

Judicial Misconduct Complaint

Panel Judges:

Timothy Tymkovich, Circuit Judge; Robert McWilliams, Senior Circuit Judge; Claire V. Eagan, Chief District Court Judge, Northern District of Oklahoma

Case Numbers: 05-4079 and 05-4222

Lisa Burke, Michael Carper, and on behalf of all others similarly situated, v. Utah Transit Authority, John English, individually, Amalgamated Transit Union Local 382 and the United States Department of Labor

Complaint filed by Lisa Burke and Michael Carper

This complaint is essentially a continuation of a complaint filed against Judge Paul G. Cassell. Complainants maintain that the circuit judges assigned or chosen to serve on this panel were determined that the Appellants would not prevail. Further, they maintain that the panel intended to protect Judge Cassell from responsibility for his actions while this case was in district court.

The appeal of the denial of the injunction (05-4079) was filed on April 11, 2005. The appeal of the summary judgment (05-4222) was filed August 22, 2005. Both appeals were accepted by the Tenth Circuit despite the numerous procedural problems deliberately created, in the view of the plaintiffs, by Judge Cassell while the case was in district court. The Tenth Circuit agreed to consolidate the two cases and have one hearing and one order. A mediation conference was scheduled but the day before it was scheduled to occur the attorney for UTA notified the court that they would not participate. UTA faced no consequences for this. Appellants had believed, when the case was accepted, that they were finally on a level playing field and that they might find justice at the Tenth Circuit. But Appellants were disabused of that notion when the panel was announced. It was made up of fellow Federalist Society member Judge Timothy Tymkovich,¹ Judge Claire V. Eagan of the Northern District of Oklahoma and Senior Circuit Judge Robert McWilliams, ninety years old and retired from active status since 1984.

This case was fully briefed and oral arguments were held on May 10, 2006 in Denver. Since the Tenth Circuit does not allow transcripts to be made public, Complainants have relied on memory here but believe that this account is accurate. Complainants request that the Circuit Executive review the transcripts to confirm these statements.

All of the attorneys for the defendants were obsessed with the 11:48 p.m. filing of the amended complaint in district court. Their summary judgment response briefs (05-4222) all contain references to it and all attempt to protect Judge Cassell and explain away his actions.

The response by UTA states:

Burke and Carper next argue that the district court abused its discretion in denying their

¹ Complainants had learned shortly before the hearing that Judge Tymkovich had recently employed Judge Cassell's former law clerk. Both judges, as mentioned, are members of the Federalist Society, an extremist organization in the opinion of the Complainants.

motion for leave to amend. The motion for leave to amend was filed at 11:48 p.m. on Sunday, August 14, 2005. Because the motion was served by mail, UTA's memorandum in opposition to the motion was due on September 1, 2005. See DUCivR 7-1(b)(3) (opposition due 15 days after service of motion) (Exh. D hereto); Fed. R. Civ. P. 6(e) (three days added for service by mail). The district court order granting UTA's motion for summary judgment and administratively closing the case was issued on Monday, August 15, 2005. Following issuance of that order, Burke and Carper made no effort to seek a decision on the motion for leave to amend, but simply filed their notice of appeal on August 22, 2005, before any opposition memorandum was due. (UTA response; 05-4222; pp. 26-27.)

The response by Local 382 was similar:

Just before midnight on a Sunday, Burke and Carper filed their motion for leave to amend complaint. The next day, presumably without knowledge of the motion for leave to amend complaint, the District Court's issued its Order Granting Defendants' Motion for Summary Judgment and closing the case. Responses to this motion from the UTA, the Union, and the DOL were not due until September 1, 2005. DUCivR 7- 1(b)(3). However, without first requesting relief to its closing order from the District Court, Burke and Carper filed their notice of appeal on August 22, 2005, ten (10) days before any party was required to file a response to the motion for leave to amend. The filing of the notice of appeal from a final order ends any jurisdiction the District Court may have had to hear the motion for leave to amend complaint. (Local 382 response; 05-4222; p. 14-15.)

The response by the DOL was virtually identical to the responses of UTA and Local 382.

All the defendants argued that Judge Cassell had likely not seen the amended complaint and that Judge Cassell lost the ability to rule on it when the Appellants filed the appeal to the Tenth Circuit. Complainants maintain that the fact that Judge Cassell granted summary judgment less than five hours after the amended complaint was docketed suggests he certainly *did* see it. The probability that Judge Cassell would grant the motion for summary judgment in an order that was apparently identical to the tentative order which he issued at the May 20, 2005 hearing, nearly three months earlier, is extremely improbable. Also improbable is the suggestion by each of the defendants that they would have responded to the amended complaint after Judge Cassell issued an order granting summary judgment and closing the case.

At the hearing, Judge Eagan began questioning the attorney for Appellants, Mr. Moquin, in a furious manner. Judge Eagan asked little or nothing about the labor law aspects of the case. She was only interested, it appeared, in berating Mr. Moquin for having demonstrated that Judge Cassell was biased against the Plaintiffs/Appellants during the district court proceedings. She argued that Judge Cassell had obviously not seen the amended complaint and went to great lengths to defend Judge Cassell. She maintained that judges often issue orders without having seen filings. "It happens all the time!" she announced loudly. That may be true in the Northern District of Oklahoma but it does not happen all the time in the rest of the nation. If Judge Eagan was so convinced that Judge Cassell had simply not seen the amended complaint, then she had an ethical duty to remand the case back to district court and instruct Judge Cassell to address the amended complaint. This is particularly true since she is not a circuit court judge. She was

invited to be on the panel and should have exhibited the highest possible ethical standards. She chose instead to try to discredit Mr. Moquin in her apparent effort to protect Judge Cassell. The Complainants, who watched this exchange, were truly stunned. Having hoped that they would have impartial circuit court judges, they realized that this spectacle was anything but impartial.

Judge Tymkovich asked many questions related to labor law. He clearly had some knowledge of the issues in the case. While he did not do anything at the hearing that the Appellants considered particularly biased, it was the order, authored by Judge Tymkovich, that was shocking.²

Judge McWilliams, who at the time of the hearing was ninety years old and had been retired from active status since 1984 had to be helped to his seat and never said anything during the hearing. He gazed out vacantly over the spectators. The Appellants found this very alarming. Judge McWilliams may or may not have been cognizant of the arguments, issues and facts of the case. If he was, he never gave any indication. Complainants felt it very unfair to have a judge that had been retired from active status for twenty two years hearing a case involving such complicated issues. Given the ultimate decision by the Tenth Circuit, Complainants have every right to be suspicious of Judge McWilliams' placement on that panel and doubt that he was a randomly assigned. An explanation is expected, as is evidence that Judge McWilliams understood the issues.

The order misstated (be assured Complainants are being diplomatic here) key facts in the case as the petition for en banc rehearing demonstrated. Perhaps the panel's most egregious offense was how it treated the amended complaint issue. No party disputed that the amended complaint was filed prior to the granting of summary judgment. Thus, justice clearly required that the panel remand so that the district court could be given an opportunity to consider it, if the panel truly believed that Judge Cassell had not seen it. For the panel to state that Judge Cassell committed no error by not considering it after the appeal was filed ignores that Plaintiffs/Appellants would have lost the ability to appeal by waiting for the district court to act. (Order; 05-4079 and 05-4222; p. 22) Since Tenth Circuit case law clearly requires a reason to deny a motion to amend, allowing a judge to deny an amendment by ignoring it is neither fair nor logical. Further, considering Judge Cassell's blatantly biased actions in district court, there was no reason for Plaintiffs/Appellants to believe that he would have considered the amended complaint even if requested to do so.

As noted earlier, the order misstated critical facts of the case. Had the panel stated the facts correctly they would not have been able to reach their conclusions. The panel stated that the Appellants had never presented any evidence that the TRAX employees had objected to Local 382 as a bargaining representative. (*Id.*; p. 17) However, the Appellants had presented a petition demonstrating that 63% of the TRAX employees had objected to Local 382. The panel decision also claimed that the TRAX employees had consented to Local 382 in two elections. The facts

² The panel issued the order for the two cases on September 1, 2006. This just happened to be the Friday before Labor Day. The irony of a decision stripping transit workers of all ability to choose their bargaining unit just before that particular holiday was not lost on Appellants/Complainants and they do not consider it a coincidence.

are contrary. There had never been a representative election where the TRAX employees were allowed to choose their representative. Moreover, in two contract elections, the TRAX employees had rejected the contract and evidence was presented supporting this rejection.

The order rejects Appellants' argument that this is an accretion case and states: We doubt federal labor doctrine even applies here...(*Id.*; p. 13 fn. 2) It then asserts that it is a severance case. Of course, severance is a federal labor doctrine and requires that the 12-factor test be used to determine whether it is appropriate, the same 12-factor test that neither Judge Cassell nor the Tenth Circuit panel would allow the Plaintiffs/Appellants to apply. (*Id.* p. 16) The panel simply ignored all the arguments made by Appellants as well as all the very recent case law supporting them. The panel's logic was so simplistic that they asserted that since Local 382 had represented transit workers in Utah since 1904 they were an appropriate bargaining unit. (*Id.* p. 11) Local 382 does not have a birthright to represent transit workers in Utah. Had the panel actually wanted to follow the law, Appellants had explained, repeatedly, what was required. Since modern labor case law overwhelmingly supports Appellants, Judge Tymkovich had to go back decades to find labor cases that stated what he wanted them to. (*Id.*; p. 12) He examined the standards for accretion and severance, citing the standards and then misstating or ignoring the facts and all relevant case law as well as refusing to apply the 12-factor test cited by Appellants. (*Id.*; p. 14-18) This is not justice.

The essence of this complaint is that a panel was created that was clearly biased against the Appellants. Its sole function appears to have been to protect Judge Cassell. It did not take any action to ensure justice. The difference between the Tenth Circuit and the Ninth Circuit treatment of similar issues demonstrates to Complainants that justice depends on living in the correct circuit.³ The Tenth Circuit is more concerned with collegiality than justice.⁴ Apparently, the fact that Judge Cassell regularly sits on Tenth Circuit panels doomed this meritorious case.

³ A recent case from the Northern District of California, involving an injunction, First Amendment issues and a company that prevented its employees from trying to form a union, was handled much differently. The case, *Skywest Pilots Alpa Organizing Committee* 3:07-cv-02688-CRB, is still in district court but the judge in that case is considering all aspects of the case and displays no bias toward any of the parties.

⁴ In the October 2006 issue of *The Federal Lawyer*, a feature story profiles Chief Judge Deanell Reece Tacha of the Tenth Circuit Court of Appeals. She states, "I'm very proud that our circuit is known as one that is, if not the most collegial, one of the most collegial in the country." Collegiality is important but justice is far more important.

A few comments from Lisa Burke:

I come from a U.S. Navy family. My father, Capt. Louis E. Burke (ret.) was a 1940 graduate of the U.S. Naval Academy. Upon graduation he was assigned to the U.S.S. Saratoga CV-3, one of the first aircraft carriers, stationed at Pearl Harbor, Territory of Hawaii. He met my mother there in early 1941. The attack on Pearl Harbor, December 7, 1941, was, of course, a defining point in both their lives. My father was not at Pearl Harbor. Fortuitously, none of the U.S. aircraft carriers were in port when the attack occurred. My mother was there, however. Shortly after the attack, my father was sent to flight school in Pensacola, Florida and trained to fly carrier based dive bombers. In 1944 he became Executive Officer of Bomb Squadron 6, attached to the aircraft carrier U.S.S. Hancock CV-19, flying SB2C Helldivers. He was awarded the Navy Cross for heroism during the battle of Kure Bay (Japan) in July 1945. The temporary citation, which was given to him before the medal was formally awarded, was signed by Vice Admiral J. S. (John Sidney) McCain, grandfather of Senator John McCain.

Immediately after the war ended, my father and his tail-gunner, Norman Lorentzen, who is still alive and lives in Anacortes, Washington, flew missions over Japan helping locate prisoner of war camps and dropping supplies and food until they could be liberated.

My father retired from the Navy in 1965 and became a math teacher at a crowded inner-city junior high school in San Diego. He rarely spoke to us about the war and never with bravado. Much of what I know was learned from Mr. Lorentzen years after my father's death.

WWII was fought largely by young men from rural and working class families who had suffered through the great depression. My father, no exception, was from Buffalo, New York. These men fought for freedom, democracy, and the principles of justice. They came to be known, with good reason, as the greatest generation. They did not fight and sacrifice and die so that a later generation of arrogant, elitist judges, who have never made any sacrifices for their country, could brazenly deny justice to law abiding, working class men and women.

Capt. Burke died in 1984 and is buried at the Presidio National Cemetery in San Francisco. My mother and paternal grandparents are buried at Fort Rosecrans N.C. in San Diego. I would suggest that Judges Cassell, Tymkovich and Eagan walk through a National Cemetery and contemplate the sacrifices made by the men and women buried there.⁵ Perhaps the judges might have a greater appreciation of the importance of justice for all.

⁵ I exempt Judge McWilliams. He *did* serve his country; in Naval intelligence during WWII. However, I consider his participation in this case a sad end to a distinguished career.

Signed:

SIGNATURES ON FILE

Lisa Burke

Michael Carper