emails, but it's nonetheless sexist, and the
2 Commission determined that it was. It's reducing a woman,
3 a female professional, to her appearance, which is the kind
4 of thing that's rarely, if ever, done when we talk about a
5 male professional.

6 JUDGE WILSON: So let me - - - let me try my
7 question on you, as well, which is suppose that these - - -
8 and I'm not sure what the equivalent would be - - - but
9 suppose he had instead made equivalent derogatory comments
10 in - - - in the same volume about a man, right? So we're
11 not any longer talking about a gender issue. Would the
12 language had been sufficient for the Commission to
13 recommend removal?

14 MR. LINDNER: Well, I think the answer would have
15 to be yes, although I have to admit, Judge Wilson, that I
16 also don't know what the equivalent would really be that
17 would have quite the history of that word and the - - - and
18 the gender sting that it carries. But yeah, any language
19 that, over a period of time, conveys disrespect or bias
20 based on a characteristic like sex or race and any language
21 that denigrates the court system as a whole is problematic.

22 JUDGE STEIN: What - - - Counselor, what - - -
23 let me ask a slightly different question. And that's about
24 the - - - the - - - the nature of - - - of the
25 circumstances under which these comments were made. What -

1 - - I would never do this, I promise, but what if I - - - I
2 said something uncharacteristic of myself to my spouse in
3 an email about somebody, okay, in - - - in the system. And
4 some time down the road, my spouse decided that he wanted a
5 divorce and publicized these inappropriate comments I made.
6 Would that subject me to removal - - -

7 MR. LINDNER: Almost certainly not, Your Honor.

8 JUDGE STEIN: - - - from the bench?

9 MR. LINDNER: Let me point to the Commission's
10 determination. This is at page 8 of your record, where
11 they say explicitly right out front - - - right up front
12 that the use of profanity when communicating with a client
13 is not an issue in this case, nor is criticizing
14 participants in a legal proceeding. And they emphasize
15 that again on page 13 of the record, where they say the
16 occasional use of profanity or vulgarity, the occasional
17 use of sexist terms, that's not what this case is about.
18 This is about a pattern of comments over a period of months
19 which demean women and denigrate the court system as a
20 whole. So - - -

21 JUDGE GARCIA: Counsel, on - - - on that point,
22 what's your view of the import - - - the relevance of the
23 '02 caution here to the penalty?

24 MR. LINDNER: It's not the same, but it's clearly
25 not the unrelated. Here, again, you have the petitioner



1 making sarcastic and disrespectful comments. He is making
2 them to women, although he's not using the same sorts of
3 gender specific slurs. And there is the - - - the portion
4 of that caution letter which points out that in several
5 times during that proceeding, the petitioner went off the
6 record, trying to keep his comments from being recorded,
7 and suggested he knew at the time that he was speaking out
8 of turn, and he didn't want to make a record of that.

9 And you see an echo of that here, where in his
10 November 25th email, he says, don't quote me. Don't quote
11 me. He knows at the time that what he's saying is - - - is
12 not correct. And he knows at the time that this is the
13 kind of thing that people talk about, that this can spread.
14 So I disagree with counsel's assertion that he had no way
15 of knowing that this language would ever come out because
16 he testified differently to that during the hearing. He
17 said - - -

18 JUDGE WILSON: So the - - - the bar for removal
19 is high; is that correct?

20 MR. LINDNER: I'm sorry?

21 JUDGE WILSON: The bar for removal of a judge is
22 high.

23 MR. LINDNER: I - - - absolutely.

24 JUDGE WILSON: So I'm - - - I've struggled to
25 find a case that where I would say, well, this case, if we



1 come out the way the Commission has come out, wouldn't
2 somewhat lower the bar. Is - - - is - - - is that - - - I
3 mean, I'm not saying that lowering the bar isn't a good
4 thing.

5 MR. LINDNER: I - - - I understand the question,
6 Your Honor, and - - - and let me ask the court to take a
7 close look at the facts in Assini. They're not exactly the
8 same, but the first portion of that determination, of your
9 decision, is really quite close. He asks for - - -

10 JUDGE WILSON: Yeah, but the second portion is
11 there, too, and that to me, is the more troubling, that
12 after having been told not to have the driving-school guy
13 in court dictating who's going to get referred to this
14 guy's own driving school, the judge continues to - - - that
15 seems to me by itself is reason for removal.

16 MR. LINDNER: I - - - I'd readily concede that,
17 Your Honor, but I'm asking you to focus on the language in
18 your decision in which you said that the use of the gender
19 slurs, indefensible and by itself, it suggests that that
20 judge was unfit for judicial office. And you have someone
21 using the same words here. And let me point out that
22 Assini now was twenty years ago. It was certainly wrong
23 for Judge Assini to use those words in 1999, but no judge
24 in 2020, should think that that's acceptable conduct.

25 JUDGE FAHEY: So back to the point that - - -



1 that Judge Stein had asked about before. How do we weigh
2 the context of the communication? The way I - - - and you
3 can correct me; you know the record better than I do, but
4 the way I understand the charge is that it was a lost case,
5 and there was a dispute about the fee, and then the emails
6 and all this information came forward in the context of a
7 complaint to the Commission. Is that correct?

8 MR. LINDNER: Well, I'm not sure if you have the
9 timeline correct or if I misunderstand what you're saying.

10 JUDGE FAHEY: Correct me, then.

11 MR. LINDNER: I mean, what - - -

12 JUDGE FAHEY: It's fine; just correct me.

13 MR. LINDNER: What happened was that - - - yeah,
14 there was a family court matter in which he was
15 representing the Colemans, and all of these emails came out
16 there. Later - - -

17 JUDGE FAHEY: And they were - - - but it was
18 afterwards. It was a dispute; he said they want their
19 money back because they lost, and so - - - and they didn't
20 get it.

21 MR. LINDNER: I - - - and that was a finding by
22 the Commission, but I would treat that fact with some
23 caution. If you look at the record underlying that, the
24 petitioner never claimed that the Colemans were angry with
25 him. He never claimed that they wanted a refund. That



1 came up only because Ms. Coleman volunteered it on cross-
2 examination, and she didn't say that she was angry as well.
3 She was asked, why did you contact him, and she said, I
4 wanted to talk to him about a refund. So it's a fact in
5 the record; it's true. But I don't know how much weight
6 you can give it.

7 This actually came out, and it's a little
8 convoluted, because the Colemans read in the newspaper that
9 the petitioner was the subject of a civil rights suit
10 involving different people in a different situation. And
11 they felt that the information that they had regarding his
12 comments were relevant to that. And so they contacted the
13 attorney, who was representing those other clients, and
14 that attorney felt obligated to - - - to report that to the
15 Commission.

16 JUDGE RIVERA: It does - - -

17 MR. LINDNER: A little convoluted.

18 JUDGE RIVERA: It does seem odd, though. It does
19 seem that there's some retaliation involved.

20 MR. LINDNER: It's possible. And honestly, Your
21 Honor, that comes a lot in our business. The fact that - -
22 - that a complainant may have an axe to grind, doesn't
23 really bear on whether or not he or she is telling the
24 truth. And here, there's no dispute. We have the emails.

25 JUDGE RIVERA: Yeah.



1 CHIEF JUDGE DIFIORE: Thank you, Counsel.

2 MR. LINDNER: Thank you, Your Honor.

3 CHIEF JUDGE DIFIORE: Counsel, your rebuttal.

4 MR. BLAKEY: Yes. I'd - - - I'd just like to make
5 one point about plenary review. Now, obviously, you guys
6 get to look at this de novo. However, I would like to
7 point out that you can reassess facts that were sustained
8 below. I don't believe that plenary review allows you to
9 revisit facts that were not sustained below. I think
10 that's an important point because the dissent took the
11 position that if somebody makes a sexist remark, they're
12 more likely to also be a racist. I don't believe that
13 logical.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MR. BLAKEY: Oh, just my closing remark, one
16 sentence.

17 CHIEF JUDGE DIFIORE: Please.

18 MR. BLAKEY: Public censure is a very serious
19 sanction which fully expresses the necessary amount of
20 societal opprobrium and clearly establishes that all forms
21 of extrajudicial speech can have profound consequences.
22 Thank you.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 Thank you.

25 (Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of the Honorable Paul H. Senzer, No. 31 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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