

FILED

APR 19 2021

THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:

Case #58

COURT OF THE JUDICIARY
Rebecca C. Oates
Secretary

The Honorable Tracie A. Todd
Circuit Judge,
Birmingham Division
Criminal Division
Jefferson County, Alabama

AMENDED

PETITION TO DISMISS

Comes now Tracie A. Todd, by and through counsel, and files this petition to dismiss this case brought against Judge Todd based on Rules of Judiciary Rule 19, the Theory of Condonation and Laws of Equity as set forth below:

1. On December 22, 2017 the interim District Attorney for Jefferson County, in his official capacity, filed a complaint with the Judicial Inquiry Commission (the Commission) in advance of Judge Todd's campaign for re-election. The complaint was based on events that took place prior to the interim District Attorney's appointment, without his first-hand knowledge and/or review of the complaint. The events alleged took place during previous administrations, but no complaints were filed by the previous District Attorneys or litigants with firsthand knowledge of the alleged events.
2. Judge Todd was re-elected on November 6, 2018. After a nearly 48-month investigation, the Commission filed a Complaint (identified as case number 58) against Judge Todd on April 6, 2021 before this Court.
3. The Commission had nearly 10 months to file a complaint during Judge Todd's first term, but chose to file this Complaint nearly 48 months after it opened its investigation and nearly 36 months after Judge Todd was reelected to a second term.
4. The Commission's action against Judge Todd is a violation of the well-established Condonation Theory. "It seems to be the policy of our Constitution to make each term independent of the other and to disassociate the conduct under one term from the qualification or right to fill another term." *State ex rel. Attorney General v. Hasty*, 184 Ala. 121, 63 So. 559 (1913)." "Simply stated, the 'condonation theory' is that re-election to an office operates as a condonation of the officer's conduct during the prior term." *Parker v. State*, 333 So. 2d 806, 808 (Ala. 1976). The Theory of Condonation acts as a statute of limitations, providing protections for judges against stale, punitive claims that can be raised retroactively without time constraints.

5. The Commission's action against Judge Todd violates the law of equity, or laches. Laches is defined as neglect to assert a right or a claim that, taken together with a lapse of time and other circumstances causing disadvantage or prejudice to the adverse party, operates as a bar. See *Black's Law Dictionary* 787 (5th ed.1979). Laches is an equitable doctrine designed to prevent unfairness to a defendant ... due to a plaintiff's ... delay in filing suit, in the absence of an appropriate statute of limitations. *Equal Employment Opportunity Commission v. Dresser Industries, Inc.*, 668 F.2d 1199 (11th Cir.1982). "Classic elements of undue prejudice, for purposes of determining the applicability of the doctrine of laches, include the unavailability of witnesses, changed personnel, and the loss of pertinent records." *Grubbs*, 542 So.2d at 929 (citing *Equal Employment Opportunity Commission v. Dresser Indus., Inc.*, 668 F.2d 1199 (11th Cir.1982)). In addition to some of the allegations occurring nearly seven years ago, the Commission's 48-month delay in filing this Complaint has caused undue prejudice including the unavailability of key witnesses due to death, changed personnel and lost evidence.
6. The Commission's action against Judge Todd violates her right to Due Process under the law. Alabama courts seek to avoid stale claims and the injustice such claims can engender. *Travis v. Ziter*, 681 So.2d 1348, 1355 (Ala.1996)." A state violates the guarantee of substantive due process when its actions impair a liberty interest without sufficient justification. See *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). A state violates the guarantee of procedural due process when it impairs a liberty interest without fair proceedings.² See *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The Commission's unjustified delay in filing this Complaint is not supported by law and constitutes an arbitrary use of statutory discretion. Furthermore, the Commission's failure to follow its own rules has deprived Judge Todd of a fair proceeding.
7. The Commission also violated Alabama law by filing a complaint, Rules of the Judicial Inquiry Commission (RJIC) Rule 10 does not require a filing of a complaint in order to present a settlement agreement before the Court for approval (See Exhibit 1: RJIC Rule 10). The Commission simultaneously seeks to publicly admonish Judge Todd in a filed Complaint that includes allegations and language that have been disputed, while seeking to prohibit her from responding to the disputed allegations.
8. The filing of the complaint was unnecessary to present the Settlement Agreement before the Court. The filing of this Complaint made the allegations public in violation of RJIC Rule 5 as to Judge Todd's right to confidentiality.
9. The Complaint filed by the Commission deviates significantly from the complaint submitted to Judge Todd to consider as the basis for her acceptance and reliance during negotiations. The Settlement Agreement specifically references the Complaint and implies a meeting of the minds. However, there could be no such understanding if the filed Complaint did not exist and was not part of the negotiation.

10. Judge Todd agreed to settlement based on the complaint that was presented to her, but was not advised of the amended complaint filed before the Court. The Commission's attorney represented that it conform to the settlement agreement to meet Judge Todd's objections, and that Judge Todd would have an opportunity to review the complaint before it was filed. See (Exhibit 2: Email from Commission Attorney).

From: "Davis, RosaH" <RosaH.Davis@jic.alabama.gov>
Date: March 24, 2021 at 11:51:50 AM CDT
To: Tracie Todd <tracie.todd@alacourt.gov>, "Garrett, Jenny" <Jenny.Garrett@jic.alabama.gov>, Tyrell <tfj@tfjlaw.com>
Subject: Re: Settlement

Dear Judge Todd,

The Commission has received the settlement agreement by certified mail yesterday late afternoon. I checked with the office and confirmed this morning. Ms. Garrett and I are working on the complaint to more conform to the agreement to meet your original objections as agreed to in the settlement. You will have an opportunity to review it before filing. We will also notify you when we are filing in time for you to arrange dockets where necessary and to the extent possible.

Thank you for returning the agreement promptly.

Rosa H. Davis
Counsel for the Commission

Exhibit 2

11. The Commission filed the post-agreement, amended Complaint after Judge Todd signed the Settlement Agreement, denying her an opportunity to consider the amended Complaint before making her decision to agree to the settlement, understanding the allegations that would be presented and depriving her of the right to be heard and publicly respond. Judge Todd was not notified that the Complaint was filed.

Wherefore, we pray that this Court will dismiss this cause, with prejudice, as being in error and direct the Commission to publish a statement that this claim was filed in error and issue a public apology to Judge Todd.

Respectfully Submitted,

/S/Emory Anthony, Jr.

Rules of Procedure of Judicial Inquiry Commission

Rule 10.

Alternate dispute resolution.

A. At any time during the pendency of a charge or investigation but more than 10 days before the trial, the judge being charged or investigated may demand, and the whole commission must conduct, a hearing before the whole commission to discuss the charge or suspected conduct and to attempt to resolve the charge or investigation on terms to be presented by joint motion to the Court of the Judiciary. A majority of the commission may bind it to any such resolution. Any such resolution reduced to writing and signed by the judge and a majority of the commission shall bind the judge and the commission unless and until the proposed resolution is rejected by the Court of the Judiciary.

B. All statements made by or for the judge in or for a hearing conducted or to be conducted pursuant to this rule shall be privileged and inadmissible as either substantive evidence or impeachment evidence against the judge.

[Amended eff. 10-9-2001; Amended eff. 2-1-2009.]

Note from the reporter of decisions: The order amending the Rules of Procedure of the Judicial Inquiry Commission, effective February 1, 2009, is published in that volume of *Alabama Reporter* that contains Alabama cases from 996 So.2d.

Exhibit 1

CERTIFICATE OF SERVICE

I hereby certify that I have on this 19th day of April 2021, electronically filed the foregoing with the court of the Judiciary, and that I have further served a copy upon the following by placing same in the United States Mail, postage prepaid and properly addressed as follows:

Rosa H. Davis

Attorney for the Commission

Alabama Judicial Inquiry Commission

P. O. Box 303400

Montgomery, Alabama 36130-3400

/s/Emory Anthony, Jr.