STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 18-17

Judicial Ethics and Discrimination on the Basis of Sexual Orientation

Question 1

Rule 2.3 of the Tennessee Code of Judicial Conduct requires a judge, in the performance of judicial duties, to refrain from words or conduct that "manifest bias or prejudice" and from "engag[ing] in harassment" including but not limited to prejudice, bias, or harassment "based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." Can a judge comply with this ethical obligation and also apply state anti-discrimination law that does not prohibit discrimination based on sexual orientation?

Opinion 1

Yes. Judges must apply state law, including state anti-discrimination law, faithfully. They can do so while still complying with their ethical obligations, including Rule 2.3.

Question 2

Rule 3.6 of the Tennessee Code of Judicial Conduct directs that a judge "shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation." Does this establish a religious test that excludes from office any judge who is a member of a religious organization that disapproves of, or even condemns, sexual orientations other than heterosexual?

Opinion 2

No. A judge's membership in a religious organization is a lawful exercise of the freedom of religion and does not violate Rule 3.6.

ANALYSIS

Pursuant to its inherent constitutional authority as the "supreme judicial tribunal of the state" and its "general supervisory control over all the inferior courts of the state," the Tennessee Supreme Court has adopted ethics rules for the judges of the state. In re Bell, 344 S.W.3d 304, 313 (Tenn. 2011) (internal citations omitted); see also Tenn. Code Ann. § 16-3-501. The Code of Judicial Conduct, promulgated by the Supreme Court as Tennessee Supreme Court Rule 10, "is the set of rules by which judicial conduct is to be determined." In re Bell, 344 S.W.3d at 313. The Code of Judicial Conduct includes explanatory comments to each rule, and these comments are to

"be read in conjunction with the Rules and as aids to the interpretation and application of the Rules." Tenn. Sup. Ct. R. 10, RJC, Scope 3.

1. One of these rules, Rule 2.3, prohibits a judge and the judge's staff from manifesting bias or prejudice or engaging in harassment "based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." Tenn. Sup. Ct. R. 10, RJC 2.3(B). The comments to Rule 2.3 provide examples of manifestations of bias, including: "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based on stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics." *Id.*, RJC 2.3 cmt. 2. Under the rule, a judge "must avoid conduct that may reasonably be perceived as prejudiced or biased." *Id.* Harassment, as used in the rule, is "verbal or physical conduct that denigrates or shows hostility or aversion toward a person on the basis of one of the characteristics listed in the rule, including race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. *Id.*, RJC 2.3 cmt. 3.

Tennessee state and local law does not prohibit discrimination on the basis of sexual orientation. The Tennessee Human Rights Act prohibits discrimination in employment, public accommodations, and housing, *see* Tenn. Code Ann. § 4-21-101, and it defines "discriminatory practices" as "any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of race, creed, color, religion, sex, age or national origin," *id.* § 4-21-102(4). In 2011, the General Assembly amended the Tennessee Human Rights Act to make it clear that the act did not prohibit discrimination on the basis of sexual orientation. *See* Tenn. Code Ann. § 4-21-102(20) (defining "sex" to "refer[] only to the designation of an individual person as male or female as indicated on the individual's birth certificate"); 2011 Tenn. Pub. Acts, ch. 278, § 2. At the same time, the General Assembly enacted a law prohibiting local governments from imposing any anti-discrimination law or policy "that shall deviate from, modify, supplement, add to, change, or vary in any manner from" the state standards and definitions applicable to discrimination. Tenn. Code Ann. § 7-51-1802(a)(1), (2); 2011 Tenn. Pub. Acts, ch. 278, § 3. That law precludes local governments from adopting laws or policies to prohibit or prevent discrimination on the basis of sexual orientation and declares existing laws and policies that do so "null and void." Tenn. Code Ann. § 7-51-1802(a)-(d).

Tennessee judges can—indeed they must—both act in accordance with the Code of Judicial Conduct *and* apply Tennessee's anti-discrimination law faithfully. *See* Tenn. Sup. Ct. R. 10, RJC 1.1 ("A judge shall comply with the law[.]"); *id.*, RJC 2.2 ("A judge shall uphold and apply the law[.]").

No conflict exists between these two obligations. The Code of Judicial Conduct governs a judge's personal conduct to ensure procedural fairness, whereas the Tennessee Human Rights Act sets the substantive law that a judge must apply when deciding certain disputes. Rule 2.3 applies only to judges' actions "in the performance of judicial duties," and establishes ethical requirements necessary to maintain the integrity and appearance of impartiality that are essential to judicial proceedings. *Id.*, RJC 2.3(A), (B) & cmts. 1, 2. This means that a judge may not, on the basis of personal characteristics such as those listed in Rule 2.3, engage in harassment or manifest bias or

prejudice towards the litigants, attorneys, witnesses, or anyone else involved in the judicial process.

The Tennessee Human Rights Act, on the other hand, establishes the anti-discrimination law that the judge must use to decide certain cases. The Act prohibits covered entities and individuals from engaging in "direct or indirect act[s]" of discrimination on the basis of the listed characteristics. Tenn. Code Ann. § 4-21-102(4). In a discrimination case, therefore, a judge must apply this law, as written and enacted by the General Assembly, to the facts of the case to arrive at a resolution of the dispute between the parties. Applying this substantive law to resolve a case does not conflict with the judge's ethical duties to ensure that the process of deciding the case is fair and impartial.

The Tennessee Supreme Court, in the exercise of its supervisory authority, determined that manifestations of bias or prejudice and harassment by judges may "impair[] the fairness of [a judicial] proceeding and bring[] the judiciary into disrepute." Tenn. Sup. Ct. R. 10, RJC 2.3 cmt. 1. The Court included in Rule 2.3 a list of several examples of personal characteristics that should not be the basis for such manifestations, and that list, which is not intended to be exhaustive, includes characteristics such as sexual orientation, marital status, and political affiliation that are not protected under state anti-discrimination law. *Id.*, RJC 2.3(B), (C). Rule 2.3 thus protects the judiciary from allegations that a particular judge's actions are improperly based on *personal* prejudices or partialities related to the types of characteristics listed, instead of being based on the impartial application of the law.

In sum, a judge who impartially applies state anti-discrimination law, as written and enacted by the General Assembly, is fulfilling the judicial duty to "uphold and apply the law," *id.*, RJC 2.2, not manifesting bias or prejudice or engaging in harassment. Rule 2.3 does not, nor could it, prevent a judge from faithfully applying that law in a case before the court.

2. Rule 3.6 of the Code of Judicial Conduct prohibits a judge from holding a membership "in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation." Tenn. Sup. Ct. Rule 10, RJC 3.6(A). It further prohibits a judge from "us[ing] the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination" on any of those bases. *Id.*, RJC 3.6(B). As is the case for manifestations of bias and harassment proscribed under Rule 2.3, membership in an organization that practices invidious discrimination "gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary." *Id.*, RJC 3.6 cmt. 1. Accordingly, if a judge learns that an organization to which he belongs practices such discrimination, "the judge must resign immediately from the organization." *Id.*, RJC 3.6 cmt. 3.

Comment 4 to Rule 3.6 clarifies that the rule does not proscribe membership in any religious organization: "A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule." *Id.*, RJC 3.6 cmt. 4. This comment reflects the Tennessee Supreme Court's official interpretation of Rule 3.6, *see id.*, RJC, Scope 3, and prevents the rule from infringing on judges' constitutional right to practice their religion, *see* U.S. Const. amend I; Tenn. Const. art. I, § 3, and from violating other constitutional principles such as the prohibition against any religious test for office, *see* Tenn. Const. art I, § 4.

Accordingly, Rule 3.6 does not establish a religious test that excludes from office members of any religious organization, including ones that disapprove of or condemn homosexuality. Rule 3.6 is inapplicable to membership in religious organizations.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JONATHAN DAVID SHAUB
Assistant Solicitor General

Requested by:

The Honorable John D. Ragan
State Representative
614 Cordell Hull Building
Nashville, TN 37243