

STATE OF MICHIGAN
IN THE SUPREME COURT

In re:

The Honorable Beverley Nettles-Nickerson,
Judge, 30th Circuit Court

Supreme Court No. 133929

JTC: Formal Complaint No. 81

AMICI CURIAE BRIEF
OF THE
MICHIGAN CIVIL RIGHTS COMMISSION
AND
MICHIGAN DEPARTMENT OF CIVIL RIGHTS

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Table of Contents

	<u>Page</u>
Counter-Statement of Standard of Review	iv
Counter-Statement of Questions Involved.....	v
Counter-Statement of Facts.....	1
Argument	1
I. A Judge Facing Discipline Based On The Decision And Recommendation Of The Michigan Judicial Tenure Commission Should Not Be Ordered To Pay The Entire Costs Incurred By The Commission In Prosecuting The Complaint When Reimbursing Such Costs Would Punish The Judge For Having Filed A Complaint With The Michigan Department Of Civil Rights, Reward The Judicial Tenure Commission For Filing A Civil Rights Related Count Against The Judge Without Presenting A Legal Basis For Doing So, And Have A Chilling Effect On Others Who Might Have Legitimate Concerns That Their Own Civil Rights Are Being Violated.	2
A. Introduction.....	2
1. Amici Curiae have a unique interest in this matter.....	2
2. Amici Curiae take no position on the other issues presently before this Court.....	3
3. This is an issue of first impression.....	3
B. Judge Nettles-Nickerson should not be penalized by being ordered to pay any of the costs related to having filed a complaint with the Department of Civil Rights, because the JTC’s charge was improperly brought in violation of state law prohibiting discipline of an individual for filing such a complaint.	4
1. The Judicial Tenure Commission’s Examiner Complaint charged that Judge Nettles-Nickerson should be disciplined for filing a civil rights complaint.....	4
2. Michigan law prohibits punishing a person for filing a complaint with the Department of Civil Rights.....	5
3. In his Findings of Fact and Conclusions of Law the Special Master in this matter agreed that it would be improper to penalize Judge Nettles-Nickerson for having filed her claim with the Department of Civil Rights.....	6
4. The JTC presently, through its effort to now charge Judge Nettles-Nickerson for expenses related to its own error of wrongly pursuing the allegation, is once again seeking to penalize the Judge “for exercising her right as a citizen.”.....	6

C. Judge Nettles-Nickerson should not be penalized by being ordered to pay any of the costs related to statements she made indicating that she believed she was being treated differently than others due to her race, because it was improper for the Judicial Tenure Commission to have ever considered the statements as possible cause for discipline without any consideration being given to whether the belief was genuine or that it might in fact be true. . 7

1. The Examiner went to considerable lengths and expense to find and call witnesses to establish that Judge Nettles-Nickerson said she felt she was being treated differently due to her race – but he presented absolutely no evidence that she wasn't, or that she didn't honestly believe that she was..... 7

2. The Examiner then objected to Judge Nettles-Nickerson's efforts to call witnesses who would have provided the basis for her belief that she was being treated differently because of her race..... 9

3. The Examiner should not have brought charges of "playing the race card", without being prepared to present at least some evidence that Judge Nettles-Nickerson knew her statements to be untrue..... 10

4. The Judicial Tenure Commission later dismissed all remaining allegations that had accused Judge Nettles-Nickerson of "making unfounded accusations of racism," and of "playing the race card," because "the evidence presented does not support a determination that [Judge Nettles-Nickerson] lacked a good faith belief in the truth of her assertions regarding race and racism."..... 12

5. The Judicial Tenure Commission now seeks to have Judge Nettles-Nickerson ordered to pay \$128,861.26 to reimburse the Commission for ALL costs, fees, and expenses incurred in prosecuting the complaint, including its costs in prosecuting the unsupported allegations. 13

Conclusion and Relief Sought 14

Index of Authorities

	<u>Page</u>
CASES:	
<i>In re Noecker</i> , 472 Mich. 1; 691 N.W.2d 440 (2005)	iv, 3, 14
<i>In re Chrzanowski</i> , 465 Mich 468; 636 NW2d758 (2001)	iv, 3
<i>Booker v Brown & Williamson Tobacco Co, Inc</i> , 879 F2d 1304, (CA6, 1989)	4, 7
<i>In re Ferrara</i> , 458 Mich 350, 582 NW2d 817 (1998)	14
STATE CONSTITUTIONS:	
Const 1963, Art 5, §29	2
STATUTES:	
Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.	2, 4, 5
MCL 37.2602(c)	2
MCL 37.2701(a)	5
Title VII of the Civil Rights Act of 1964 (28 USC § 2000e et seq.)	3
COURT RULES:	
MCR 9.205(B)	3

Counter-Statement of Standard of Review

The Standard of review for the issue raised by Amici Curiae is **de novo**.

This Court reviews the Judicial Tenure Commission's factual findings and its disciplinary recommendations de novo. *In re Noecker*, 472 Mich. 1, 8; 691 N.W.2d 440 (2005, citing *In re Chrzanowski*, 465 Mich 468; 636 NW2d758 (2001)).

Amici Curiae take no position on the standards of review set forth by the parties relative to issues other than the imposition of the entire costs of prosecution as a disciplinary sanction.

Counter-Statement of Questions Involved

I. Should a judge facing discipline based on the Decision and Recommendation of the Michigan Judicial Tenure Commission (MJTC) be ordered to pay the entire costs incurred by the Commission in prosecuting the complaint when reimbursing such costs would, punish the judge for having filed a complaint with the Michigan Department of Civil Rights, reward the MJTC for filing a civil rights related count against the judge without presenting a legal basis for doing so, and have a chilling effect on others who might have legitimate concerns that their own civil rights are being violated?

Amici Curare's answer: "No"

Judge Beverley Nettles Nickerson would answer: "No"

Judicial Tenure Commission would answer: "Yes"

Counter-Statement of Facts

Amici Curiae accept the statement of facts as presented by Judge Beverley Nettles-Nickerson. Additional facts may be included in the argument portion of this brief when relevant.

Argument

- I. A Judge Facing Discipline Based On The Decision And Recommendation Of The Michigan Judicial Tenure Commission Should Not Be Ordered To Pay The Entire Costs Incurred By The Commission In Prosecuting The Complaint When Reimbursing Such Costs Would Punish The Judge For Having Filed A Complaint With The Michigan Department Of Civil Rights, Reward The Judicial Tenure Commission For Filing A Civil Rights Related Count Against The Judge Without Presenting A Legal Basis For Doing So, And Have A Chilling Effect On Others Who Might Have Legitimate Concerns That Their Own Civil Rights Are Being Violated.**

A. Introduction

1. Amici Curiae have a unique interest in this matter.

Amicus Curiae Michigan Civil Rights Commission (MCRC) is a constitutionally created body charged with a duty “to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination.” (Const 1963, Art 5, §29)

Amicus Curiae Michigan Department of Civil Rights (MDCR) was established by the state legislature in 1965, as a staff complement to implement the Commission’s policies. (Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.). The Department enforces the state’s civil rights laws and is tasked to “receive, initiate, investigate, conciliate, adjust, dispose of, issue charges, and hold hearings on complaints alleging a violation of this [civil rights] act . . .” (MCL 37.2602(c)).

As the bodies charged with enforcing Michigan’s civil rights laws, Amici Curiae challenge that portion of the Michigan Judicial Tenure Commission (JTC) recommendations seeking to have Judge Nettles-Nickerson reimburse the JTC for those expenses it incurred investigating and prosecuting civil rights related issues that were never properly placed before the Special Master hearing this case.

2. Amici Curiae take no position on the other issues presently before this Court.

Neither Amici Curiae Michigan Civil Rights Commission nor Michigan Department of Civil Rights has independent knowledge of, and neither takes a position on, the truth or falsity of any of the counts, charges and/or allegations brought against Judge Nettles-Nickerson other than as described below (relative to Count X and the imposition of costs). Nor do Amici Curiae challenge the Michigan Judicial Tenure Commission’s recommendation that Judge Nettles-Nickerson be ordered to pay costs not related to the civil rights allegations, provided those costs can be fairly separated in a manner that assures she is not sanctioned with costs that were related.

3. This is an issue of first impression

While MCR 9.205(B) now provides that a judge may be ordered to pay the costs, fees, and expenses incurred by the Judicial Tenure Commission in certain circumstances, this has not long been the case. As recently as 2005 this Court stated that “no specific court rule or statute provides for imposing costs in judicial disciplinary matters.” (*In re Noecker*, 472 Mich. 1, 16; 691 N.W.2d 440 (2005, citing *In re Chrzanowski*, 465 Mich 468; 636 NW2d758 (2001)). Amici Curiae have found no case (before or) since which discusses whether, if costs are imposed, they must necessarily include all costs, or whether the amount may be equitably divided in appropriate instances.

B. Judge Nettles-Nickerson should not be penalized by being ordered to pay any of the costs related to having filed a complaint with the Michigan Department of Civil Rights, because the JTC's charge was improperly brought in violation of state law prohibiting discipline of an individual for filing such a complaint.

After noting that the provisions of Elliott-Larsen Civil Rights Act and Title VII of the Civil Rights Act of 1964 (28 USC § 2000e et seq.) are to be applied the same way, the 6th Circuit Court of Appeals ruled in a case out of Michigan that each law prohibits retaliatory conduct in two situations. “(1) when an employee “has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding or hearing under [Elliott-Larsen],” the participation clause; or (2) when an employee “has opposed a violation of [Elliott-Larsen],” the opposition clause. (*Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1312, (CA6, Mich, 1989, parentheses and quotation marks in original).

Judge Nettles-Nickerson's filing her civil rights complaint is an act covered by “the participation clause.”

“The “exceptionally broad protection” of the participation clause extends to persons who have “participated in any manner” in Title VII proceedings. Protection is not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong.” (Id., citations omitted).

1. The Judicial Tenure Commission's Examiner Complaint charged that Judge Nettles-Nickerson should be disciplined for filing a civil rights complaint.

On or about May 16th, 2007 the Judicial Tenure Commission filed a ten-count complaint against Hon. Beverley Nettles-Nickerson, seeking her removal from the 30th Circuit Court bench. Count ten of the Complaint, entitled “Race and Racism” included a number of incidents where

the Commission alleged that Judge Nettles-Nickerson was alleged to have “played the race card,” and for which the Commission contended she should be disciplined.

The most specific of these charges stated, at paragraph 99: “On or about January 18, 2006, [Judge Nettles-Nickerson] filed her complaint with the Michigan Civil Rights Commission.” It later stated at paragraph 100, that “One week later, Respondent withdrew her complaint on January 25th.”

2. Michigan law prohibits punishing a person for filing a complaint with the Department of Civil Rights.

The Michigan Department of Civil Rights released a public statement on May 21, 2007 in response to the Commission’s Complaint. MDCR stated that “While neither the [Civil Rights] Commission nor Department has any current involvement or legal interest in the matter involving Judge Nettles-Nickerson, it is imperative to clarify that the legal right of Michigan residents and visitors to file complaints with the Michigan Department of Civil Rights is protected. Both the Elliott-Larsen and Persons With Disabilities Civil Rights Acts explicitly provide protection from acts of retaliation for civil rights activity, including filing a complaint with MDCR.” (Respondent’s Exhibit 94)

The Elliott-Larsen Civil Rights Act, specifically prohibits any retaliation against a person because that person has “made a charge” or “filed a complaint” with the Department of Civil Rights. MCL 37.2701(a). In Judge Nettles-Nickerson’s case the prohibition is particularly critical, and punishing her for filing her complaint is particularly egregious, because as MDCR noted in the above referenced public statement: “Such a message from a legal authority would have a chilling effect on the state’s ability to protect persons who legitimately believe they may be victims of illegal discrimination.” (Emphasis added.)

3. In his Findings of Fact and Conclusions of Law the Special Master in this matter agreed that it would be improper to penalize Judge Nettles-Nickerson for having filed her claim with the Department of Civil Rights.

On February 12, 2008 Honorable Leopold P. Borrello, the Special Master appointed in this matter, issued his “Master’s Findings of Fact and Conclusions of Law.” Although he did conclude that Judge Nettles-Nickerson had in other ways acted “inappropriately” when using race and allegations of racism, the Special Master specifically rejected the portion of Count 10 dealing with the filing of the Civil Rights complaint. He stated in no uncertain terms that, “it is [Judge Nettles-Nickerson’s] right to file such a claim. [Judge Nettles-Nickerson] should not be penalized for exercising her right as a citizen.” (Masters Findings at 30, 32)

4. The JTC presently, through its effort to now charge Judge Nettles-Nickerson for expenses related to its own error of wrongly pursuing the allegation, is once again seeking to penalize the Judge “for exercising her right as a citizen.”

The Special Master ruled that Judge Nettles-Nickerson “should not be penalized” for filing her claim with MDCR. The JTC accepted that ruling when it filed the “Examiner’s Petition to Adopt the Report of the Master and Modify Evidentiary Ruling”. In this pleading, which the JTC filed with the Michigan Supreme Court on or about March 6, 2008, the Examiner states with respect to the three entirely rejected counts and “that portion of Count X concerned with the filing of the Complaint with the Civil Rights Commission,” that the “Examiner disagrees but will not contest those findings.” (Examiner’s Petition at 4)

Nonetheless, and in spite of the JTC’s indication that it too “adopts the findings of facts set forth in the Master’s report” (Decision and Recommendation for Order of Discipline, p 2), the JTC now recommends that Judge Nettles-Nickerson be ordered to pay \$128,861.26 to the

JTC. This amount represents the entire amount of the expenses incurred by the JTC, as billed by the JTC Examiner. (*Id.* at 16)

C. Judge Nettles-Nickerson should not be penalized by being ordered to pay any of the costs related to statements she made indicating that she believed she was being treated differently than others due to her race, because it was improper for the Judicial Tenure Commission to have ever considered the statements as possible cause for discipline without any consideration being given to whether the belief was genuine or that it might in fact be true.

As noted above, when one opposes a perceived civil rights violation, but does not ‘participate’ in the process of filing a formal complaint, their acts are protected from retaliatory acts by the “opposition clause.” (*Booker* at 1312).

Judge Nettles-Nickerson’s comments that make up the remainder the JTC’s now dismissed Count X are acts covered by “the opposition clause.”

“A person opposing an apparently discriminatory practice does not bear the entire risk that it is in fact lawful, he or she must only have a good faith belief that the practice is unlawful.” (*Id.* at 1312-1313, citations omitted, emphasis added).

1. The Examiner went to considerable lengths and expense to find and call witnesses to establish that Judge Nettles-Nickerson said she felt she was being treated differently due to her race – but he presented absolutely no evidence that she wasn’t, or that she didn’t honestly believe that she was.

In addition to the portion of Count X that specifically faulted Judge Nettles-Nickerson for filing her civil rights complaint with MDCR, other allegations included instances where the Judge expressed to various JTC witnesses that she believed she was being treated differently in whatever given incident because of her race. The JTC called witnesses to testify to these instances including, e.g. Ann Marie Ward-Fuchs (vol 5), Hon. Joyce Draganchuk (vol 7), Rhonda Swaze (vol 7), Angela Morgan (vol 11), Stewart Dunnings (vol 15), and Hon. William E. Collette (vol 17-18).

These witnesses were called by the JTC's Special Examiner to establish that Judge Nettles-Nickerson made certain comments. The Special Examiner made no attempt to determine whether there might be some truth to Judge Nettles-Nickerson's comments, or whether Judge Nettles-Nickerson may have had genuine reason to believe the comments were true (even if they ultimately might not have been). One example is particularly telling.

Ann Marie Ward-Fuchs had been a law clerk for Judge Nettles-Nickerson (vol 5 at 666). Ms. Ward Fuchs testified that on one occasion when the Judge was asking about who was spreading stories, "I basically told her that I didn't know who was spreading those specific rumors about her. And there was a picture hanging on her wall, and it was a black girl and she was holding some books, she was walking to school, and she was with two uniformed police officers, and she said, "You see that little girl in the picture, I feel like that little girl." And she looked at me and said, "I will not hesitate to play the race card.'" (Id. at 675).

After establishing that the comment was made, the Special Examiner immediately went on to a different issue involving a different incident on a different date. He did not ask Ms. Ward-Fuchs whether she believed the Judge may have had a valid reason to feel as she said she did. More tellingly, the Special Examiner does not ask Ms. Ward-Fuchs whether the Judge appeared genuine in her statement that she identified with the girl in the picture.

One reason the Special Examiner may not have asked is apparent to anyone who has seen the picture that Ms. Ward-Fuchs is describing. The girl in the picture is in no way the offensive, 'in your face', black radical caricature that the Special Examiner appears to want to paint Judge Nettles-Nickerson as. The girl is instead, a quiet and extremely isolated figure who shows equal amounts of fear, and of determination not to give into it. When the Judge identifies with this

child, “playing the race card” is not a threat to make false accusations, it is an expression that she will not be cowed into giving up and going away.

Most striking is that Judge Nettles-Nickerson at this point is making these comments alone with her law clerk in the privacy of chambers. Perhaps the private setting and reflective nature of the comments explain why Ms. Ward-Fuchs’ testified her only comment in reply was “If that’s honestly how you feel, then that is an option that you have” -- hardly the response of someone who believes they just heard a threat to make false accusations. (Id. at 676).

2. The Examiner then objected to Judge Nettles-Nickerson’s efforts to call witnesses who would have provided the basis for her belief that she was being treated differently because of her race.

When Judge Nettles-Nickerson attempted to call a witness (an attorney) to testify about how Chief Judge Collette treated other African-Americans, the Special Examiner objected stating “this Complaint does not involve allegations against Judge Collette.” (vol 20 at 3505). The Special Master then sustained the objection stating “Judge Collette has nothing to do with this right now.” (Id.) After getting a ruling that no such testimony would be allowed, Judge Nettles-Nickerson’s attorney then noted for the Special Master that “I believe that that ruling regarding not allowing testimony related to Judge Collette’s treatment of anybody else based upon race or bias, et cetera, is probably going to trim our witness list down by about six or eight people at a minimum.” (Id. at 3507).

The Special Examiner’s objection, and the Special Master’s ruling, might have been proper if Judge Nettles-Nickerson was suing Judge Collette for discrimination. Here, however, what was supposed to be on trial was whether Judge Nettles-Nickerson’s comments about her thoughts and opinions were made while knowing them to be untrue. Preventing her from calling these witnesses, prevented her from establishing at a minimum, a basis for why she felt as she

did. The JTC Special Examiner, by objecting to all such testimony, evidences the belief that allegations of racism and disparity in treatment were to be presumed false and malicious.

3. The Examiner should not have brought charges of “playing the race card”, without being prepared to present at least some evidence that Judge Nettles-Nickerson knew her statements to be untrue.

The JTC should not have accused Judge Nettles-Nickerson of crying wolf, if it was not prepared to show no wolf existed. The Examiner states Judge Nettles-Nickerson should be disciplined because she, for example, “again played the ‘race card,’ and accused the Honorable William Collette . . . of treating her differently because she was black.” (Examiner’s Closing Argument at 50). The Examiner ‘accuses’ Judge Nettles-Nickerson of having “made racial remarks or accused people of racism, whether directly or through “code words” with the same meaning.” (Examiner’s Brief in Support of Petition to Adopt the Report of the Master at 38). In one instance where Judge Nettles-Nickerson “asked Ms. Swayze if she had sent the memo simply because [the Judge] was a black female” the Examiner goes so far as to characterize it as an “accusation” of racism. (Id. at 40, emphasis added).

In short, the JTC has offered evidence establishing that Judge Nettles-Nickerson said she felt she was being treated differently because of her race. They have shown that the Judge characterized such treatment as racism. What they did not show, or even attempt to show, was that the statements were unfounded and knowingly untrue.

In point of fact, there was testimony establishing that Judge Nettles-Nickerson was being treated differently.

Judge Collette also agreed that he had asked a court employee to monitor and log Judge Nettles-Nickerson’s attendance (absences, tardiness, sick days etc.), to the point of checking whether and when her car was in the parking lot. (vol 18 at 3085-91). When asked if it was true

that he had never asked “any other Court employee at the Court, to keep that type of record, or maintain that type of record regarding any of the other Judges”, Judge Collette responded, “That’s correct.” (Id. at 3086).

When Chief Judge Collette was asked if “there were any other Judges in the building . . . that were conducting a docket that they customized, that did not permit their Court Reporter to get a lunch break between those hours?” he responded, “There may have been.” (vol.17 at 2976). When pushed on the subject and asked whether Judge Giddings had said he was doing pretty much the same thing that Judge Collette had forbidden of Judge Nettles-Nickerson, Judge Collette’s response was to explain why Judge Giddings opinion that his conduct was the same was mistaken. (vol 15 at 2981-3003). While acknowledging that both Judge Nettles-Nickerson and Giddings may have believed the situations were the same (and thus that they were being treated differently), Judge Collette explained they were different because the latter used a video court recorder and the former did not. In fact, Judge Collette admitted that he declined to permit the matter to be placed on the agenda for a meeting of the trial judges, which would have allowed the judges to compare and discuss implementation of the ‘policy’. (Id.).

Simply put, the evidence shows that Judge Nettles-Nickerson was being treated differently. While it is entirely possible that there are non-racial reasons for the disparity in treatment, the fact that the Chief Judge refuses to discuss them certainly leaves the door open to the possibility of racial discrimination.

If the Examiner had no evidence to introduce that would show that Judge Nettles-Nickerson did not, or rationally could not, believe what she was saying to be true, it was his obligation not to introduce the statements as disciplinable offenses.

4. The Judicial Tenure Commission later dismissed all remaining allegations that had accused Judge Nettles-Nickerson of “making unfounded accusations of racism,” and of “playing the race card,” because “the evidence presented does not support a determination that [Judge Nettles-Nickerson] lacked a good faith belief in the truth of her assertions regarding race and racism.”

In its April 24th, 2008, Decision and Recommendation for Order of Discipline, the Judicial Tenure Commission acknowledged that “the evidence presented does not support a determination that Respondent lacked a good faith belief in the truth of her assertions regarding race and racism.” (Decision and Recommendation at 3).

The JTC correctly notes that the burden of proof lies with the Examiner and that Judge Nettles-Nickerson thus did not have to prove her “accusations.” (Id. at 4-5). The JTC concluded that “we cannot find that the respondent *knowingly* made false accusations of race discrimination.” (Id. at 7, emphasis in original).

What the JTC neglects to do, however, is establish that while the Judge was not “obligated to establish the specific factual basis substantiating her accusations”, the Examiner was obligated to be able to do so with his. The JTC also notes that “No evidence in the record supports a conclusion that [Judge Nettles-Nickerson] was in fact, discriminated against on the basis of her race.” (Id. at 6). It does not note that the Special Master prevented the Judge from presenting any such evidence. Most significantly, while the JTC does feel the need to specifically speak about the complete lack of this evidence, which was not required -- it does not do so with the evidence that was required. Had it done so, the JTC would have had no choice but to acknowledge that “no evidence in the record supports” the charges brought relating to the Judges allegedly unfounded accusations of racism.

There being no evidence to support these charges, they should not, as a matter of law, have been brought.

5. The Judicial Tenure Commission now seeks to have Judge Nettles-Nickerson ordered to pay \$128,861.26 to reimburse the Commission for ALL costs, fees, and expenses incurred in prosecuting the complaint, including its costs in prosecuting the unsupported allegations.

The Judicial Tenure Commission recommends that this Court order Judge Nettles-Nickerson pay it the sum of \$128,861.26. (Decision and Recommendation at 16). This figure represents the sum total of costs, fees and expenses related to the JTC's action against Judge Nettles-Nickerson as submitted to the JTC in bill form by the JTC's Examiner. (Id.).

Because this sum represents all costs, it includes all the cost related to the time spent inappropriately gathering and presenting evidence related to the previously dismissed race related allegations included in Count 10. Because none of the allegations included in Count 10 were properly brought, the JTC should not be rewarded, and Judge Nettles-Nickerson should not be punished, for the JTC's conduct in bringing them.

Amici Curiae believe making Judge Nettles-Nickerson pay for these expenses may have an even greater chilling effect than bringing the charges in the first place may already have done. While the judicial system integrity would be harmed by false accusations of racism, it has no less an interest in properly investigating perceived or alleged disparities in treatment, and in exposing, and eliminating any real instances of racism. It is critical that a body like the JTC not presume anyone who believes they are being discriminated against is "playing the race card" with malicious intent. The JTC should not be rewarded for making that presumption in this instance, because doing so would send a message to anyone in a similar situation that they best keep their concerns about possible discrimination to themselves.

The JTC should never have charged Judge Nettles-Nickerson with the allegations in Count 10 at the outset of this case. The JTC should not be permitted to charge her for them now.

Conclusion

This Court has stated that in Judicial Tenure matters: “[The Supreme Court’s] primary concern in determining **the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public.**” (*In re Noecker*, at p. 13-14; citing *In re Ferrara*, 458 Mich 350, 582 NW2d 817 (1998), emphasis added). Adopting the recommendation of the JTC, and **ordering that Judge Nettles-Nickerson pay the JTC \$128,861.26, would have exactly the opposite effect.**

Ordering Judge Nettles-Nickerson to reimburse the JTC for the costs incurred by the JTC related to the Judge’s filing a complaint with the Department of Civil Rights, would punish the Judge for having filed the complaint. This would violate the Elliott-Larsen Civil Rights Act’s prohibition against punishing someone for the act of filing a complaint. It would also cause the Judge to pay, not for mistakes she made, but for the mistakes of the JTC.

Ordering Judge Nettles-Nickerson to reimburse the JTC for any of the costs the JTC incurred in investigating and prosecuting her for stating that she felt she was being treated differently than others based on her race, when the JTC failed to investigate whether the statements were believed (or possibly true), likewise penalizes the Judge for the JTC’s error.

It is important to note that Amici Curiae do not here represent that Judge Nettles-Nickerson was in fact being discriminated against. Regardless of what a complete investigation might reveal, it was entirely improper for the JTC Examiner to offer the statements with nothing more than an expectation that it should be automatically and irrebuttably presumed that any public expression even questioning whether a chief judge was treating a subordinate judge differently because of her race was, by definition, spurious.

Of particular importance to Amici Curiae is that these injustices would not only be inflicted upon Judge Nettles-Nickerson but that, if endorsed by the Michigan Supreme Court, they are likely to have a significant chilling effect on others who might have legitimate concerns that their own civil rights are being violated. Furthermore, even beyond the area of potential civil rights claimants, the perception that a judge would be financially sanctioned for believing that her race was causing her to be treated differently would harm the impartiality and integrity of the judiciary in the eye of at least portions of the public.

Relief Sought

Amici Curiae Michigan Civil Rights Commission and Michigan Department of Civil Rights ask that if this Court decides to accept the JTC's recommendation to order Judge Nettles-Nickerson to pay an assessment of costs, fees and expenses to the JTC, that it not do so in the recommended amount of \$128,861.26.

Amici Curiae believe it is impossible to accurately determine precisely and with any certainty the portion of the total amount that was spent in pursuit and presentation of the race related charges, but estimate it could be as much as 20 or 25% of the total requested. Amici Curiae also believe that justice would require that the benefit of any doubt in such a determination be resolved against the JTC which should never have brought the charges. As such, **if costs, fees and expenses are to be ordered Amici Curiae respectfully request that they not exceed \$96,645.95.**

If this Court does not believe that the portion of costs spent in pursuit and presentation of the race related charges can be properly determined, or if this Court concludes that the assessment of costs must for some reason be all or nothing, Amici Curiae respectfully requests that no costs, fees and expenses be ordered.

Amici Curiae take no position on the legality or appropriateness of ordering costs, fees and expenses unrelated to the race allegations.

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