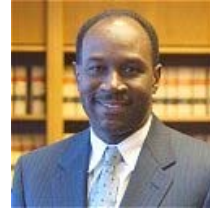


Judge Mulls Validity of Suit Against Bar

The Recorder
By **Mike McKee**
May 18, 2005



Judge Martin Jenkins, U.S. District Court for the Northern District of California
image: Jason Doly/The Recorder

A retaliation suit against the State Bar of California by one of its former prosecutors seemed to hit a wall Tuesday when a federal judge raised several questions about its viability.

"Much of what I see looks like workplace disputes that wouldn't be of public concern," U.S. District Judge Martin Jenkins said while hearing the State Bar's motion for summary judgment in San Francisco federal court.

He also said he isn't sure that Alan Konig, the ex-prosecutor who sued his employer of more than five years, had shown that his complaints about Bar procedures constitute protected speech under the First Amendment.

"His personal debate, about his feeling uncomfortable about doing the duties of his job -- why is that a matter of public interest?" Jenkins asked.

Jenkins' questions bothered Konig, who said in a telephone interview afterward that aspects of the hearing were a "little troubling."

He said he felt there was confusion by everyone about the underlying facts and that the State Bar's lawyers had focused the public interest arguments too narrowly. He also said he had never been insubordinate, but rather was trying to comply with the Bar's own rules.

Konig sued the State Bar and several of his superiors 11 months ago, claiming they retaliated against him for reporting alleged improprieties by his bosses and a couple of State Bar Court judges.

He accuses his superiors of violating rules of procedure in filing charges against miscreant lawyers and claims the judges hurt the Bar's goal of protecting the public by disregarding precedent and mistreating witnesses. He also complained that the office suffered from lack of morale.

After raising his complaints with his bosses, Konig maintains, he was transferred to a position that essentially ended his prosecutorial days. He said Tuesday that he involuntarily resigned from the State Bar's Office of Chief Trial Counsel in October.

In recent months, all but one of Konig's charges have been dismissed. And that one -- violation of his First Amendment rights -- seemed in danger Tuesday.

Judge Jenkins peppered Konig's attorney, Mayo & Rogers partner Richard Rogers, with tough questions about whether Konig's complaints, especially in a lengthy memorandum to his superiors on Sept. 11, 2003, could be considered protected speech.

"We have to examine the content and the context," he added.

Most of the complaints, the judge said, referred to Konig himself and not the office in general. "There's nothing in these memos that [says] the morale issue was broader than him," Jenkins said.

Rogers said Konig "clearly isn't talking about just himself," but rather about office-wide problems.

Kerr & Wagstaffe partner James Wagstaffe, who represented the State Bar, would have none of that.

"As my mom told me, when you use the 'I' word, the 'me' word, the 'my' word, you're usually talking

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about yourself," he said.

Wagstaffe argued that rather than facing retaliation, Konig was handled as an insubordinate employee, with his superiors trying to work with him to rein him in after he allegedly refused to follow office policies.

"Supervisors are entitled to make policy," Wagstaffe said. "Individual employees cannot do it their way. Insubordination is not protected."

Rogers had earlier told Jenkins that his client had, indeed, refused to back down, but only because he felt his bosses were trying to make him act unethically.

"After Sept. 11, they began to discipline him, they micromanaged him, they made his work environment hostile," he said.

Judge Jenkins said he had some worries about the possible existence of some "personal bias" against Konig by the State Bar Court judges. And he also asked whether Konig isn't correct that the State Bar acts improperly by charging cases only if they have clear-and-convincing evidence even though the group's own rules allow a lesser standard of reasonable cause.

Wagstaffe said that's common practice among district attorneys around the state. It's not illegal, he said, to require a higher standard of proof for filing cases.

After the hearing, Wagstaffe said he was "cautiously optimistic" that Jenkins would see the situation as a private workplace dispute and not a retaliation case.

Rogers said by telephone that he felt Jenkins was "favorable" toward Konig's position, "but it's hard to be sure."

Jenkins took the case under submission, but didn't indicate when he would rule. The case is *Konig v. Dal Cerro*, 04-2210.

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