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New York's Top Judge Sues Over Judicial Pay: [Metropolitan Desk]

Anemona Hartocollis. *New York Times* [New York, N.Y.] 11 Apr 2008: .3.

Abstract (summary)

[...] standing on the steps outside State Supreme Court in Manhattan, Judge Kaye's lawyer, Bernard W. Nussbaum, a former counsel to the Clinton White House, denied that the lawsuit was a stunt and said that desperate times called for desperate measures.

Full Text

CORRECTION: An article on Friday about a lawsuit over judicial pay filed against New York State by Judith S. Kaye, the state's chief judge, misidentified the party represented by Kenneth Feinberg in a similar lawsuit filed in 1991 by Sol Wachtler, the chief judge at the time. Mr. Feinberg was the lawyer for Gov. Mario M. Cuomo, not Judge Wachtler.

The state's chief judge, Judith S. Kaye, has tried reasoning, begging and shaming to get the Legislature and the governor to raise judicial pay.

Now things are so bad, she says, that she is using her knowledge of the judicial system to do what lawyers do best -- sue.

On Thursday, Judge Kaye filed a lawsuit on behalf of the state's 1,250 judges, charging that the political process has denied them their constitutional right to an "adequate" salary, because the State Legislature has refused to give them a raise for the last decade.

New York State trial judges are paid \$136,700 a year for presiding over cases ranging from murder and mayhem to complicated business and discrimination cases. The lawsuit asks for a raise to \$169,300, which would take them to the same level as Federal District Court judges.

It is, by all accounts, a rare event for a chief judge to use the power of the court system to achieve what some might call a political goal.

But standing on the steps outside State Supreme Court in Manhattan, Judge Kaye's lawyer, Bernard W. Nussbaum, a former counsel to the Clinton White House, denied that the lawsuit was a stunt and said that desperate times called for desperate measures.

"How many other people's salaries have been frozen for 10 years?" he asked.

Some lawyers said that the lawsuit raised tricky issues for other public servants, like police officers and teachers, who might also feel underpaid and entitled to sue for higher pay. It is the province of government, they said, to decide the relative value of different categories of employees, as wrong-minded as such decisions might sometimes seem.

"To some extent these are policy arguments," said Carl W. Tobias, a law professor at the University of Richmond, on Thursday. On the other hand, Professor Tobias said that while the lawsuit might sound self-serving, he thought Judge Kaye had exercised "extraordinary patience" in trying to cajole lawmakers into a raise, and now had little other recourse.

The lawsuit charges that the Legislature has interfered with judicial independence by denying judges a raise for a decade, essentially making them worry about paying their bills. It also says that the Legislature has denied the judges' constitutional right to an adequate salary, "proportionate to their learning, experience and elevated position," and that it has discriminated against them because most

other state employees had seen pay increases.

New York's state judges have not received a raise since January 1999, a longer time than federal judges and state judges in all the other states, hurting recruitment and morale, the lawsuit says.

Mr. Nussbaum said the lawsuit recognized the futility of trying to squeeze money out of the Legislature. Rather, he said, it seeks a court judgment against the state, which would force the comptroller to disburse raises retroactive to Jan. 1, 2005, which is when Judge Kaye began making specific proposals to lawmakers.

"This is like we're bringing a damage action against the state comptroller," Mr. Nussbaum said.

Joseph L. Bruno, the State Senate majority leader, and Sheldon Silver, the Assembly speaker, said on Thursday that they supported raises for judges. A spokesman for Mr. Silver added that the speaker also supported raises for legislators and agency commissioners.

But Mr. Nussbaum said the lawmakers were holding the judicial pay raises "hostage" to their own desire for pay increases.

There is a precedent for such litigation. In 1991, the chief judge at the time, Sol Wachtler, sued Gov. Mario M. Cuomo and the Legislature to restore funds to the courts that had been cut from the budget. That case was resolved out of court.

"I think what Chief Judge Kaye is trying to do is prod the governor and the Legislature into once again working out an agreed-upon settlement rather than fight an unseemly battle in the courtroom," said Kenneth Feinberg, Judge Wachtler's lawyer in 1991, on Thursday.

Mr. Nussbaum said that state judges earned less than public law school deans, some public university professors and even first-year associates at large law firms in New York City.

He said salaries for New York judges ranked 49th in the nation, after accounting for the state's high cost of living, while legislative salaries ranked sixth by the same standard, and third without deducting the cost of living.

Mr. Nussbaum said he had asked for a 30-day trial beginning in May, and that he planned to call Mr. Silver, Mr. Bruno and Governor Paterson to the witness stand to explain why, despite repeated promises to raise the judges' salaries, "each year they broke their promises."

He said he had asked for a judge trial, rather than a jury trial.

Surrounded by dark-suited lawyers, Mr. Nussbaum swept into the courthouse at 1 p.m. on Thursday to file the lawsuit personally, the first time he has done that, he said, in decades. "How many lawyers does it take to file a light bulb?" one clerk joked.

The lawsuit is not costing the taxpayers anything, Mr. Nussbaum said, as he is working pro bono. Beyond what he believes to be the merits of the case, he said, Judge Kaye is an old friend. "She was the editor in chief of the Barnard Bulletin, and I was the editor of the Columbia Spectator. That was 1958."

Credit: ANEMONA HARTOCOLLIS; Jeremy W. Peters contributed reporting.

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Indexing (details)

Subjects:	Raises, State government, Judges & magistrates, Civil actions
Locations:	New York
People:	Kaye, Judith S
Company/Org:	Legislature-New York (NAICS: 921120)
Title:	New York's Top Judge Sues Over Judicial Pay : [Metropolitan Desk]
Authors:	Anemona Hartocollis
Publication title:	New York Times
Pages:	B.3
Publication year:	2008
Publication Date:	Apr 11, 2008
Year:	2008
Section:	B
Publisher:	New York Times Company

Place of Publication: New York, N.Y.
Journal Subjects: General Interest Periodicals--United States
ISSN: 03624331
CODEN: NYTIAO
Source type: Newspapers
Language of Publication: English
Document Type: News
ProQuest Document ID: 433819887
Document URL: <http://0-search.proquest.com.alpha1.suffolk.lib.ny.us/docview/433819887?accountid=35174>
Copyright: Copyright New York Times Company Apr 11, 2008
Last Updated: 2010-08-19
Database: New York Times

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