

1  
2  
3  
4  
5  
6  
7  
8  
9

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

WANXIA LIAO,

No. C 08-02776 SBA

Plaintiff,

**ORDER**

v.

[Docket No. 9]

JOHN ASHCROFT, United States  
Attorney General, *et al.*,

Defendants.

---

**REQUEST BEFORE THE COURT**

Plaintiff has filed a motion to disqualify the Court, under 28 U.S.C. § 455(b)(1), on the grounds of personal bias allegedly developed in plaintiff's prior suit before this Court. *See* Docket No. 9. The Court DENIES her motion.

**BACKGROUND**

**I. Pre-Federal Litigation Developments**

In 1991, as a masters student at the University of Toronto ("UT"), Liao had an academic dispute with David Waterhouse, a professor in the university's East Asian Studies Department. Liao submitted a term paper in which she challenged Waterhouse's previously published contention that "beautiful" is a European concept. Waterhouse graded her paper a "B." In 1993, Liao lodged a formal complaint with the Ontario Human Rights Commission ("OHRC"), which sent her paper to two experts designated by Liao. One of these was James Cahill, a professor at the University of California at Berkeley ("UCB"). On or about April 26, 1995, he gave Liao's paper a low "B" grade. He found she misunderstood Waterhouse's article, and had poor command of the English language. Liao became agitated, insinuated Cahill was a racist, and threatened to kill him. She was arrested on May 10, 1995. Liao claimed Cahill, in violation of her human rights, used racism to provoke her to engage in behavior leading to her arrest. She was released on bail with the condition she not initiate contact with any OHRC member. The OHRC dismissed her complaint in 1997.

///

1 In June 1998, Liao wrote to UCB requesting it to investigate Cahill's conduct. It declined  
2 because Cahill was retired. Liao sued UCB and Cahill, in propria persona, in superior court for  
3 conspiracy to interfere with her civil rights and for racial discrimination, which claims were  
4 dismissed with prejudice.

5 **II. Liao v. Cahill, Case Number 03-cv-02906-SBA**

6 On June 23, 2003, Liao sued Cahill and UCB, in propria persona, in this Court, claiming  
7 breach of contract and race discrimination. See Docket No. 1. She requested in forma pauperis  
8 ("IFP") status, which was denied due to her finances. See Docket No. 4. The Court dismissed her  
9 complaint with leave to amend. See *id.* On September 8, 2003, Liao filed a First Amended  
10 Complaint ("FAC") against Cahill, alleging a violation of 42 U.S.C. § 1983, breach of contract,  
11 breach of fiduciary duty, conspiracy for malicious prosecution, and intentional infliction of  
12 emotional distress, see Docket No. 7, for which she paid the filing fees, see Docket entries for  
13 11/9/2003.

14 On March 2, 2004, the Court dismissed with prejudice the § 1983 claim under res judicata,  
15 but left the other claims intact. See Docket No. 28. On March 29, 2004, Liao appealed and  
16 requested IFP status for appeal. See Docket Nos. 31-32. On May 25, 2004, the Court reduced her  
17 \$255 filing fee to \$50. See Docket No. 53. On November 29, 2004, however, the Ninth Circuit  
18 dismissed her appeal because she failed to pay this fee. See Docket No. 74.

19 On May 27, 2004, the Court denied a motion by Liao to amend her FAC and instead granted  
20 summary judgment for Cahill as Liao's four remaining claims were time-barred. See Docket No. 42.  
21 On December 14, 2004, the Court denied Liao's motion for relief from judgment. See Docket  
22 No. 76. On May 5, 2005, the Court denied Liao's renewed motion for relief from judgment and to  
23 file a second amended complaint. See Docket No. 89.<sup>1</sup> On May 24, 2005, Liao filed a motion for  
24 relief from judgment, see Docket No. 90, followed by an amended motion for relief from judgment,  
25 see Docket No. 94, which the Court denied on July 29, 2005, see Docket No. 106. On October 20,  
26

---

27 <sup>1</sup> On May 9, 2005, Liao sued a number of defendants, including the San Francisco Superior  
28 Court itself, for civil rights violations, in *Liao v. Quidachay*, 05-cv-01888 CW. This matter was  
closed on January 24, 2007.

1 2005, Liao filed a Motion for Rule 56(f) Discovery, for Stay of Summary Judgment, and for Relief  
2 Under Rule 60(b)(6) from the July 29, 2005 Order. *See* Docket No. 108. On March 1, 2006, the  
3 Court denied this motion as untimely, and factually and legally groundless. *See* Docket No. 120.  
4 The Court also admonished Liao she must seek its leave before filing any future pleadings. *See id.*  
5 at 9.

6 On March 13, 2006, Liao appealed and requested IFP status for her appeal. *See* Docket  
7 Nos. 121-22. On June 30, 2006, the Court denied her IFP status, for lack of merit, as she failed to  
8 identify the issues she was appealing. *See* Docket No. 123. On August 16, 2006, the Ninth Circuit  
9 ordered Liao to pay a docketing fee of \$455<sup>2</sup> or file with the Ninth Circuit a renewed motion to  
10 proceed IFP. *See* Docket No. 5 in appeal no. 06-15544. On September 5, 2006, Liao filed an  
11 Amended Notice of Appeal, appealing the Court’s July 29, 2005 and March 1, 2006 Orders. *See*  
12 Docket No. 124. On September 25, 2006 the Ninth Circuit dismissed her appeal because she had not  
13 paid her filing fee nor filed a renewed motion. *See* Docket No. 125. On October 4, 2006, Liao filed  
14 in the Ninth Circuit a Motion to Reinstate Appeal and a Renewed Motion to Proceed IFP. *See*  
15 Docket No. 12 in appeal 06-15544. On December 4, 2006, the Ninth Circuit reinstated Liao’s  
16 appeal, but ordered her to pay a \$255 docketing fee to this Court or be dismissed.<sup>3</sup> *See* Docket  
17 No. 127; Docket No. 13 in appeal 06-15544. On January 18, 2007, the Ninth Circuit dismissed her  
18 appeal because she had not paid her docketing fee. *See* Docket No. 128.

19 **III. *Liao v. Ashcroft, et al.*, Case Number 08-cv-02776 SBA**

20 On June 4, 2008, Liao, in propria persona, sued 21 defendants, including John Ashcroft,  
21 Judge Claudia Wilken, Bill Lockyer, Heather Fong, CNN, You Tube, *et seq.* *See* Docket No. 1.  
22 Liao alleges defendants racially discriminated against her by refusing to investigate her criminal  
23 complaints related to the facts giving rise to *Liao v. Cahill*, and that there was a “conspiracy by  
24

---

25 <sup>2</sup> On April 9, 2006, the Ninth Circuit filing fee increased from \$250 to \$450. 28 U.S.C. § 1913  
26 note (2006) (Appeals Filed in Courts of Appeals). The additional \$5 arises from 28 U.S.C. § 1917,  
27 which allows the district courts to charge this fee for processing a notice of appeal.

28 <sup>3</sup> The December fee is lower than the August fee, to reflect the fact that Liao appealed in  
March 2006, prior to the April 9, 2006 increase. The Ninth Circuit had erroneously charged Liao in  
August 2006, as if she had appealed in August 2006.

1 federal justice administrative officials with the US major media to place a secret prior restraint on  
2 [her] Internet free speech” regarding *Cahill*. See Docket No. 1. The matter was assigned to  
3 Magistrate Judge Chen. See Docket No. 2. On September 8, 2008, Liao declined to proceed before  
4 a magistrate judge. See Docket No. 4. The next day, the matter was reassigned to this Court. See  
5 Docket No. 5. On September 17, 2008, defendant Ashcroft declined to proceed before a magistrate  
6 judge. See Docket No. 8. On September 25, 2008, Liao filed her motion to disqualify this Court,  
7 which is before the Court. See Docket No. 9.

### 8 LEGAL STANDARD

9 There are three sources of law which provide for a motion to disqualify a judge: the Due  
10 Process Clause of the Fifth Amendment, 28 U.S.C. § 144, and 28 U.S.C. § 455. The Due Process  
11 Clause prohibits a judge from having a direct financial or personal stake in a matter, that is, from  
12 judging their own case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986). Section 144  
13 provides a process whereby if a party “files a timely and sufficient affidavit that the judge before  
14 whom the matter is pending has a personal bias or prejudice either against him or in favor of any  
15 adverse party,” then that judge shall refer the motion to another judge for disposition. 28 U.S.C.  
16 § 144. And section 455 provides in part that a “judge . . . shall disqualify himself in any proceeding  
17 in which his impartiality might reasonably be questioned.” *Id.* § 455(a). Section 455 also provides  
18 in part that a judge shall disqualify himself or herself “[w]here [they have] a personal bias or  
19 prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the  
20 proceeding[.]” *Id.* § 455(b)(1).

21 Section 455(a) is a “catchall” provision, while section 455(b)(1) specifically addresses, in  
22 part, a personal bias or prejudice against a party. *Liteky v. U.S.*, 510 U.S. 540, 549-51 (1994).  
23 Section 144 may be invoked on the same grounds for invoking § 455(b)(1). *Liteky*, 510 U.S.  
24 at 550-51. Not every bias or prejudice against a party, however, will support recusal under § 144 or  
25 § 455(b)(1). *Liteky*, 510 U.S. at 550. During a criminal trial, for example, a judge may develop a  
26 *rational* bias against a defendant, especially if the evidence proves their guilt beyond a reasonable  
27 doubt. *Id.* at 550-51. Sections 144 and 455(b)(1), however, prohibit “a favorable or unfavorable  
28 disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved,”

1 “rests upon knowledge that the [judge] ought not to possess[.]” or “is excessive in degree[.]” *Liteky*,  
2 510 U.S. at 550 (emphasis in original). In a like manner, section 455(a) only bars a *wrongful* or  
3 *inappropriate* partiality. *Id.* at 551-52.

4 “[O]pinions held by judges[, however,] as a result of what they learned in earlier  
5 proceedings” are “not subject to deprecatory characterization as ‘bias’ or ‘prejudice’[.]” *Id.* at 551.  
6 This is because, “[i]t has long been regarded as normal and proper for a judge to sit in the same case  
7 upon its remand, and to sit in successive trials involving the same defendant.” *Id.* As such:

8 judicial rulings alone almost never constitute a valid basis for a bias or partiality  
9 motion. In and of themselves (i.e., apart from surrounding comments or  
10 accompanying opinion), they cannot possibly show reliance upon an extrajudicial  
11 source; and can only in the rarest circumstances evidence the degree of favoritism or  
12 antagonism required . . . when no extrajudicial source is involved. Almost invariably,  
13 they are proper grounds for appeal, not for recusal.

14 *Liteky*, 510 U.S. at 555 (citation omitted).

15 Further:

16 opinions formed by the judge on the basis of facts introduced or events occurring in  
17 the course of . . . prior proceedings, do not constitute a basis for a bias or partiality  
18 motion unless they display *a deep-seated favoritism or antagonism that would make*  
19 *fair judgment impossible*. Thus, judicial remarks during the course of a trial that are  
20 critical or disapproving of, or even hostile to, counsel, the parties, or their cases,  
21 ordinarily do not support a bias or partiality challenge.

22 *Id.* (emphasis added).

23 Thus, an example of a remark supporting disqualification, is an alleged statement by a  
24 district judge in *Berger v. United States*, 255 U.S. 22 (1921), a World War I espionage case against  
25 German-American defendants, that “[o]ne must have a very judicial mind, indeed, not [to be]  
26 prejudiced against the German Americans’ because their ‘hearts are reeking with disloyalty.’”  
27 *Liteky*, 510 U.S. at 555 (quoting *Berger*, 255 U.S. at 28 (internal quotation marks omitted)). In  
28 contrast, disqualification is not supported by “expressions of impatience, dissatisfaction, annoyance,

1 and even anger[.]” *Liteky*, 510 U.S. at 555-56. Likewise, “[a] judge’s ordinary efforts at courtroom  
2 administration-even a stern and short-tempered judge’s ordinary efforts at courtroom  
3 administration-remain immune.” *Id.* at 556.

4 Under the plain language of section 144, once a judge has determined a party has filed a  
5 “timely and sufficient affidavit[.]” the judge must refer the disqualification motion to another judge  
6 for disposition. 28 U.S.C. § 144; Civ. L.R. 3-15; *U.S. v. Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980).  
7 In contrast, a motion to disqualify a judge under 28 U.S.C. § 455 is decided by that judge. *In re*  
8 *Bernard*, 31 F.3d 842, 843 (9th Cir. 1994); *Sibla*, 624 F.2d at 867-68.

### 9 ANALYSIS

10 The Court DENIES Liao’s motion to disqualify this Court, because she has not shown that  
11 this Court bears a “a deep-seated favoritism or antagonism that would make fair judgment  
12 impossible.” *See Liteky*, 510 U.S. at 555. Liao has not presented any affidavit or declaration with  
13 her motion, thus she is not proceeding under § 144. Nor has she alleged that this Court is sitting in  
14 judgment of its own matter. She is thus not proceeding under the Due Process Clause of the Fifth  
15 Amendment. Instead, Liao states that because this Court disposed of *Cahill*, it

16 has strong personal prejudice against me. [It] violated the procedural rules to abuse  
17 the process in handling that case from the first beginning, since [it] disregarded the  
18 discovery rules that require the presiding judge to set up discovery steps at the first  
19 Case Management Conference, and disregarded my request for court’s order to abide  
20 the defendants to discovery procedures. At the initial Case Management Conference  
21 [the Judge] did not even allow me the chance to speak to reassert my request.

22 Mot. at 1-2.

23 Liao is clearly proceeding under § 455(b)(1), which addresses “personal bias or prejudice  
24 concerning a party.” As *Liteky* holds:

25 judicial rulings alone almost never constitute a valid basis for a bias or partiality  
26 motion. . . . [They] can only in the rarest circumstances evidence the degree of

27 ///

28 ///

1 favoritism or antagonism required . . . when no extrajudicial source is involved.

2 *Almost invariably, they are proper grounds for appeal, not for recusal.*

3 *Liteky*, 510 U.S. at 555-56

4 If Liao had concerns regarding how the discovery proceeded in *Cahill*, she could have presented  
5 them to the Ninth Circuit on appeal. She failed to prosecute her appeals, however. Under *Liteky*,  
6 she may not now raise these concerns as the basis for motion to disqualify.

7 With regard to the Court’s handling of the discovery in *Cahill*, Liao asserts, that it was part  
8 of “a hidden agenda which helped the defendants of my case against Cahill get away easily, because  
9 my complaint against Cahill involved [a] conspiracy that he conducted with the Canadian  
10 governments and the University of Toronto and a White professor Waterhouse.” Mot. at 2. Liao  
11 fails to provide any evidence that this Court conspired with Cahill. Regardless, per *Liteky*, if Liao  
12 believed while prosecuting *Cahill* that there was a conspiracy which affected its discovery, then she  
13 could have, but failed to, raise this issue on appeal.

14 In addition, Liao concludes that this Court is “highly prejudicial against” her, based not just  
15 on the discovery process in *Cahill*, but also because her dismissal was improper, as her claims were  
16 allegedly not time barred, and because she could not appeal, as she could not allegedly afford the  
17 docketing fees. Mot. at 2. Again, under *Liteky*, Liao’s dissatisfaction with *Cahill*’s disposition was  
18 a proper basis for an appeal, which she declined to prosecute, but is not now a proper basis for a  
19 motion to disqualify. Further, Liao’s dissatisfaction with the disposition of her appellate IFP  
20 applications, is not the proper basis for a motion to disqualify, as she raised this issue with the Ninth  
21 Circuit, which on December 4, 2006, ordered her to pay a full docketing fee. *See* Docket No. 127;  
22 Docket No. 13 in appeal 06-15544.

23 Turning to this matter, Liao alleges that she believes the Court will proceed with “a similar  
24 hidden agenda[,]” as in *Cahill*, “since in [its] initial Case Management Order, like before, [it]  
25 deliberately skipped all the discovery steps required by procedural rules.” Mot. at 2. Liao does not  
26 explain the final clause of this sentence. Nor is it logical, as the Standing Order for All Judges of the  
27 Northern District of California, is not unique to this Court, and *implements* Federal Rules of Civil  
28 Procedure 16 and 26, which are civil discovery rules.

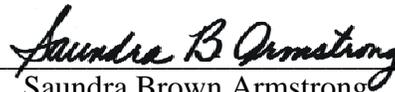
1 Finally, Liao cryptically alleges that to “further” the Court’s prejudice, it has “already ruled  
2 before that all the subsequent cases that I filed shall not be deemed related to my case against Cahill  
3 . . . .” Mot. at 2. She then asserts that this matter should not be related to *Cahill*. *Id.* The Court  
4 merely notes that no party to either *Cahill* or this matter has filed a notice of related case, nor has the  
5 Court sua sponte considered this issue. Regardless, because Liao is proceeding under § 455(b)(1),  
6 on the grounds of personal bias or prejudice against a party, not arising from an “extrajudicial  
7 source,” she bears the burden to show “a deep-seated favoritism or antagonism that would make fair  
8 judgment impossible.” *See Liteky*, 510 U.S. at 555. She has failed to do this, however. Instead, she  
9 has only shown her dissatisfaction with the Court’s rulings in *Cahill*, which under *Liteky*, were  
10 issues for her to appeal, but are not the proper grounds for a motion to disqualify this Court.<sup>4</sup>

11 **CONCLUSION**

12 Accordingly, the Court DENIES plaintiff’s motion to disqualify this Court [Docket No. 9].

13  
14 IT IS SO ORDERED.

15 December 19, 2008

16   
17 Saundra Brown Armstrong  
18 United States District Judge

19  
20  
21  
22  
23  
24  
25  
26 \_\_\_\_\_  
27 <sup>4</sup> Liao also attempts to withdraw her declination to proceed before a magistrate judge. Mot.  
28 at 3. Defendant Ashcroft, however, has declined to so proceed and defendant CNN has not  
consented to so proceed. Absent the consent of *all the parties who have appeared*, the Court may  
not refer this matter to a magistrate judge, except for certain limited purposes. *See* 28 U.S.C.  
§ 636(a)-(c); Fed. R. Civ. P. 72-73; Civ. L.R. 73-1(a).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LIAO et al,

Plaintiff,

v.

ASHCROFT et al,

Defendant.

Case Number: CV08-02776 SBA

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 19, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Wanxia Liao  
7 Beatrice Street  
Toronto, Ontario, M6J 2T2

Dated: December 19, 2008

Richard W. Wieking, Clerk  
By: LISA R CLARK, Deputy Clerk