IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

GARY ERIC SUSSER

Respondent.
_____/

Case No. 81,402

TFB File No. 93-00723-02-NRE

INITIAL BRIEF OF COMPLAINANT

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PRELIMINARY STATEMENT

Appellee, Gary Eric Susser, shall be referred to as Respondent or Mr. Susser throughout this Brief. The Appellant, The Florida Bar, shall be referred to as such or as The Bar.

References to the Report of the Referee shall be by the symbol "RR" followed by the appropriate page number.

References to the transcript of the reinstatement hearing held on September 22, 1993, shall be referred to by the symbol "TR" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent is a resident of Ohio, and was formerly a member of that state's bar association. Respondent became a member of the Florida Bar in 1986.

In 1989, Respondent was suspended from practicing law in Florida for one year, nunc pro tunc May 23, 1989. This suspension was a result of a felony drug abuse conviction in an Ohio court. Respondent received a one year suspended prison sentence and five years of probation by the Ohio court.

While on probation, Respondent was arrested and charged in April 1989 with attempted theft, falsification involving insurance proceeds, drug abuse and possession of criminal tools (drug paraphernalia). Respondent was convicted of these charges on September 6, 1989. (TR p 66-69). As a result of these convictions, Respondent was found to be in violation of his probation and sentenced to one year in prison. (TR p. 66).

Based upon the above-mentioned criminal convictions and violation of probation, The Florida Bar filed additional charges against Respondent in the Supreme Court Case No. 75,353. In this matter, Respondent was suspended on February 2, 1992 for two years, nunc pro tunc to November 14, 1989. This suspension was reduced by the referee on remand due to all the Ohio felony convictions being reversed on appeal. (TR p. 66-69).

As a result of the criminal charges and the violation of probation, Respondent was permanently disbarred in Ohio in April,

1993. (RR p. 2-3).

Respondent in March 1993 filed a Petition for Reinstatement to The Florida Bar. On or about March 16, 1993, the Supreme Court of Florida appointed William L. Gary as referee to conduct reinstatement proceedings pursuant to Rule 3-7.9(e), Rules of Discipline. Pursuant to notice a hearing was held on September 22, 1993.

On January 7, 1994, the Referee filed a report in which he recommended that Respondent be granted reinstatement to practice law in the State of Florida.

On February 28, 1994, The Bar filed a Petition for Review.

SUMMARY OF THE ARGUMENT

Previous decisions of this Court have held quite clearly that the Supreme Court of Florida should not allow the practice of law in Florida by an individual who has been disbarred in his/her home state. See The Florida Bar re: Sanders, 580 So.2d 594 (Fla 1991); The Florida Board of Bar Examiners re: R.L.V.H., 587 So.2d 462 (Fla. 1991). In the instant case, Respondent was disbarred in Ohio, his home state, in 1993 as a result of criminal charges and a violation of his probation. For this same misconduct, Respondent, a member of the Florida Bar, was suspended by the Bar for two years. According to the above-mentioned caselaw, Respondent may not be reinstated to The Florida Bar until he is reinstated to the Ohio Bar.

The rationale for the Sanders holding, as put forth by the Florida Board of Bar Examiners in Florida Board of Bar Examiners re: Amendment to Rules of the Supreme Court Relating to Admissions to the Bar, 578 So.2d 704 (Fla. 1991), is that an out-of-state disbarred lawyer ought to be treated the same as a lawyer disbarred in Florida. That is, just as a lawyer disbarred in Florida is seen as not having the requisite criteria to actively practice law in Florida, a lawyer who has been disbarred in a foreign state should be considered in a similar fashion. Furthermore, allowing an out-of-state disbarred lawyer to practice in Florida would only serve to provide the disbarred lawyer with a forum state in which one could skirt the punishment of his/her home state. That is, if the referee's report in the

instant case is upheld by this Court, an out-of-state disbarred lawyer may avoid the consequences of his/her actions in his/her home state simply by coming to Florida to practice law.

In the instant case, the referee erred in not considering the Ohio disbarment as a critical factor in determining reinstatement. The analysis of this issue as it has been set forth by the Court in Sanders and R.L.V.H. is that an out-of-state attorney that has been disbarred by his home state should not be permitted to practice law in Florida. This analysis should be upheld, and the referee's recommendation granting Respondent's Petition for Reinstatement should be rejected.

ARGUMENT

RESPONDENT'S PETITION FOR REINSTATED TO THE FLORIDA BAR SHOULD BE DENIED SINCE HE HAS BEEN DISBARRED FROM THE BAR IN HIS HOME STATE.

In The Florida Bar re: Sanders, 580 So.2d 594 (Fla 1991), this Court put forth the proposition that The Florida Bar "should not allow the practice of law in Florida of one disbarred in his home state." Id. at 594. This proposition originated from Justice Ehrlich's concurring opinion in The Florida Bar re: Sickmen, 523 So.2d 154 (Fla. 1988). In Sickmen, a New York attorney, Mr. Sickmen, was a member of both the New York and Florida Bars. Sickmen was convicted of a felony in a New York court. As a result of this conviction, The Florida Bar suspended Sickmen. Subsequent to the Florida disciplinary action and before Sickmen filed for reinstatement, the New York Bar disbarred Sickmen for the same felony conviction. This Court upheld the referee's recommendation for Sickmen's reinstatement to the Florida Bar, as it was found that Sickmen had satisfied the criteria for reinstatement. However Justice Ehrlich, in his concurring opinion, noted that it was only because the Florida disciplinary proceedings occurred before the New York disciplinary action that Sickmen had not been disbarred in Florida. "If New York had instituted its disciplinary proceedings first and had disbarred Mr. Sickmen, there is no doubt in my mind that this Court would have imposed the same discipline, and would not readmit him to The Florida Bar unless and until the State of New York had done likewise." Id. at 156

(emphasis added).

The Sanders Court adopted the reasoning found in Justice Ehrlich's concurring opinion in Sickmen and affirmed the proposition that a lawyer disbarred in his/her home state may not be reinstated to practice law in Florida unless he/she has been readmitted in the home state. In that case, Mr. Sanders was disbarred from the New York Bar and subsequently suspended from the Florida Bar for a felony conviction in New York. This Court upheld the referee's refusal to recommend Mr. Sanders' reinstatement, even though Sanders had shown that he was of good character, had rehabilitated himself, and was sincere in his intent to avoid future wrongdoing. The referee withheld a favorable recommendation because Sanders had not been readmitted to the New York Bar. Applying the logic used by Justice Ehrlic in Sickmen, the referee concluded that Sanders could not be reinstated to the Florida Bar until he was readmitted to the New York Bar.

In denying Sanders' Petition for Reinstatement, the Court affirmed the referee's consideration of the disbarment from Respondent's home state of New York and stated:

> "We should not allow the practice of law in Florida of one disbarred in his home state."

580 So.2d at 594.

The analysis in Sanders was further applied in The Florida Board of Bar Examiners re: R.L.V.H., 587 So.2d 462 (Fla. 1991). In R.L.V.H., this Court considered a petition for review of a ruling made by the Florida Board of Bar Examiners which declared

the petitioner ineligible to apply for admission to the Florida Bar. The Bar Examiner's decision rested upon the fact that the petitioner had been disbarred from practicing law in Ohio. "Pursuant to the rationale in Sanders, we will not allow petitioner to practice law in Florida so long as he is disbarred in the state of Ohio." Id. at 463. Thus, in R.L.V.H., this Court expanded the Sanders holding to apply not only to those attorneys who are applying for reinstatement, but also to those who are applying for initial admission to the Florida Bar.

The holding of R.L.V.H. is reflected in this Court's adoption of the amendments to the Rules of the Supreme Court Relating to the Admissions to the Bar, put forth in Florida Board of Bar Examiners re: Amendment to Rules of the Supreme Court Relating to Admissions to the Bar, 578 So.2d 704 (Fla. 1991). As is indicated by the amendment to Article III, §2(f) "[a] person who has been disbarred from the practice of law in a foreign jurisdiction shall not be eligible to apply for admission to The Florida Bar or the Florida Bar Examination for a period of five years from the date of disbarment or such longer period set by the foreign jurisdiction for readmission to the foreign jurisdiction." Id. at 707. As rationale for this, the Bar Examiners "submit that an out-of-state disbarred lawyer should be treated in the same manner as a lawyer disbarred in Florida." Id. at 707.

Lastly, this Court affirmed the holding of Sanders in The Florida Bar v. Eberhart, 19 F.L.W. S88 (February 17, 1994). In

that case, Eberhart resigned from the Connecticut Bar without leave to reapply. This Court upheld the referee's recommendation that Eberhart be disbarred from The Florida Bar unless and until such time that he is reinstated in Connecticut. In upholding this recommendation, this Court cited the holding of Sanders, that we should not allow the practice of law in Florida of one who has been disbarred in his/her home state.

In the instant case, The Bar argued against reinstatement citing the Sanders rationale that Respondent's disbarment in Ohio does not allow his reinstatement to practice law in Florida. Although concurring that this was a valid consideration and a factor to be considered in his recommendation, the referee rejected the Bar's argument and the Sanders rationale. The referee held that to hold the Ohio disbarment to be a bar to Respondent's reinstatement in Florida would change the previous discipline imposed by the Court and that Respondent would be denied reinstatement on a fourth degree misdemeanor. (RR p. 3).

Such a ruling by the referee is contrary to the present position of this Court as set forth in the above-mentioned caselaw. Since Sanders, the only controlling factor in assessing admission or reinstatement of out-of-state attorneys to the Florida Bar is their current membership status with their home state bar associations. Where an attorney is applying for admission or reinstatement to the Florida Bar, there is no review of the reasoning of any existing out-of-state disciplinary orders except that a status of disbarment will not allow such an

attorney to practice law in Florida. Sanders at 594.

Contrary to the findings of the referee herein, the disbarment of Respondent in Ohio was not merely the result of a fourth degree misdemeanor conviction. As testified to by Respondent, the disbarment was the result of the criminal charges and the violation of probation. (TR p. 66).

While the concerns of the referee are placed upon the ultimate effect of denying Respondent reinstatement to the Florida Bar, these are not legitimate concerns. This Court has held that if the protection of the public, as well as the image of the Florida Bar, are to have any meaning at all, cases involving the reinstatement of suspended lawyers must be viewed in the cold light of objectivity and without regard to personal sympathy. Petition of Wolf, 257 So.2d 547, 550 (Fla. 1972).

The objective demands of Sanders and its succession of cases is that the final controlling consideration for the reinstatement of a disbarred out-of-state member of the Florida Bar who has been suspended by the Florida Bar his status with his/her home state bar association.

Applying the holding of Sanders to the instant case shows that the referee erred in recommending that Mr. Susser's petition for reinstatement be granted. Mr. Susser has been disbarred from his home state of Ohio. Therefore, in accordance with the above-mentioned caselaw, Mr. Susser should not be reinstated to practice law in Florida as long as he is disbarred from the Ohio Bar.

CONCLUSION

Based upon the foregoing facts and argument, The Florida Bar respectfully requests that this Honorable Court reject the Recommendation of the Referee and deny Respondent's Petition for Reinstatement.

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing Initial Brief regarding Supreme Court Case No. 81,402; TFB File No. 93-723-02-NRE has been forwarded by certified mail # Z 751 829 200, return receipt requested, to **GARY ERIC SUSSER**, c/o **JOHN A. WEISS**, Counsel for Respondent, at his record Bar address of Post Office Box 1167, Tallahassee, Florida 32302-1167, on this 29th day of March, 1994.

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