



Names of DOJ attorneys who ‘misled’ judge scrubbed from court doc; DOJ not volunteering info

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The U.S. Department of Justice won't release the names of attorneys whose conduct in a high-profile immigration case was called "unseemly and unprofessional" by a federal judge, or whether those attorneys will face internal disciplinary action.

The DOJ says it “emphatically” disagrees with Judge Andrew Hanen’s May order in *State of Texas, et al. v. United States of America, et al.*, in which he wrote that he was “disappointed” that the court even had to address the subject of lawyer behavior when it has “many more pressing matters on its docket.”

Hanen concluded that DOJ attorneys “effectively misled” the plaintiff states into foregoing a request for a temporary restraining order or an earlier hearing on a motion for an injunction.

Their misrepresentations, the judge said, also “misdirected” the court as to the timeline involved in the implementation of a 2014 Department of Homeland Security directive, which included amendments to the Deferred Action for Childhood Arrivals program.

DOJ attorneys said President Barack Obama’s three-year amnesty plan wasn’t being implemented, but actually it was -- and more than 100,000 aliens were to be affected.

The Justice Department declined to release a complete list of all those attorneys involved, and their salaries, to *Legal Newsline*. Their names, following a court order, were redacted from the department’s response to the judge’s order.

Many DOJ lawyers are listed as participating in the case. They are James Gilligan, Daniel Hu, Adam Kirschner, Jennifer Ricketts, Daniel Schwei, John Tyler, Kathleen Hartnett, Bradley Cohen and Kyle Freeny.

Freeny is listed as “Attorney-in-Charge” on one of the DOJ’s earliest filings -- a response to the motion for a preliminary injunction.

The lawsuit, filed by 26 states, took issue with the constitutionality of the Deferred Action for Parents of Americans, or DAPA, program.

The program, announced by Obama in November 2014 as part of his plan for immigration reform, attempts to grant deferred action to illegal immigrants who are the parents of a U.S. citizen or a lawful permanent resident.

The program, combined with DACA, would have delayed deportation of millions of undocumented aliens in the United States.

“The United States Department of Justice has now admitted making statements that clearly did not match the facts. It has admitted that the lawyers who made these statements had knowledge of the truth when they made these misstatements,” Hanen wrote in his 28-page order.

“The DOJ’s only explanation has been that its lawyers either ‘lost focus’ or that the ‘fact[s] receded in memory or awareness.’

“These misrepresentations were made on multiple occasions starting with the very first hearing this Court held. This Court would be remiss if it left such unseemly and unprofessional conduct unaddressed.”

The DOJ shot back at Hanen’s searing words in an email to *Legal Newsline* -- after numerous requests for comment on the judge’s order.

“The Department of Justice takes with utmost seriousness the public trust committed to it to represent the interests of the American people in the courts of the United States, and insists that its attorneys adhere to the high standards of ethical conduct and professionalism required to carry out that critical mission,” a Justice Department spokesperson said.

“The Court previously found that certain representations to the Court in this case were made in bad faith or with intent to deceive. We respectfully but emphatically disagree with that conclusion and welcomed the opportunity to provide additional information to the Court.”

In the wake of Hanen’s order -- as an affirmation of the DOJ’s “steadfast commitment” to its “solemn obligations” -- Principal Deputy Assistant Attorney General Benjamin Mizer directed all DOJ Civil Division attorneys complete supplemental training designed and led by an outside expert in attorney ethics and professional responsibility.

According to the Justice Department’s response, filed July 31 to a June 7 order, all Civil Division attorneys will be required to complete the one-hour training within the next 90 days.

A DOJ spokesperson would not tell *Legal Newsline* who, exactly, would provide the training, what it would consist of, if there would be any sort of assessment after, and whether any other changes have been made within the department to prevent such “mistakes” in the future.

The spokesperson also would not say whether the attorneys at the center of Hanen’s order will face any other disciplinary action.

Mizer has said he hopes the training “will help to assure the Court that we are making every effort to maintain the trust placed in the Department of Justice.”

“The Government sincerely hopes that this significant measure will not only demonstrate the Department’s good faith generally, but also make evident that no sanctions are necessary in this matter,” the DOJ wrote in its response.

Hanen, a judge on the U.S. District Court for the Southern District of Texas, gave the government an opportunity, in a June 7 order, to submit evidence regarding the conclusions reached in his May 19 opinion and orders.

The DOJ, in its response, said it did not intend to mislead or misrepresent the facts to the court about the implementation of the 2014 deferred action guidance.

“We do not dispute that we made mistakes that led to the unfortunate circumstances here: at critical times we provided incomplete information to the Court because of our failure to appreciate the scope of the questions asked of us; and we used imprecise terminology in our oral and written submissions to the Court,” it wrote.

“As a result, our submissions left the Court with an incorrect understanding of the facts regarding grants by the Department of Homeland Security of three-year terms of deferred action to individuals qualifying under the 2012 Deferred Action for Childhood Arrival eligibility criteria.

“We acknowledge and apologize for these mistakes, and for the valuable time the Court has expended on this matter as a result. But we did not intend to mislead the Court or to conceal any fact concerning implementation of the Guidance.”

In a July 31 motion, the DOJ asked that the Texas federal court grant its leave to file their response under seal and *in camera* -- meaning a hearing would be held before the judge in his private chambers.

The department cited issues of privacy and attorney-client privilege.

“Defendants’ response and accompanying declarations will necessarily include a significant amount of information that is privileged. They will also contain sensitive personal information, and will necessarily identify the counsel named in the Court’s sealed order of May 19, 2016,” the Justice Department wrote.

“For all these reasons, filing Defendants’ response under seal and *in camera* is necessary to avoid the improper disclosure of these types of information.”

The DOJ argued there was “no meaningful non-privileged, segregable” information that can be disclosed without also placing individual declarants’ personal privacy interests at risk.

Susan Klein, a law professor at the University of Texas who teaches courses on federal criminal law and federal criminal prosecution, and is a former federal prosecutor herself, said such mistakes can’t be made.

“My experience is with the Criminal Division,” she told *Legal Newsline*. “However, in either case, it is very clear to me, and was part of my training when I was at the DOJ, that you didn’t make factual errors to a judge, especially when representing what actions the federal government took.

“I have no personal knowledge regarding the facts of this case, but I can certainly understand that Judge Hanen or any judge would be angry if he believed that DOJ attorneys lied to him.”

During her five years in the Criminal Division, Klein rotated through the Money Laundering and Asset Forfeiture section, the Public Integrity Unit, Terrorism and Violent Crimes, and the U.S. Attorney’s Office for the District of Columbia.

She suggested training may be slightly different for attorneys in the Civil Division.

“No matter what, you don’t lie to a judge,” said Klein, who is considered a nationally prominent scholar in the fields of federal criminal law and prosecutorial ethics. “As a federal prosecutor, you don’t do that.”

Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, found it “remarkable” that the Justice Department initiated its own ethics training.

The think tank last year filed a brief supporting the states’ challenge.

“I figured they would try to appeal in some way,” Shapiro told *Legal Newsline*. “The fact that it’s taking it (the judge’s order) so seriously and is doing this training -- well, I have to give them credit for that.”

He pointed out that such mistakes -- in this case, the DOJ’s errors or omissions -- are “highly irregular,” especially for top-level federal prosecutors in a case of such legal significance.

“This is a case that has the attention of the U.S. attorney general,” Shapiro said. “And it isn’t just a local rookie attorney who is handling it.

“I don’t want to say this is unprecedented, but it certainly is exceedingly rare.”

It wouldn’t be the first time in recent months that the DOJ has bungled a case.

In June, a California federal judge agreed to dismiss the Justice Department’s indictment against FedEx Corporation over allegations of transporting illegal prescription drugs.

FedEx was indicted in 2014 by a federal grand jury in San Francisco for its alleged role in distributing controlled substances and prescription drugs for illegal Internet pharmacies. The DOJ charged the Memphis-based global courier with conspiracy to distribute controlled substances, conspiracy to distribute misbranded drugs, distribution of controlled substances and misbranding drugs.

Its Atlanta-based rival, United Parcel Service Inc., was similarly charged; however, UPS agreed to settle with the DOJ for \$40 million in 2013.

Judge Charles Breyer, for the U.S. District Court for the Northern District of California and brother to U.S. Supreme Court Justice Stephen Breyer, concluded FedEx was “factually innocent” and did not have criminal intent.

There have been no public statements about the reasons for the dismissal and the U.S. Attorney’s Office cannot provide one, even now, months later.

