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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JAMES E. SMITH,

Plaintiff,

vs.

A.K. SCRIBNER, et al.,

Defendants.

CASE NO. CV F 06-1800 LJO GSA

**ORDER TO DENY DISQUALIFICATION OF
JUDGE**
(Doc. 20.)

BACKGROUND

This Court's December 10, 2007 order dismissed this action based on plaintiff James E. Smith's ("Mr. Smith") failure to state a cognizable claim and to comply with orders. The clerk entered a December 10, 2007 judgment against Mr. Smith.

On January 31, 2008, Mr. Smith filed a document entitled "Notice of Motion and Motion for Recusal and Appeal Rule 4(a), 4(a)(1) 4(a)4." This Court construes the document as a motion to disqualify United States District Judge Lawrence J. O'Neill ("Judge O'Neill") and to appeal the December 10, 2007 judgment. Mr. Smith suggests, with neither explanation nor support, that Judge O'Neill is "related to a party to this action or that he is bias [sic] towards plaintiff and are [sic] unable to be impartial."

DISCUSSION

28 U.S.C. § 455 ("section 455") addresses judicial disqualification and provides in pertinent part:

1 (a) Any . . . judge . . . of the United States shall disqualify himself in any
2 proceeding in which his impartiality might reasonably be questioned.

3 (b) He shall also disqualify himself in the following circumstances;

4 (1) Where he has a personal bias or prejudice concerning a party . . .

5 The standard to judge the appearance of partiality requiring recusal under section 455(a) is an
6 objective one and involves ascertaining “whether a reasonable person with knowledge of all the facts
7 would conclude that the judge’s impartiality might reasonably be questioned.” *United States v. Nelson*,
8 718 F.2d 315, 321 (9th Cir. 1983).

9 In *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147 (1994), the United States Supreme Court
10 determined that recusal under section 455(a) is subject to the limitation of “extrajudicial source”:

11 First, judicial rulings alone almost never constitute a valid basis for a bias or
12 partiality motion . . . In and of themselves (i.e., apart from surrounding comments or
13 accompanying opinion), they cannot possibly show reliance upon an extrajudicial source;
14 and only in the rarest circumstances evidence the degree of favoritism or antagonism
15 required . . . when no extrajudicial source is involved. . . . Second, opinions formed by
16 the judge on the basis of facts introduced or events occurring in the course of current
17 proceedings, or of prior proceedings, do not constitute a basis for bias or partiality
18 motion unless they display a deep-seated favoritism or antagonism that would make fair
19 judgment impossible.

20 . . .

21 [J]udicial remarks during the course of a trial that are critical or disapproving of,
22 or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or
23 partiality challenge. They may do so if they reveal an opinion that derives from an
24 extrajudicial source; and they will do so if they reveal such a high degree of favoritism
25 or antagonism as to make fair judgments impossible. . . . Not establishing bias or
26 partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even
27 anger, that are within the bounds of what imperfect men and women, even after having
28 been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at
courtroom administration – even a stern and short-tempered judge’s ordinary efforts at
courtroom administration – remain immune.

29 *Liteky*, 510 U.S. at 555-556, 114 S.Ct. 1147 (underlining in original).

30 In *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980),
31 the Ninth Circuit Court of Appeals explained the degree of bias or animus to warrant recusal:

32 It is an animus more active and deep-rooted than an attitude of disapproval toward
33 certain persons because of their known conduct, unless the attitude is somehow related
34 to a suspect or invidious motive such as racial bias or a dangerous link such as a financial
35 interest, and only the slightest indication of the appearance or fact of bias or prejudice
36 arising from those sources would be sufficient to disqualify.

1 Judge O'Neill is not related to named defendants A.K. Scribner and Apple Computer. Mr. Smith
2 did not seek to disqualify Judge O'Neill until weeks after dismissal of this action and after Mr. Smith
3 disobeyed orders. The objective evidence reveals nothing to question Judge O'Neill's impartiality and
4 that Mr. Smith seeks another chance to avoid dismissal of his claims. An unfavorable decision does not
5 equate to partiality. Comments in this Court's orders are confined to the order's context – nothing more.
6 Mr. Smith offers no extrajudicial source of bias against him. His disqualification attempt further
7 exemplifies his frustration with an unfavorable decision.

8 **CONCLUSION AND ORDER**

9 For the reasons discussed above, this Court:

- 10 1. DENIES Ms. Smith's attempt to disqualify Judge O'Neill; and
11 2. DIRECTS the clerk to treat Mr. Smith's motion (Doc. 20) as a notice of appeal and
12 prepare an appeal for this action.

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15 IT IS SO ORDERED.

16 **Dated: February 3, 2008**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

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