Winkle v. Loranger et al Doc. 30

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MARK R. WINKLE,

Plaintiff, : Case No. 3:14-cv-020

District Judge Thomas M. Rose

\- vs - Magistrate Judge Michael R. Merz

CAROL S. LORANGER, et al.,

Defendants. :

DECISION AND ORDER DENYING DEMAND FOR RECUSAL

This case is before the Court on Plaintiff's Brief in Opposition to Magistrate Michael Merz's Supplemental Report and Recommendations (Doc. No. 28) which the Clerk has appropriately docketed as objections to that Report.

Under Fed. R. Civ. P. 72, the question of whether the Supplemental Report should be adopted, rejected, modified, or remanded is one for District Judge Thomas Rose. However, Plaintiff also asserts that I should recuse myself from further participation in this case and "save himself the embarrassment of having charges of judicial misconduct brought against him. . ." (Doc. No. 28, PageID 663). At another point, Plaintiff blatantly threatens "[t]he plaintiff would rather not have to bring the magistrate's alleged bias before the Sixth Circuit Court of Appeals Judicial Panel for a misconduct hearing." *Id.* at PageID 653.

Dockets.Justia.com

It would be a serious breach of the Code of Judicial Conduct, and cowardly as well, for a judge to recuse himself because of the threat of judicial misconduct proceedings. I will not do so. If Plaintiff believes he has grounds for filing a judicial misconduct complaint, he should do so without any further hesitation. The form for doing so is available at www.ca6.uscourts.gov/internet/circuit_executive/judicialcomplaint.

Demands for recusal of a federal judge are directed in the first instance to the judge sought to be disqualified. *United States v. Studley,* 783 F.2d 934, 940 (9th Cir. 1986); *In re Drexel Burnham Lambert, Inc.,* 861 F.2d 1307, 1312 (2nd Cir. 1988); *MacNeil v. Americold Corp*., 735 F. Supp. 32, 36 (D. Mass. 1990)(specifically applying rule to United States magistrate judges).

Plaintiff alleges that I should recuse myself because I am "biased against pro se litigants." (Doc. No. 28, PageID 653). The only examples he cites, however, are cases involving himself, to wit, this case and a prior case in which he sued the United Food and Commercial Workers Union and Meijer, Inc. The earlier case was Winkle v. Meijer, Inc., Case No. 3:97-cv-281. That case was litigated before electronic filing and the paper file. In that case as well, Winkle filed an Affidavit of Prejudice which was denied. He never bothered to file any response to the summary judgment motions of the defendants and Judge Rice dismissed the case with prejudice. He sought mandamus and a stay of proceedings from the Sixth Circuit which that Court denied. Winkle took no appeal from the final judgment in this Court.

My actions in denying Plaintiff's motions to amend and recommending dismissal of the Amended Complaint without prejudice for pleading defects are fully explained in the decisions and reports regarding those motions.

Winkle has not cited any statutory basis for his recusal demand, but the governing statute is 28 U.S.C. § 455(a) which provides. "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The standard applied in evaluating recusal motions is an objective one. "[W]hat matters is not the reality of bias or prejudice, but its appearance." *Liteky v. United States,* 510 U.S. 540, 548 (1994). A federal judicial officer must recuse himself or herself where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. This standard is not based 'on the subjective view of a party,'" no matter how strongly that subjective view is held. *United States v. Nelson*, 922 F.2d 311, 319 (6th Cir. 1990); *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir. 1990); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1251 (6th Cir. 1989); *Browning v. Foltz*, 837 F.2d 276, 279 (6th Cir. 1988). Review is for abuse of discretion. *Wheeler*, 875 F.2d at 1251. A judge's introspective estimate of his own ability to be impartial is not the standard. *Roberts v. Bailar,* 625 F.2d 125, 129 (6th Cir. 1980). The same case holds that where the question is close, the judge must recuse himself. *Id.*

§ 455(a) requires disqualification in any proceeding in which a judge's impartiality might reasonably be questioned. "This statute embodies the principle that 'to perform its high function in the best way justice must satisfy the appearance of justice.'" *Ligon v. City of New York (In re Reassignment of Cases)*, 736 F.3d 119, 123 (2nd Cir. 2013), quoting *In re Murchison*, 349 U.S. 133, 136 (1955).

A disqualifying prejudice or bias must ordinarily be personal or extrajudicial. *United States v. Sammons,* 918 F.2d 592, 598 (6th Cir. 1990); *Wheeler*, 875 F.2d at 1250. That is, it "must stem from an extrajudicial source and result in an opinion on the merits on some basis

other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *see also Youn v. Track, Inc.,* 324 F.3d 409 (6th Cir. 2003), citing *Grinnell, supra; Bradley v. Milliken,* 620 F.2d 1143, 1157 (6th Cir. 1980); *Woodruff v. Tomlin*, 593 F.2d 33, 44 (6th Cir. 1979). The Supreme Court has held:

> The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for 'bias and prejudice' recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for 'bias and prejudice' recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice. ... [J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). ... Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

Liteky v. United States, 510 U.S. 540, 554-55 (1994); *see also Alley v. Bell*, 307 F.3d 380, 388 (6th Cir. 2002)(quoting the deep-seated favoritism or antagonism standard). The *Liteky* Court went on to hold:

> *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having 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.

510 U.S. at 555. In *Liteky* itself the Court approved as a common practice the retrial of cases on remand by the same judge who heard them before appeal. Since the decision in *Liteky, supra,* "federal courts have been uniform in holding that § 455(a) cannot be satisfied without proof of

extrajudicial bias, except in the most egregious cases." Flamm, Judicial Disqualification 2d § 25.99, citing *In re Antar,* 71 F.3d 97 (3rd Cir. 1995). Plaintiff does not assert any extrajudicial bias and has not moved for disqualification under §455(b) which requires recusal "[w]here [a judge] has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;"

Instead, Plaintiff asserts I am biased against him because I am biased against all *pro se* litigants. As noted above, he cites no examples except those relating to himself. I note the following cases filed by Winkle in this Court:

1. Winkle v. Honda of America, 2:95-mc-126. Dismissed by Magistrate Judge Abel for Winkle's failure to respond to a court order.

2. Winkle v. Winkle, Case No. 3:98-cv-344. In that case Judge Rice dismissed Winkle's Amended Complaint for failure to state a claim upon which relief could be granted. Winkle took no appeal.

3. Winkle v. Shingler, Case No. 3:03-cv-445. I dismissed that case after a preliminary injunction hearing because Winkle had no evidence to satisfy his claim that defendant there had violated the Fair Housing Act. Winkle took no appeal.

4. Winkle v. Sargus, Case No. 2:14-cv-003. In this case Winkle has sued District Judge Edmund A. Sargus, Jr., and Magistrate Judge Elizabeth Preston Deavers. In that case Winkle accuses Judge Sargus of violating the United States Constitution by putting another of Winkle's cases on hold in retaliation for two motions to recuse Judges Sargus and Deavers. That case was dismissed on recommendation of Magistrate Judge Norah King. When Judge Frost dismissed the case, Winkle filed a motion to recuse him. Winkle took an appeal without paying the required filing fee and Judge Frost has certified the appeal is not taken in good faith.

5. Winkle v. Flaker, Case No. 2:12-cv-1014. Magistrate Judge King recommended this case be dismissed with prejudice, Judge Smith adopted her recommendation, and Winkle took no appeal.

6. Winkle v. Ruggieri, Case No. 2:12-cv-1079. This case appears to involve a controversy with Ohio University similar to the controversy with Wright State here. On recommendation of Magistrate Judge Deavers, Judge Sargus dismissed this case with prejudice. Winkle has appealed and the appeal remains pending.

To summarize, Winkle has frequently sued in this Court and his cases are typically against many defendants. He has never won either in this Court or on appeal. He has filed accusations of bias against four of the judges who have handled his cases and has sued two of them.

A reasonable objective observer knowing these facts would not conclude that I am disqualified from further adjudicating this case. The demand for recusal is DENIED.

May 28, 2014.

s/ *Michael R. Merz*
United States Magistrate Judge