Opinion Issued January 11, 2022

DOCKET NO. SCR 21-0001

SPECIAL COURT OF REVIEW[1]

IN RE INQUIRY CONCERNING HONORABLE SARAH ECKHARDT
CJC Nos. 20-0148 and 20-0469

OPINION

"Can't tell a book by its cover"; "don't just scratch the surface"; "things aren't what they seem"; "all that glitter's not gold"; and "anything essential is invisible to the eyes" are just a few idioms describing the issue before this special court of review. We have been assigned to conduct a *de novo* review of and implicitly affirm disciplinary sanctions levied by the Texas State Commission on Judicial Conduct in December of 2020.[2] Upon conducting that review, we vacate the sanctions levied by the Commission and deny further sanction.

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[1] The Special Court of Review consists of The Honorable Brian Quinn, Chief Justice of the Seventh Court of Appeals, presiding by appointment; The Honorable Charles Kreger, Justice of the Ninth Court of Appeals, participating by appointment; and The Honorable W. Stacy Trotter, Justice of the Eleventh Court of Appeals, participating by appointment.

[2] The parties agreed to submit the cause on a stipulated record.

Background

The sanctions in question consisted of a "public admonition." The Travis County Judge against whom the Commission assessed it relinquished that office months earlier. She now is a member of the Texas Senate. Her name is Sarah Eckhardt.

Of the two acts for which the Commission admonished her, one occurred approximately three years earlier on January 24, 2017. The other happened on September 27, 2019. Both garnered much public and media attention. Nevertheless, someone complained to the Commission on September 28, 2019, about both. The unnamed individual averred that "[j]udges take oaths of office to be non-partisan which is clearly not the case here." "[Eckhardt] does not take the oath of office seriously via public displays on and off the job," continued the complainant. "I do not trust her to have unbiased decisions and believe any conservative republican should be in fear when entering her courtroom." "She has lost the confidence of the public and is a partisan hack," concluded the individual.

Those allegations eventually resulted in the Commission's December 2020 admonition of Eckhardt "for engaging in willful conduct that cast public discredit upon the judiciary in violation of Article V, Section 1-a(6) of the Texas Constitution." The Commission took that action "pursuant to the . . . authority conferred it in Article V, § 1-a of the Texas Constitution in a continuing effort to protect the public and promote public confidence in the judicial system."

The January 2017 incident involved Eckhardt wearing "a pink knitted beanie with cat ears, referred to as a 'pussy hat,' while presiding over a meeting of the Travis County Commissioners Court." She and the Commission agreed that 1) the object was worn "as a political expression" protesting a statement uttered by the "the newly elected" United States President regarding the

treatment of women;[3] 2) the "[a]genda item 3 [about to be considered] at that meeting was a proposed resolution in support of women's health and reproductive rights"; and, 3) "[a]genda Item 3 . . . was legislative in nature" as were "[t]he actions of the Travis County Commissioners Court in considering and acting on [it]."

As for the September 2019 incident, the record illustrated that Eckhardt accepted an invitation to sit on "a panel at the annual 'Texas Tribune Festival,' scheduled for September 27–29, 2019." The other panelists were "a former mayor of Midland, Texas, the sitting Mayor of Santa Fe, New Mexico, and the former Deputy Mayor of New York City." Additionally, the panelists were assigned the topic of "'Civic Enragement: How progressive politics are turning citizens into warriors and cities into battlegrounds.'" The parties stipulated that the topic "did not include judicial matters." Upon the panel's convening at the festival, the moderator broached the subject of "actions at the state government level in Texas to override or preempt local government measures, such as regulation of ride sharing services and tree preservation ordinances."[4] Responding, Eckhardt quipped that "Texas Governor Greg Abbott 'hates trees because one fell on him.'" This utterance alluded to Governor Abbott's partial, yet permanent, paralysis caused when a falling tree struck him.

The Commission concluded that Eckhardt's wearing a "pussy hat" during a legislative forum as a political expression and alluding to the Governor's physical condition were instances of "willful conduct that cast public discredit upon the judiciary." Publicly admonishing her

[3] The statement consisted of the President saying, "You can do anything you want—grab 'em by the pussy."

[4] The Commission described the inquiry as "asking [Eckhardt] to speculate on why Governor Abbott would involve himself in the City of Austin's tree ordinance."

allegedly was necessary "to protect the public and promote public confidence in the judicial system."[5]

Jurisdiction

First, we return to a legal topic previously addressed yet again raised by Eckhardt and supported by amicus. Eckhardt earlier moved to dismiss this proceeding because the Commission allegedly lacked jurisdiction to discipline her. The absence of jurisdiction stemmed from the nature of her duties as Travis County Judge. That is, the post did not entail the performance of any traditional judicial functions. Her role solely consisted of acting as the presiding officer of the Travis County Commissioner's Court, which body governed the county. She entertained neither probate nor other judicial matters traditionally assigned constitutional county judges.[6]

Through our order of July 22, 2021, we rejected her contention and concluded that the Commission had the requisite jurisdiction. We reaffirm that decision for the reasons stated in the July 22, 2021 order. Simply put, "Texans vested the Commission with the authority to conduct disciplinary proceedings involving justices or judges of courts established by the [Texas] Constitution. One such court is a [constitutional] County Court, . . . and one such judge is the County Judge of that court." *In re Eckhardt*, No. SCR 21-0001 at 3 (Tex. Spec. Ct. Rev. July 22, 2021) (order). "[W]hether Eckhardt performed any judicial functions as County Judge for Travis County is inconsequential. The Commission's jurisdiction to discipline depended upon whether she held the post of judge of a court established by the Constitution or legislature. No one questions that she did." *Id.*

[5] Of note is that the neither the complainant nor the Commission objected to Eckhardt engaging in legislative activities or sitting on a panel debating political topics. They excepted to the expressive nature of what she did and said.

[6] She did perform marriages.

Merits

Our having dispensed with the procedural issue of jurisdiction, the merits call to us. Considering them begins with the constitutional provision under which the Commission acted. It provides that any judge or justice "of the courts established by this Constitution or created by the Legislature . . . may . . . be removed from office for . . . willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice." TEX. CONST. art. V, § 1-a(6)(A). In lieu of removal, the judge or justice may also "be disciplined or censured." *Id.* As said earlier, the Commission found Eckhardt's conduct "cast public discredit upon the judiciary" and, therefore, publicly admonished her. Eckhardt claims that admonishing her violated her First Amendment right to speak freely.[7] We agree.

In arriving at our conclusion, we accept the Commission's invitation to apply the two-step analysis espoused in *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990) (involving restrictions on the speech of governmental employees), and reiterated in *In re Davis*, 82 S.W.3d 140 (Tex. Spec. Ct. Rev. 2002).[8] In the first step, we decide whether the form and context of the purportedly protected speech implicated a matter of legitimate public concern, given the context of the activity. *Scott*, 910 F.2d at 210; *In re Davis*, 82 S.W.3d at 149. The second requires us to balance the individual's First Amendment rights against the government's interest in promoting the efficient performance of its functions. *Id.*

[7] "The First Amendment provides that Congress 'shall make no law . . . abridging the freedom of speech." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015); *accord* U.S. CONST. amend. I. "The Fourteenth Amendment makes that prohibition applicable to the States." *Williams-Yulee*, 575 U.S. at 442.

[8] *See In re Hecht*, 213 S.W.3d 547, 592 (Tex. Spec. Ct. Rev. 2006) (McClure, J., concurring) (questioning "the continued viability of *Scott* inasmuch as a judge's ability to offer personal opinions or viewpoints has since been found to be protected speech").

Step One

Before us, we have instances of Eckhardt donning a cap during a commissioner's court meeting and uttering a comment during a panel discussion. That wearing politically symbolic garb is protected speech has been true for innumerable years. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 24–26 (1971) (involving Cohen's wearing, in a courthouse, a jacket bearing the words "Fuck the Draft"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (allowing students to wear black arm bands to protest Vietnam War). And, it remains true here. All concede that the cap Eckhardt wore represented a symbol responding to tasteless commentary about women uttered by a United States President. Moreover, she opted to wear it when the topic of women's rights came for discussion during a legislative session of the Travis County Commissioners Court. One cannot reasonably dispute that women's rights are a matter of public concern. Thus, Eckhardt's donning the cap in support of them and in protest of the President's utterance logically related to a matter of public concern.

As for Eckhardt's utterance about a tree falling on the governor, it was said during a public panel discussion. If one were to give meaning to the topic assigned the panel, he would see that the group was tasked with debating political activism and its impact on local communities.[9] And, to reiterate, the moderator had broached the subject of "actions at the state government level in Texas to override or preempt local government measures, such as regulation of ride sharing services and tree preservation ordinances." At that point, Eckhardt expressed her view about the governor and his reason for intervening into a debate concerning tree preservation. The debate apparently encompassed ecological matters like trees, the enactment of local zoning ordinances,

[9] The topic was named "'Civic Enragement: How progressive politics are turning citizens into warriors and cities into battlegrounds.'"

and the State's intervention in purportedly local matters. Those too are matters of public concern, and Eckhardt's words dealt with those topics and the debate surrounding them.

Her intended "joke" may be injudicious and callous; indeed, she admitted as much. Yet, "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed." *Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 159 (Tex. 2004) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)) (noting same). Jokes, parody, and satire often shine light on issues of public interest and concern. One need only recall the stand-up routines of George Carlin,[10] the pratfalls of Chevy Chase,[11] scenes from "Thank You for Smoking,"[12] or skits from Saturday Night Live as proof of that.[13] They remain protected expressions, nonetheless. "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, . . . fundamental societal values are truly implicated." *Cohen*, 403 U.S. at 25. "That is why 'wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons,'" *id.* (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)), "and why 'so long as the means are peaceful, the communication need not meet standards of acceptability.'" *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). And, therein fall Eckhardt's words alluding to the Texas governor.

[10] https://youtu.be/0Hc8ZsywLYk

[11] https://youtu.be/_Sk0YubNnwY

[12] https://youtu.be/xuaHRN7UhRo

[13] https://youtu.be/kssJdMtcSVg; https://youtu.be/pVfUvwb167Q

Step Two

Yet speech, even that within the borders of the First Amendment, may be regulated. That leads us to the second step of *Scott*. Again, it obligates us to balance the individual's First Amendment rights against the government's interest in promoting efficient performance of its functions. The interest in play here relates to the judicial branch of our government. Preserving public confidence in it is "'a state interest of the highest order.'" *Williams-Yulee*, 575 U.S. at 446. A means of furthering that interest involves restricting judges from casting public discredit upon it and its obligation to administer justice. As said by our United States Supreme Court, "[t]he importance of public confidence in the integrity of judges stems from the place of the judiciary in the government." *Id.* at 445. "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.'" *Id.* (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton)). "The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." *Id.* at 445–46.

Yet, what of an elected official performing duties akin to those of an executive and legislature and who holds the title of "judge" in name only—does he or she hold a place in the historical concept of the judiciary? Is he or she truly a "judge" for purposes of fostering the integrity of what we have come to know as and what the *Williams-Yulee* court understands to be the "judiciary"? A judge, in the common sense, adjudicates disputes. *See City of Round Rock v. Smith*, 687 S.W.2d 300, 302–03 (Tex. 1985) (stating that "[j]udicial power is the power conferred upon a public officer to adjudicate the rights of individual citizens by construing and applying the law"). He or she does not engage, as a matter of course, in legislative activities such as enacting laws, regulations, ordinances or public resolutions voicing positions on topics of public interest.

He or she does not engage, as a matter of course, in executive activities such as supervising the expansive operations of a city, county, or state. He or she does not solicit or heed public input, as a matter of course, to perform his or her duties or make decisions. He or she does not publicly voice preconceived answers to disputes on matters of public notoriety when seeking election or prior to performing his or her official duties. Those, among other characteristics, distinguish members of the judiciary from members of the the legislative and executive branches of our government. Most importantly, our citizenry ceded the pulpit to those within the legislative and executive branches, not to those in the judicial branch.

Comparing the characteristics of the role assigned Eckhardt as Travis County Judge to those of first the judicial branch and then to the legislative and executive branches identifies the true nature of her position. As with a book, a title signifies one thing but not necessarily the true substance of what one finds upon deeper search. As previously mentioned, constitutional county judges have been tasked duties of a judicial nature. Texas law permitted Eckhardt to relinquish them, however, and she did. Her primary duties were likened to those of a county executive or legislator, not a "judge." The plane on which she travelled while performing her duties came intertwined with public debate and input. Those indicia of her job cannot be ignored and are overwhelming considerations when undertaking the balance required by the second prong of *Scott.* Indeed, the record illustrated that her role as Travis County Judge implicated the performance of no judicial functions. She enjoyed the title "judge" but had none of its duties.

Our Texas Supreme Court repeatedly cautions us against elevating form over substance. *See, e.g., Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 536 (Tex. 2019) (quoting *Dudley Constr., Ltd. v. Act Pipe & Supply, Inc.*, 545 S.W.3d 532, 538 (Tex. 2018), and stating that "'[w]henever possible, we reject form-over-substance requirements that favor procedural

machinations over reaching the merits of a case'"); *Thota v. Young*, 366 S.W.3d 678, 690 (Tex. 2012) (stating that "we have long favored a common sense application of our procedural rules that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance"). We heed that caution. The form of Eckhardt's office was the mere title "judge." Its substance was legislator and executive. So, the attributes of a judge found critical in *Williams-Yulee* as justifying unique treatment of the judiciary are absent here. The interest in restricting its members from injuring public confidence in the integrity of the judicial branch wanes when their status as a "judge" is in name only, like here. It wanes when the "judge" performs no judicial role, like here. It wanes when the sole function of the "judge," like here, is that of an executive or legislator thrust into an arena inherently requiring public debate and input as part of the office. This is not to say that a compelling interest may never arise to justify disciplinary measures against one in her unique position. However, the interest proffered by the Commission at bar is not one, given the particular circumstances before us. Thus, we strike the balance required of the second *Scott* test in favor of Eckhardt, vacate the sanctions levied by the Commission, and deny further sanction.

SPECIAL COURT OF REVIEW[14]

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