

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Civil Action N^o 05-cv-01858-EWN–MJW

SEAN HARRINGTON

Plaintiff,

v.

MADLINE WILSON and the “LAW OFFICE OF MADLINE WILSON”;
CHRISTY RYAN;
BILL J. FYFE and COLUMBINE COUNSELING CENTER, P.C.;
LAURA ARCILISE, in her personal capacity;
LOUISE CULBERSON-SMITH, in her personal capacity;
JOHN GLEASON in both his personal and official capacity;
WENDELL PRYOR in his official capacity;
ROBERT EVANS, in his official capacity; and
the JEFFERSON COUNTY COMBINED COURT (a/k/a “THE FIRST JUDICIAL DISTRICT”),
by and through the COLORADO ATTORNEY GENERAL, JOHN SUTHERS, in his official Capacity.

Defendants

PLAINTIFF’S MOTION FOR SUBSTITUTION OF JUDGE

COMES NOW, Plaintiff Sean Harrington, pursuant to 28 U.S.C. § 455, who respectfully moves this Court for an Order of Substitution of Judge.

1. Although Plaintiff moves the Court under Section 455, the right to a tribunal free from bias, prejudice, or the appearance of partiality is based on the Due Process Clause, and not on any statute. *See United States v. Sciuto*, 521 F.2d 842 (7th Cir. 1996).

2. A necessary incident of a judge’s duty is that he must hear with an open mind all of the evidence that the parties are entitled and attempt to introduce before reaching a final conclusion. When this precept is violated by predetermination as to the merits of any material issue, “that may justify a party’s fear that an impartial adjudication will be denied. In such circumstances, disqualification of the judge may be warranted and, where judgment has already been rendered, reversal may be appropriate.” *Flamm, Richard E., Judicial Disqualification* (Little, Brown & Co. 1996) at § 15.2.

3. The undersigned believes that the Tenth Circuit will remand this case but, because Judge Nottingham has already formed an adverse predetermination of the merits of this case (though there has been no discovery and evidence entered),¹ the undersigned is unmistakably convinced that this case will receive no impartial determination. Accordingly, this Motion is not moot and Plaintiff requests assignment to another division and that this Motion be decided by a different Article III judge.

4. In the case at bar, there has been no discovery and the pleadings have been essentially limited to motions to dismiss. Plaintiff has not appeared before Judge Nottingham and, consequently, Judge Nottingham has had no opportunity to form an opinion based on any observation of the undersigned or testimony of the undersigned. Throughout this case, Plaintiff has never questioned or offended the dignity of the Court, yet at every opportunity, Judge Nottingham—for reasons known only to him—has vented his spleen on the undersigned. Plaintiff has petitioned this honorable Court for the redress of grievances and the vindication of concrete interests and constitutional rights. These are important matters that leave no leeway for frivolity or Judge Nottingham’s personal vendettas, political views or caprice.

5. Throughout these proceedings under Rule 12(b), the magistrate—and now the Article III judge—have advocated for the defendants. For example, as Plaintiff has previously argued, the magistrate’s Recommendations contains numerous *sua sponte* adverse findings of ultimate facts that violates the rule that the factual allegations of a complaint are to be taken as true and that all reasonable inferences are to be construed in Plaintiff’s favor. Docket #76-11, K1-K4. The magistrate’s Recommendations also contained numerous *sua sponte* bases for dismissal. *See Perez v. Ortiz*, *Perez v. Ortiz*, 849 F.2d 793, 797 (2nd Cir. 1988) (*sua sponte* findings in support of dismissal are disfavored because they tend to cast the judge in the role of “a proponent rather than an independent entity”) (quoting *Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 415 (7th Cir. 1986)).

6. Judicial bias is generally not presumed on the basis of adverse rulings even when such rulings are not only numerous but erroneous, no matter how erroneous they are. *Flamm, Richard E., Judicial Disqualification* (Little, Brown & Co. 1996), § 16.4 at 473. This is because a judge’s mis-

¹ This inference is formed not solely on the basis of orders, but also on the basis of Judge Nottingham’s pattern of suppressing a justiciable controversy by abdicating the duties of his office and also by oppressively discharging the duties of his office.

take of fact or law would not warrant a reasonable person to conclude that the judge is partial to one side of a dispute. *Id.* An exception to the general rule is bias inferred from conduct that is not extra-judicial when it displays clearly an, “inability to render fair judgment.” *Liteky v. United States*, 510 U.S. 540, 552 (1994). The *Liteky* Court referred to such conduct as a, “high degree of favoritism or antagonism.” *Id.* at 555.

7. The Federal Judicial Center’s 2002 Publication, Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144, notes that, “A judge’s rulings and expressions of opinion generally fail to justify recusal . . . naturally, judges hold and express attitudes about the litigants and issues that they have formed during the trial.”² *Id.* at 20. In *United States v. Grinnell Corp.*, a case predating the 1974 amendment to Section 455, the Court ruled against recusal because, “[a]ny adverse attitudes that [the judge] evinced toward the defendants were based on his study of the depositions and briefs, which the parties had requested him to make.” 384 U.S. 563, 582 (1966). The one difference here is that the case was dismissed under Rule 12(b), where all facts stated in the Complaint are to be taken as true, and all reasonable inferences are to be construed in Plaintiff’s favor. *See also* Flamm, *supra*, § 16.6:

Even where local jurisprudence expressly acknowledges the power of judges to express their opinions within reasonable limits, a logical basis for inferring judicial bias may be deemed to exist where a judge’s comments connote a “fixed opinion” or “a closed mind” with respect to the merits of a case. **This is particularly true where such comments are made during a stage of the proceedings at which a judge would not normally be expected to have formed a fixed opinion as to the dispositive facts.**

Id. at 483-85. [emphasis added]. In the instant case, which had not yet proceeded to discovery and which was dismissed for the stated reason of want of jurisdiction, Judge Nottingham exercised jurisdiction [that he has already ruled that he lacked] to *sua sponte* judge the merits of the case, char-

² Of course, in the case at bar, there has been no discovery or trial.

acterizing Plaintiff's claims as "frivolous" and "vexatious."³ As with each and all of his previous orders, he provided no findings of fact or conclusion of law to justify the assailment.⁴ Docket # 114.

8. In *United States v. Young*, 45 F.3d 1405, 1414 (10th Cir. 1995), the Tenth Circuit upheld a refusal to recuse, even though the trial judge opined pretrial that, "the obvious thing that's going to happen . . . is that she's going to get convicted." The Court of Appeals observed, "Nothing in the remark indicates that the judge was unable or unwilling to carry out his responsibilities impartially." By contrast, in the case *sub judice*, Judge Nottingham's collective judicial hostile actions and inaction⁵ indicate his strong aversion to any discharge of his duties (except for dismissing the case without any expenditure of time, effort or respect for the law or the rights of litigants).

9. Judge Nottingham's conduct in this case would cause a reasonable person to infer an appearance of partiality therefrom: Judge Nottingham was so eager to suppress the justiciable controversy of this matter, that he dismissed the case prematurely before the time to submit objections under Fed.R.Civ.P. 72(b) had elapsed (docket # 74). He exhibited deep-seated resentment by using unprovoked offensive, caustic language⁶ in his Order (docket # 80), refusing to consider Plaintiff's

³ The only allegation that this case was "frivolous," out of the nine defendants represented by four attorneys, was contained Defendant Wilson in her 'wherefore clause.' Docket # 38 at 21. Defendant Ryan described the complaint as containing some allegations that were "scandalous." Docket # 25 at 6. None of the defendants described the suit as vexatious or harassing. No defendant moved for sanctions under Rule 11. The magistrate, who allegedly performed "yeoman service in reviewing the case and making a thorough recommendation" (docket # 80), did not describe the case as groundless, frivolous, vexatious or harassing.

⁴ See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 Geo. L.J. 121, 157, 181 (2005) ("the generally accepted yet rarely articulated position is that court should strive to be universally candid. . . There is a strong preference and . . . , arguably, a duty for full, candid elaboration . . . elaboration is critical to meaningful assessment of whether a court has breached its duty in a given case").

⁵ *E.g.*, Judge Nottingham declined to review any version of Plaintiff's objections, as required of him under Fed.R.Civ.P. 72(b). In another case of a *pro se* non-custodial father, No. 04-cv-2289, where the State defendants filed neither an answer nor a motion to dismiss, Judge Nottingham waited nearly a full year to issue an Order accepting the magistrate's recommendations to dismiss that case.

⁶ Judge Nottingham has established a reputation among the Colorado legal community, to which Plaintiff belongs, and also in the Tenth Circuit of being caustic and verbally abusive to both litigants and attorneys. One well-respected appellate attorney informed the undersigned that it is thought that Judge Nottingham keep a "thesaurus of insults" on his desk for opinion writing; another advised the undersigned not to take Judge Nottingham's comments personally, "because he treats me and everybody that way;" another informed the undersigned that Judge Nottingham's vitriol is well-known to the Tenth Circuit Court; and yet another attorney, who had filed several fifty and sixty-pages briefs throughout one case, complained that he had been called "Lazy" by Judge Nottingham. A Denver Post newspaper article, referring to Judge Nottingham as a

Objections to the magistrate's recommendation (a statutory procedural due process protection) and subsequently refusing to consider Plaintiff amended objections (amended for the Court's pleasure (docket # 81)). He added "with prejudice" to the dismissal (docket # 80) but, only after Plaintiff timely filed his objections under Fed.R.Civ.P. 72(b) and after Plaintiff had respectfully assigned error to Judge Nottingham for his erroneous premature dismissal under Fed.R.Civ.P. 59. Docket # 75. He *sua sponte* added an award of costs and, in so doing, rendered a *different* judgment under Rule 60(a), where no costs had previously been ordered under § 1919 (docket # 115). These latter actions, without just cause, were punitive in nature. *See, e.g., Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554 (1963) (defining the traditional aims of punishment as, "retribution and deterrence").

10. In each of these instances described hereinabove, Judge Nottingham, not only refused to reconsider his clearly erroneous orders, but he also refused to entertain Plaintiff's benign requests to provide reviewable findings of fact or conclusions of law. *See, e.g.,* docket 81 at 4. "According to one view of the relationship between elaboration and the proper processes of judicial decision . . . a decision can be legitimate, even without the issuance of reasons supporting it, so long as the process that led to the decision complied with the criteria of legitimacy." Chad M. Oldfather, Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide, 94 Geo. L.J. 121, 175-76 (2005). Here, the decisions were devoid of elaboration and the processes that led to the decisions did not comply with the criteria of legitimacy.

11. Under a nation of laws (John Adams, Declaration of Rights, Massachusetts Constitution, 1780), Judge Nottingham has an affirmative obligation to set aside whatever personal and political views he may have to impartially and dispassionately discharge the duties of his office. Chief Justice Marshall may as well have been writing directly to Judge Nottingham to remind him that, "Questions may occur, which we would gladly avoid, but we cannot avoid them." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). To take two of the twenty-eight claims as examples, **(a)** this was a case of a mother, who has concealed a minor child from Plaintiff—a tort recognized in the majority of the States, including Colorado—and also **(b)** a case that included claims for cogent breaches of a valid, binding contract. Yet, without any discovery and without hearing any evidence and supposedly disposing the case for lack of jurisdiction (thereby divesting the court of any power to make

"no frills" judge commented on his penchant for compelling attorneys to appear before him at 6:30 a.m. on Monday mornings to argue motions that Judge Nottingham characterized as "frivolous."

judgment on the merits), Judge Nottingham passed judgment on the merits by *sua sponte* describing the case as frivolous and vexatious —in effect, expressing his personal caprice, based on no legal standard, that Plaintiff has no cognizable basis in the law to pursue such claims against an ex-spouse, who has concealed a minor child from him —even where the Colorado State courts have held that this is cognizable (*Hall v. Hall-Stradley*, 13 Fam. L. Rep. (BNA) 1108 (Colo. Dist. Ct. 1986, Case NO 84-CV-2865) docket 76-20); and that Plaintiff has no right to enforce binding valid contracts —even where the Colorado Court of Appeals has twice held that the particular contract in question is binding and enforceable.⁷

12. To substantiate the claims in the previous paragraphs, Plaintiff Levi Samora asserted somewhat less cogent claims against the same Defendant Fyfe in Case No. 04-RB-0994, yet Judge Blackburn issued a thoughtful, meaningful nine-page order dismissing the case but, finding that the legal arguments advanced by Plaintiff Samora were not frivolous. Docket 76-13 at 6. In No. 04-D-54 (another case against another Colorado special advocate), Judge Daniel issued a meaningful, thoughtful ten-page Order dismissing that case. (Docket 76-16). In No. 03-M-408, a case against the State of Colorado by a *pro se* non-custodial parent, Judge Matsch issued a three-page Order, containing at least some reviewable findings of facts and conclusions of law, dismissing that case. (Docket # 76-14). In 06-cv-00089 (10th Cir. 06-1378), a case where the *pro se* non-custodial parent failed to appear for a hearing and accused both the magistrate and the judge of maladministration and knowingly exceeding their authority, Judge Miller issued a four-page Order, also containing reviewable conclusions of law and findings of fact, dismissing the case under as a sanction but, without prejudice so as to afford that Plaintiff an opportunity to reevaluate his approach towards the Court. Docket 76-17. Indeed, it appears that every judge, **except** Judge Nottingham, is willing or able to fulfill his duties as judge, to review the magistrate's recommendations and articulate at least some reviewable findings of facts and conclusions of law in these apparently disfavored cases of non-custodial fathers attempting to vindicate rights in federal court.

13. When Congress amended Section 455(a), it made clear that judges should apply an objective standard in determining whether to recuse. A judge contemplating recusal should not ask whether

⁷ Many of these same claims had been argued to the Colorado Court of Appeals. The Court did not characterize any of them as frivolous and, instead, reversed and vacated. See *In re Marriage of Harrington*, (Colo.App. No. 04-1161, March 9, 2006), Exhibit A to docket # 69; *In re Marriage of Harrington*, (Colo.App. No. 04-1986, August 3, 2006), Exhibit A to docket # 71.

he or she believes he or she is capable of impartially presiding over the case. The statute requires recusal in any case “in which [the judge’s] impartiality might be reasonably questioned.” Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144, (Federal Judicial Center 2002) at 15; *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995)

WHEREFORE, for the reasons more fully set forth hereinabove, Plaintiff requests that this Motion be decided by an Article III judge other than Edward Nottingham and for reassignment of the above-styled cause to another division.

Respectfully Submitted this 26th day of October, 2006:

/s Sean Harrington
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CERTIFICATE OF SERVICE

I hereby certify that on October 26th 2006, I served the foregoing Recusal Motion via U.S. Mail, unless otherwise designated, as set forth hereinbelow, and affixed hereto:

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