05 May 2004

To: Richard Wehmhoefer, Ph.D.

From:

Subject: Judge

Distr.: , 1st Judicial District

I am writing concerning Judge , who, I believe, has engaged in a 4-year pattern of discrimination against me based on my alleged mental illness and occasional *pro se* status.

***Pro se* bias**

We know that *pro se* bias exists in courtrooms, although reviewing courts around the country rarely acknowledge it in their opinions (often concluding that the record *"demonstrates the Plaintiff was treated with patience [and] restraint,"* (See Hutter v. Bray, *et al*., (Tenn.App. June 5th, 2002) see also Prefer v. PharmNetRx, LLC, 18 P.3d 844 (Colo. App. 2000)) and often classifying the complaints as, *"delusions of persecution."* Weihofen, Testimonial Competence and Credibility, 34 Geo.Wash.L.Rev. 53, 82 (1965) Depite this, Governor Owen's Task Force on Civil Justice Reform recommended that, *"Judge candidates should be screened for patience in dealing with* pro se *litigants."* (See Report of the Committee on *Pro Se* Parties and Civil Justice Reform). The 2000 Colorado Gender & Justice Annual Report, found that, *"Handling* pro se *divorce proceedings requires a certain judicial temperament and personality."* The Final Report to the Chief Justice by the Colorado Supreme Court Multicultural Commission, reported that citizens perceived bias against *pro se* litigants. *Id.* at "Pueblo Hearing."

Mental illness discrimination

It is also well-settled that [perceived] mental illness has also been used as a basis for discrimination. (See *e.g.,* Olmstead v. L.C., (98-536) 527 U.S. 581 (1999) 138 F.3d 893 (*"…persons with disabilities have been subject to historic mistreatment, indifference, and hostility."*)) In Illinois v. Allen, 397 U.S. 337 (1970), Justice Douglas lamented in his dissent that, *"Great injustices have at times been done to unpopular minorities by judges."* Indeed, a great injustice has been done to me but, I focus not on the result of the injustice here, but rather on the rationale for it, as more fully set forth hereinbelow.

Because, *"[p]rejudice is mental condition or status, a certain bent of mind, which cannot be demonstrated, ordinarily, by direct proof"* Smith v. District Court, 629 P.2d 1055 (Colo. 1981), to find that such prejudice exists *vel non,* the reviewing authority must examine the entirety of the record: *"[I]t is only after an examination of the entire record, that we can come to a conclu-*

sion about the conduct of the district court. "United States v. Manko, 979 F.2d at 905-906 (2d Cir. 1992).

I will not concern you with the specific and repetitive legal errors from my case, because I know that you may elect to dismiss those as "appellate issues," despite that they are indicative of the bias averred herein. (see *e.g.,* In re Quirk, 94-1143, 8 (La. 12/12/97), 705 So.2d 172, 178 (*"Legal error may constitute judicial misconduct if it is either egregious legal error, legal error motivated by bad faith, or a pattern of repeated legal error."*)) Rather, I will focus on Judge Tidball's articulated reasons in justifying errors. *"We should, of course, not protect a member of the judiciary "who is in fact guilty of using his power to vent his spleen upon others, or for any other personal motive not connected with the public good."* Gregoire v. Biddle, 177 F.2d 579, 581 (1949)

Non-conclusory allegations

In a recent order from my own case, Judge [redacted] began the punitive section with, "The Respondent has chosen to represent himself...," and in an earlier ruling, [redacted] issued a *punitive* award of attorney fees (under §14-10-119), stating as the reason, "the Respondent's **mental health and** the fact that he's been ***pro se*** throughout some of these proceedings." [emphasis added] The resulting written order, states: "Regarding attorney fees...The Respondent's **mental health** has caused the Petitioner to incur substantially more fees." As the *dicta* plainly states, I have been classified and treated punitively, because I am or have been *pro se* and mentally ill. Such a policy offends the Equal Protection Clause. In both cases, attorney fees under §14-10-119 were assessed against me on the basis of either my *pro se* status, mental illness or both, when §14-10-119 is not available for punitive application (for any reason). At issue here is not the legal error in applying §14-10-119 –as you will likely point out, that is an appellate issue. What is at issue is *the reason* cited in justification of a punitive application. A trial court's perceptions of mental illness are not a valid basis for discrimination (of any kind). Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 461-464 (1985) *Id.* at 448. A Judge may not, *"...by words or conduct, manifest bias or prejudice based upon...disability..."* (see Canon 3 (9) of the Colorado Code of Judicial Conduct.) *"Disability,"* includes, *"[a]ny mental or psychological disorder, such as ... emotional or mental illness."* 29 C.F.R. §1630.2(h)(2001); See also E.E.O.C. v. J. B. Hunt Transport, Inc., 321 F.3d 69, 74 (2d Cir. 2003), and includes bipolar disorder (see United States v. McMurray, 833 F. Supp. 1454, 1458 (D. Neb. 1993); Fitts v Federal National Mortgage Association et al. (DC District Court, No. 98-00617, February 26, 2002)) and also applies to those who might *not* have a disability, but are *perceived* to have a disability: See *e.g.* School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987). Because: (1) I am a *"qualified individual"* with a disability; and (2) have been [repeatedly] excluded from participation in [the court's] services, programs or activities or was otherwise discriminated against by [the court, using attorney fees, legal error, deliberate indifference and the axiomatic denial of my pleadings as a method of discrimination, intended to punish and deter me from participating in the adversarial process in a meaningful way]; and (3) such exclusion or discrimination was due to my disability, Judge [redacted] has been acting in violation of the Americans with Disabilities Act, Title II. 42 U.S.C. §12132.

Also at issue is Judge 's axiomatic denial (or, rather, disregard) of all of my legal pleadings, which constitutes a "willful or persistent failure of a judge to perform judicial duties," and, which, only occurs during the times that I do not have an attorney. As we now well know from cases like Chambers v. NASCO, Inc., 501 U.S. 32 (1991), Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986), Board of County Commissioners v. Winslow, 862 P.2d 921 (Colo. 1993), People v. Dunlap, 623 P.2d 408, 411 (Colo. 1981) and many others, the courts have the means by which to suppress allegedly abusive litigation. However, simply denying access to the courts by ignoring or axiomatically denying all legal pleadings *without any findings*, is an impermissible form of litigation deterrence. At least one reason is because such a covert action cannot be reviewed (*i.e.,* it is not appealable) and because it does not arise from a known rationale, such as that articulated in an order requiring (for example) a litigant to seek permission first before filing a case or a motion. Justice William Bedsworth (California Court of Appeals) recently wrote about abusive pro per inmate litigation (ref. Washington v. Alaimo, 934 F. Supp. 1395 (1996)) in his article entitled *"Improper Persona,"* and stated:

> "...I do know that a measurable percentage of my career has been spent addressing motions like the ones filed by Mr. Washington. – Don't misunderstand me. I make a comfortable living doing nothing more strenuous than thinking about things people ask me to think about. There is no heavy lifting, no shift work, I'm not required to drive through snow, and I don't come home smelling of fish.
>
> "When I'm done thinking about these things, I give my "opinion" about them and start thinking about something else. Anyone churlish enough to complain about such a job, anyone who -asked so little- would fail to **give every case**, regardless of whether it's handled by a successful attorney or a prison inmate, **full consideration**, is an ungrateful lout." [emphasis added]

Dr. Wehmhoefer, especially because this is an ongoing case, I will not go on record to call Judge an "ungrateful lout" (as Justice Bedsworth has done, based upon his characterization of the dilatoriness or refusal to adjudicate justiciable controversies), but, knowing how Judge feels about me, it is safe (for me) to assume that this covert litigation suppression is because simply thinks I'm crazy. However, has not actually entered any express findings that my litigation has been abusive or frivolous ("pro se *litigants are entitled to protection of subsection (6) of this section[13-17-102] unless trial court makes an express finding that such litigants knew or reasonably should have known that their claims lacked substantial justification."* Artes-Roy v. Lyman, 833 P.2d 62 (Colo. App. 1992) and "*Conclusory statements that a claim is frivolous, groundless, or vexatious are insufficient."* In re Aldrich, 945 P.2d 1370 (Colo. 1997)) Because has provided no justification for covert litigation suppression and denying my access to the courts, and because it is not proper for any of us to speculate about what reasoning may be, we must look to previously supplied explanations (*supra*).

Limitation of available remedies

As you know, absolute judicial immunity severely limits my remedies if, in fact, Judge is acting in violation of the ADA, *inter alia*. I cannot simply sue if I believe that I have a valid claim. The Department of Justice is barred by the Eleventh Amendment from suing (the state) on my behalf. (*nota bene:* I believe that is one reason why your office exists –to provide some oversight of judicial conduct as a safeguard in the absence of standard remedies.) That leaves me at the mercy of: (1) your office; (2) expensive and difficult appellate review, when and if available; and (3) rarely granted petition for writ of prohibition by the Supreme Court.

I want to briefly address the "appellate issue" facet of complaints. Merely because [an] issue[s] can be complained about on appeal does not mean that: (a) the issue is mutually exclusive –*i.e.*, it cannot be considered by your office; (b) the issue is purely legal error, best addressed by a higher court of error. At least one reason not all "complaints" concerning judicial bias and misconduct are not appropriate for appellate review is because an appeal is not an independent review (see *e.g.,* Hayes v. State, 178 Colo. 447, 498 P.2d 1119 (1972) (*Evidence will be viewed on appeal in the light most favorable to upholding the judgment.*); Laessig v. May D & F, 157 Colo. 260, 402 P.2d 183 (1965) (*"A judgment entered by a court of general jurisdiction is* ***presumed to be correct****. A litigant suffering an adverse judgment has the burden of overcoming this presumption…"*) [emphasis added]) Another is because my complaint is not about, *"adverse judgment,"*(*Id.*) but that reasoning behind it.

Conclusion

Thank you for taking the time to read and consider this matter. I reiterate that the issues I bring before you are, first and foremost, the articulated rationale for discrimination and repeated legal error and, to a lesser extent, the legal error, themselves, where they constitute violations of the Americans with Disabilities Act, the Equal Protection clause and the Judicial Code of Conduct. If you do *not* believe that the conduct described hereinabove –especially the comments on record regarding my alleged mental illness –constitutes a clear violation of Canon 3 (9) of the Judicial Code of Conduct, *inter alia*, please help me to understand, in clear terms, why the conduct is not that which is proscribed by Canon 3. In that situation, it would be most helpful [to me] if you would include a hypothetical example of discrimination on the basis of mental illness by a judge that does qualify, so that I can understand the threshold and avoid burdening you with any future complaints that do not meet that threshold.

…with kind regards,