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November 6, 2013

Timothy Lane "Slim" Smith  
Managing Editor  
The Commercial Dispatch  
P.O. Box 511  
Columbus, MS 39703-0511

Dear Slim:

On behalf of the Mayor and City Council I am writing in response to your numerous articles calling upon the Mayor and City Council to suspend or remove from office Municipal Court Judge Nicole Clinkscales (2 columns on October 29, 1 column on November 2, a thorn on November 4 and an opinion column on bullying on November 5).

In the October 29, 2013 edition of the Commercial Dispatch, Sarah Fowler began the charge against Judge Clinkscales in an article entitled "**Judge attacks school board member on Facebook.**" The lead sentence of the article then stated "*A Columbus Municipal Judge took to her Facebook page to portray a member of the Columbus Municipal School District Board of Trustees as an Uncle Tom.*" Ms. Fowler then went on to say that "*An 'Uncle Tom' is a perjorative term used to describe a black person considered too eager to be friendly and helpful to white people in authority. The term is taken from a character in Harriet Beecher Stowe's novel 'Uncle Tom's Cabin.'*" Without question the reporter, and your newspaper, intended to make it appear as though the judge's comment about a school board member was a pejorative term that was "racially charged."

Despite Sarah's and the Dispatch's efforts to portray Judge Clinkscales comments as racially perjorative, Judge Clinkscales Facebook postings do not say that school board member Aubrey Turner was an Uncle Tom. Rather, the judge's

Facebook posting appears to classify actions of the School Board as “tom foolery” and later says “I am SO over Board Member Turner.”

On the same day that Ms. Fowler’s article made the headlines of the Commercial Dispatch, your Editorial Staff published a column entitled “Our View” which characterized Judge Clinkscales comments as “inexcusable” and asserted that Judge Clinkscales should resign or be removed from office. In that opinion column, your newspaper again stated “[O]n October 24, Clinkscales turned to her Facebook page to attack CMSD Board Member Aubra Turner, inferring [sic] that Turner, who like Clinkscales is black, is an Uncle Tom.” Later in your opinion column you finally admit that Judge Clinkscales did not actually call board member Aubra Turner an Uncle Tom but in your opinion it was “an obvious reference to the phrase.”

Ms. Fowler’s headline column from October 29<sup>th</sup> referred to the Mississippi Supreme Court case of *Mississippi Commission on Judicial Performance v. Osborne*, 11 So. 3d 107 (Miss. 2009), which involved the discipline of a judge for making racist comments during a campaign for re-election in Greenwood, Mississippi. From my perspective, it appears that the Dispatch has attempted to “reverse engineer” your articles about Judge Clinkscales posts in an effort to contort Judge Clinkscales Facebook comments so as to be bound by the precedent established in *Osborne*. However, *Osborne*, is drastically different from Judge Clinkscales’ Facebook postings. In *Osborne*, County Court Judge Solomon Osborne addressed the Greenwood Voters League as follows:

*White folks don’t praise you unless you’re a damn fool. Unless they think they can use you. If you have your own mind and know what you’re doing, they don’t want you around.*

*Osborne*, 11 So. 3d at 109. To be sure, there can be no debate that Judge Osborne classified members of the white race in a negative light. His statements patently called into question his ability to be fair when adjudicating court cases involving white persons.

In contrast to *Osborne*, Judge Clinkscales’ Facebook posting said “*I never thought I’d see the kind of “tom” foolery AGAIN that I have seen in what is supposed to be an arena of education and higher order thinking. We are yet reduced back to having to defend an opposing view and race is the dirty little word no one wants to say yet it continues to be tossed around. I am SO over Board Member Turner!*” In order for a person to conclude that Judge Clinkscales was referring to board member Turner as an “Uncle Tom” one has to draw an inference or a conclusion from words that

do not appear in the writing. Applying that approach, the Dispatch would have the Mayor and City Council remove a municipal court judge from office based upon what it thinks she thought when she made the post.

It has been suggested that the Mayor and City Council had no choice but to suspend or remove Judge Clinkscales from office because they suspended some emergency responders following their vile and reprehensible social media comments about the mother of an injured minor. Yet, Judge Clinkscales Facebook posts were in no way similar to the comments of the fireman who resigned following his social media postings. Therein, the fireman posted:

*“People never cease to amaze me. Mama yelling oh my babyeee my babyeee....*

*Hey you stupid ass, where was babyees mama at [sic] while your 2 year old was getting hit by a truck [sic]. Mama needs to have her guts cut out so there won't be anymore [sic] babes [sic]. Freeloading Ignorant woman.*

Slim, I do not believe you would actually attempt to suggest that the above quoted words are comparable to suggesting that an elective body was guilty of “tomfoolery”. My research leads me to conclude that “tomfoolery” is a term from old England from the time at which “Thom” was a word used to describe a common man and “foolery” was used to describe the conduct of a fool. Hence the word “tomfoolery” describes a common man acting foolish and in no way is a racially charged term.

Further, the *Osborne*, case provides that “*The Supreme Court alone has the power to impose sanctions*” upon a Judge for misconduct in office. I do not take that to mean that the Municipal Court Judge does not serve at the will and pleasure of the Council and Mayor. Indeed our Charter provides that they are “will and pleasure” employees. However, the Mississippi Supreme Court has indicated that it might be best for the Mayor and City Council to avoid intermeddling with the Court, once the appointments have been made. In *Scott v. Stater*, 707 So. 2d 182 (Miss. 1997), the Court said:

“Neither the Mayor nor the board of aldermen may remove a municipal judge once on the bench on their own authority where the municipal judge has violated the Code of Judicial Conduct. This rule provides a safeguard protecting the court system from the usurpation of political power and influence. Article 6, § 177A of the Mississippi Constitution provides for a commission on judicial performance which recommends

to the Mississippi Supreme Court what action should be taken against a judge who has violated the terms of his office.”

*Stater*, 707 So. 2d at 185. I am aware that the Mississippi Attorney General’s Office has issued an opinion that suggests that *Stater* does not undermine the legal right of the Mayor and City Council to suspend and remove Judges from office. However, the case does raise a question about the wisdom of doing so unless the conduct in question seriously calls into question the judge’s impartiality.

I cannot disclose to your paper what conversations occurred during the executive session on Tuesday night, November 5, 2013. Nor would I discuss with you an active personnel matter. However, I will tell you that the Mayor and City Council are aware that a judge has to forfeit some of her rights under the First Amendment that might otherwise be available to “John Q Citizen.” That having been said, a municipal court judge does not, by virtue of her office, forfeit all of her First Amendment rights. This principle was recognized in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) in which the United States Supreme Court struck down a Minnesota law that prohibited judicial candidates from announcing their views on disputed legal and political issues. In doing so the Court held that such a rule would violate the candidates’ First Amendment rights to freely of express their viewpoints.

Recognizing that even judges to have freedoms of speech, and are not obliged to become mute upon being sworn into office, the Mississippi Supreme Court refused to impose sanctions upon a judge for writing a letter as an individual to the editor of a local newspaper. That was so, even where the judge had a commentary on his religious views and expressed opinions that homosexuality was sinful. Because the letter did not identify the author as a judge, the Court ruled that the letter was protected speech under the First Amendment. *See e.g. Mississippi Commission on Judicial Performance v. Wilkerson*, 876 So. 2d 1006 (Miss. 2004).

In the end, there may be a time when the Mayor and Council would have no choice but to suspend or remove a Judge of the Municipal Court for his or her public comments or social media postings. Perhaps in this case even reasonable minds can differ as to what Judge Clinkscales was trying to communicate. However, to employ inferences and innuendo in an effort to categorize ambiguous speech in a way that would justify discipline is ill-advised. Otherwise, people could be punished not for what they said, but for what others conclude what they

were thinking even when they said something different. That is a prospect even George Orwell didn't contemplate in his book "1984."

Slim, in closing, it seems that the Dispatch focuses a lot of energy at trying to unearth negative things to say about the Governing Authority of the City of Columbus. I am certainly not advocating that it should spread around the negative press, because some positive articles would be a pleasant change. But it seems unfair to single out Columbus for criticism for the lack of policies and procedures (such as a social media policy) that other local units of government don't have either. I cannot help but wonder if the reason for such unfounded focus and negative reporting is, at its core, the result of ... "tomfoolery."

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeff Turnage', written over the printed name.

Jeff Turnage  
General Counsel, City of Columbus

cc: Columbus Packet