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Growing Feud Between Fifth Circuit Judges and Houston Trial Judges Shocks Legal Experts

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Litigators in Texas are being treated to an ongoing federal court drama usually reserved for judges with names such as Posner or Kozinski or at least Sam Sparks.

On Tuesday, the plot took a mighty twist.

Two highly respected federal jurists – U.S. District Judge Keith Ellison of Houston and Judge Jerry Smith of the U.S. Court of Appeals for the Fifth Circuit – have gotten into what another federal judge told *The Texas Lawbook* is “a pissing match of two old white guys wearing black robes and calling each other names.”

Judge Smith, in an opinion issued on Feb. 21, said Judge Ellison was guilty of ignoring U.S. Supreme Court precedent and trying to “stir up litigation” and having a “jaundiced view” of arbitration. The appellate judge also said Judge Ellison violated the “Supreme Court’s explicit warning to avoid even the appearance of judicial endorsement on the merits of the action.”

Judge Ellison, in a highly unusual “memorandum and order” issued Tuesday, responded that Judge Smith’s decision included “misleading and inaccurate statements” and that he hoped the federal appellate court “can achieve a higher degree of accuracy and candor” in future opinions about the case.

“In almost 20 years on the bench, this court has not had to issue any other writing like this one,” Judge Ellison wrote in a five-page opinion. “But never before has an appellate judge mischaracterized the trial record so significantly and, it appears, willfully.”

Appellate lawyers in Texas said Tuesday that they are stunned by the open and public feud.

“I’ve been practicing federal litigation for 18 years in Texas, and before that I clerked in the federal courthouse in Houston, and I have never seen anything like this before,” Christopher

Kratovil, an appellate law expert at Dykema, told *The Texas Lawbook*.

“There’s a strong tradition of inter-judicial comity in the federal system that is deeply ingrained,” Kratovil said. “This marks a sharp break with that long-standing tradition. Frankly, it surprises me.”

Chad Baruch, an appellate law partner at Johnston Tobey Baruch, said Wednesday that the actions of the two judges “just furthers the disturbingly prevalent public perception of politics driving judicial decision making.”

“This type of public exchange between members of the federal judiciary is especially disheartening given the special effort by many bar associations and lawyers over the past few years to defend federal judges against political attacks on their competence and integrity,” Baruch said. “I am afraid it will become more difficult for lawyers to take that effort seriously if federal judges are going to attack each other publicly this way.”

“Nothing about this exchange does much to advance the cause of respect for our judicial system,” he said.

The public dispute between two highly respected federal judges – who by the way work in the same federal building in Houston and share an elevator – had appellate court blogs in Texas going bananas Tuesday afternoon and night.

“I’ve never seen the like,” Houston appellate law expert Raffi Melkonian wrote on his Twitter blog Tuesday. “Astonishing.”

“Oh my, the rare reverse bench slap,” someone responded.

“Holy shit,” wrote another. “I mean, Holy Shit!”

This was the second time in two weeks that a Republican-appointed Fifth Circuit appellate

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judge has directly dressed down a highly respected Democrat-appointed Houston trial court judge in an opinion.

But this time, the federal trial judge is fighting back.

This drama started in December in *Shannon Rivenbark, et al, vs. JPMorgan Chase*, which is a Fair Labor Standards Act case seeking class action certification. Judge Ellison, who was nominated in 1999 by President Clinton, issued a decision ordering that notices of the litigation be sent to 42,000 JPMorgan Chase employees, despite the fact that 35,000 of them had apparently signed arbitration agreements waiving class action capabilities.

Judge Ellison ruled that neither party had yet invoked the arbitration agreements and he found no harm in allowing the notices to be sent out. If the individual claims were later sent to arbitration, they could be easily removed from the civil litigation in federal court.

JPMorgan Chase filed a petition for writ of mandamus asking the Fifth Circuit to take emergency action. The Fifth Circuit on Dec. 21 stayed Judge Ellison's order on the notices two months ago.

Then, on Feb. 21, Judge Smith, who was appointed by President Reagan in 1987, wrote a separate 14-page opinion denying JPMorgan Chase's request for mandamus.

But Judge Smith's comments didn't end by simply addressing the petition. Instead, he used the opinion to state that Judge Ellison appeared to demonstrate bias against one party by referring to plaintiffs as "victims of this illegality."

"Far from 'avoiding even the appearance of judicial endorsement on the merits of the action,' the district court — by referring to the 'victims of this illegality' — appeared to say that Chase had violated the FLSA," Judge Smith wrote for a three-judge panel, which included Judge Kyle Duncan and Judge Stephen Higginson.

"That disregards *Hoffmann-La Roche Inc. v. Sperling's* (a 1989 Supreme Court decision) stern command that 'courts must be scrupulous to respect judicial neutrality' and may not use their discretion to facilitate the notice process 'merely to stir up litigation,' which is precisely what this district judge did."

Dallas appellate law expert **Chad Ruback** told *The Texas Lawbook* early Wednesday morning that it is uncommon for an appellate opinion to be so

pointed in its criticism of a trial court judge.

"I can't remember ever having seen another appellate opinion which expressly stated that the trial court judge obviously has a jaundiced view of Supreme Court decisions," Ruback said. "I don't believe that the Fifth Circuit judges would have issued such a rebuke unless they felt strongly that Judge Ellison needed a wake-up call."

Ruback points out that Judge Smith was joined in the opinion by the other two members of the Fifth Circuit panel.

"If either Judge Higginson or Judge Duncan did not agree with the rebuke of Judge Ellison, they could have easily concurred in the outcome of the opinion without joining the opinion," he said. "So, it seems that all three Fifth Circuit judges assigned to the case felt that the rebuke of Judge Ellison was necessary. For whatever reason, the Fifth Circuit judges appear to have determined that they could not achieve the desired impact on Judge Ellison with more subtle guidance to him."

On Tuesday, Judge Ellison responded in an order withdrawing his Dec. 10 decision.

"It is unfortunately necessary for this court to respond to some misleading and inaccurate statements in the decision issued by the court of appeals in this case on February 21, 2019," Judge Ellison wrote. "The opinion was authored by the Honorable Jerry E. Smith. This response is necessary because the court of appeals opinion may otherwise be relied on in subsequent stages of the case."

Judge Ellison said that he hoped the three-judge panel can in the future "achieve a higher degree of accuracy and candor.

"This court can ill afford the time and effort that are required to set right such errors," he wrote.

Ruback and other appellate lawyers said that Judge Ellison's opinion was even more unusual than Judge Smith's decision.

"These are words I have never seen used by a trial court judge in response to a higher court's opinion," Ruback said. "It is obvious that Judge Ellison feels quite strongly that the Fifth Circuit's opinion was mistaken.

"It is particularly notable that Judge Ellison's response to the Fifth Circuit's opinion calls out Judge Smith by name and does so four times," he said.

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This is the second time this year for such a confrontation.

On Feb. 7, newly appointed federal appellate Judge James Ho, who clerked for Judge Smith, directly criticized Chief Judge Lee Rosenthal of Houston for ignoring Fifth Circuit precedent last year when she issued what was viewed as a landmark ruling that employment discrimination based on sexual orientation was prohibited under Title VII.

Judge Ho took direct aim at Chief Judge Rosenthal's statement that the Fifth Circuit "has not yet addressed the issue" of sexual orientation and transgender status in the workplace.

"But we have addressed the issue," Judge Ho wrote, pointing to the Fifth Circuit's 1979 opinion in *Blum v. Gulf Oil Corp.* "We expressly held that Title VII does not prohibit discrimination on the basis of sexual orientation. Yet the district court did not mention, let alone distinguish, *Blum*. Most notably, it did not contend that Title VII applies to transgender status but not sexual orientation.

"To the contrary, the court concluded that the

'same' analysis applies to transgender status and sexual orientation alike," he stated. "*Blum* remains binding precedent in this circuit to this day."

"I join in the decision to affirm the district court," Judge Ho wrote in the opinion, which was joined by Judge Patrick Higginbotham and Judge Jennifer Elrod. "But I do so with concern that the people are losing faith in their institutions — and that our courts are giving the people reason to do so."

Chief Judge Rosenthal has not responded to Judge Ho's opinion. Legal experts are mixed regarding whether there's a connection between Judge Ho's decision and Judge Smith's opinion.

"Two opinions in two weeks does not necessarily indicate a trend," Ruback said. "Only time will tell if more opinions of this nature are forthcoming."

One thing is for sure, according to appellate law experts: This year's Fifth Circuit Judicial Conference just got a lot more intense ... and interesting.