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 SECOND MOTION FOR RECUSAL AND DENYING MOTION FOR DEFAULT JUDGMENT; ORDER TO SHOW CAUSE

This case is before the Court on Plaintiff's Motion to Disqualify Magistrate [Judge] Michael M. [sic] Merz for Federal Crimes, Obstruction, Conspiracy to Defraud, Accepting Bribes, Gifts, Gratuities, and Violating the Plaintiff's Rights to a Fair and Impartial Hearing of the Facts, Brief in Opposition to the Magistrate [Judge]'s Report and Recommendations Regarding Federal Defendants, Motion for Judgment of Default (Doc. No. 32).

On May 28, 2014, the Magistrate Judge filed a Report and Recommendations Regarding Federal Defendants (Doc. No. 29). The portion of the instant Motion objecting to that Report is timely and consideration of its merits is committed to District Judge Rose. The other two portions of the Motion will be dealt with here.

Motion to Disqualify

Winkle made a demand for recusal of the Magistrate Judge as part of his Objections (Doc. No. 28) to a prior Report and Recommendations. The grounds for recusal or disqualification raised there were dealt with in the Decision and Order Denying Demand for Recusal (Doc. No. 30). The grounds raised here are different and will be dealt with here.

Demands for recusal of a federal judge are directed in the first instance to the judge sought to be disqualified. Uni*ted 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).

As his new basis for disqualification, Winkle alleges

> that in the case of Winkle v. Shingler 3:03-445, that he [Winkle] did personally witness Magistrate Michael M. Merz accept a bribe of monetary value from the defense attorney prior to the preliminary injunction hearing in which he was the plaintiff. In fact, upon questioning both the Magistrate and the defense attorney in question, Magistrate Merz asserted that "my friend often treats me to lunch, golf outings, etc." It is interesting that a federal Magistrate would openly take a bribe from a defense attorney in front of the plaintiff whose case was to be heard in a conference room a few minutes later and attempt to play it off as a regular occurrence. This alleged "friend" is a defense attorney that has accepted many alleged "gifts" from Magistrate Merz of dismisals of cases and favorable rulings against his clients, and allegedly openly admitted to this plaintiff that "Magistrate Merz and himself" had exchanged gifts like these for years."

(Motion, Doc. No. 32, PageID 675.)

Winkle v. Shingler was a Fair Housing Act case brought by Winkle *pro se* on December 9, 2003. On January 9, 2004, Winkle moved for injunctive relief to prevent Defendant from evicting him. That motion was set for hearing on January 20, 2004. The next day the Magistrate Judge filed a Decision and Order which included findings of fact and concluded as a matter of law that Winkle could not prove discrimination under the Fair Housing Act: his essential complaint was that his landlord had rented to women with children and he was male and childless. Having dismissed the Fair Housing claims with prejudice, the Court dismissed the state law claims without prejudice so that they could be litigated in the proper forum, the Dayton Municipal Court. Winkle took no appeal. No transcript was made of the proceedings in that case although they were recorded by a court reporter using machine stenography.

Winkle now says I accepted a bribe in that case before the preliminary injunction hearing but in front of Winkle. Winkle says he questioned both me and the defense attorney and I admitted that the defense attorney, whom I described as a friend, "often treats me to lunch, golf outings, etc."

Winkle's allegation is an outrageous lie. I have never played a round of golf in my life[1]. I have never accepted anything of value from the defense lawyer in that case, or from any lawyer in any case, either as a "gift" or as a bribe to influence my decisions.

The fact that Winkle's allegation is a lie is strongly supported by the circumstantial evidence. What person as litigious as Winkle has been in this Court would proceed to a hearing in a case where he had just heard the presiding judge admit to being bribed and say nothing about it? If Winkle's allegations were true, he would himself be guilty of misprision of felony for his failure to report the bribe. 18 U.S.C. § 4 provides:

[1] I exclude two occasions when I played miniature golf with my granddaughter when she was eight and nine years old.

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

Winkle did not allege bribery when he initially sought my recusal. Nor did he raise the second allegations that he now makes, to wit, that I have "only permitted two *pro se* cases to proceed to discovery." (Motion, Doc. No. 32, PageID 676.) That is also untrue. Three **recent**[2] cases referred to this Magistrate Judge in which *pro se* plaintiffs have been allowed to conduct discovery are *Glowka v. Bemis*, Case No. 3:12-cv-345; *Smith v. Montgomery County Sheriff's Office*, Case No. 3:10-cv-448; and *Gessner v. Plummer*, Case No. 3:10-cv-223.

Winkle's second Motion to Disqualify is DENIED.

Motion for Default Judgment

Winkle moves for default judgment against United States Secretary of Education Arne Duncan and the United States Department of Education (Motion, Doc. No. 32).

On May 28, 2014, the Magistrate Judge recommended that the Amended Complaint be dismissed for want of prosecution as to the Federal Defendants because Winkle had not served them with process within the time allowed by Fed. R. Civ. P. 4(m).

On April 7, 2014, Assistant United States Attorney Gregory Dunsky suggested of record that Winkle had failed to serve the Federal Defendants in the manner required by law, to wit, Fed. R. Civ. P. 4(i)(Doc. No. 10). On the same day, the Magistrate Judge filed a notice that he

[2] i.e. filed after January 1, 2010.

would recommend dismissal for want of prosecution as to any defendant upon whom service had not been perfected by May 21, 2014, the 120th day after filing (Doc. No. 11) At no time after that has Winkle filed proof of making service on the Federal Defendants as required by Rule 4(i).

In his request for default judgment against the Federal Defendants, Winkle says:

> In his alleged further attempt to obstruct justice in this case on behalf of the defendants, Magistrate [Judge] Michael M.[sic] Merz once again has his facts in error. The plaintiff served the Federal Defendants legal counsel every document including the Plaintiffs Amended Complaint, and every document submitted by the plaintiff from that point forward. Had the magistrate, in his alleged quarrel with the plaintiff contacted the US Attorney's Office he would have been informed by Asst. U.S. Atty. Gregory Dunsky that he had indeed received every court document including the plaintiff's first amended complaint.

(Motion, Doc. No. 32, PageID 676.)

Mr. Dunsky's suggestion of lack of service (Doc. No. 10) lays out concisely what must be done to obtain personal jurisdiction over a federal officer or agency. Winkle has not proven he has served either the Department of Education or Secretary Duncan in the manner required by law. Merely sending copies to the assigned Assistant United States Attorney, although necessary under Fed. R. Civ. P. 5, is not sufficient. And whether or not copies have been sent to Mr. Dunsky, it would have been a violation of the ethical prohibition on ex parte communications for the Magistrate Judge to call Dunsky and ask.

The Motion for Default Judgment is DENIED.

Order to Show Cause

Fed. R. Civ. P. 11 provides in pertinent part:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Acting *sua sponte* pursuant to Fed. R. Civ. P. 11(b)(3), the Magistrate Judge hereby ORDERS that, on or before June 17, 2014, Plaintiff show cause in writing why he should not be sanctioned under Fed. R. Civ. P. 11 for making in the instant Motion the following allegations:

1. "[T]hat in the case of Winkle v. Shingler 3:03-445, that he [Winkle] did personally witness Magistrate Michael M. Merz accept a bribe of monetary value from the defense attorney prior to the preliminary injunction hearing in which he was the plaintiff."

2. Magistrate Merz asserted that "my friend often treats me to lunch, golf outings, etc."

3. "The Southern Christian Leadership Conference conducted a historical study of Magistrate Merz' cases to the date of their client's case and found that Magistrate Michael M. Merz had only permitted two pro se cases to proceed to discovery, and that only one of those two cases was permitted to proceed to trial."

By signing the instant Motion, Plaintiff has certified that these allegations have "evidentiary support." Plaintiff is ORDERED to produce any evidentiary support he has access to that support these three factual allegations in conjunction with his response to this Order to Show Cause.

June 7, 2014.

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