

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

Civil Action No. 07-cv-01924-MSK-KMT

KENNETH L. SMITH,

Plaintiff,

v.

HONS. MICHAEL L. BENDER,
NATHAN B. COATS,
GREGORY J. HOBBS, JR.,
REBECCA LOVE KOURLIS,
ALEX J. MARTINEZ,
MARY J. MULLARKEY, and
NANCY E. RICE, in their individual capacities only,
HON. JOHN W. SUTHERS, and
FRIEDRICK C. HAINES, in their individual capacities only,
JOHN DOES 1-99, and
THE UNITED STATES OF AMERICA,

Defendants.

**DEFENDANT UNITED STATES OF AMERICA'S
RESPONSE TO PLAINTIFF'S MOTION FOR
RECUSAL OF JUDGE KRIEGER**

Defendant United States of America (United States) opposes Plaintiff's Motion for Recusal of Judge Krieger (Doc. 43), and states as reasons therefor:

1. Plaintiff's motion requests that Judge Krieger recuse herself in the above-captioned case. *See* Doc. 43.
2. Because the United States is not aware of any conflict at this time warranting recusal, the United States opposes recusal of Judge Krieger.

3. 28 U.S.C. § 455 sets forth the circumstances in which a judge must recuse herself. Plaintiff's current motion appears to allege partiality and bias as grounds for recusal, which implicate the circumstances in 28 U.S.C. § 455(a) requiring recusal where "impartiality might reasonably be questioned," and 28 U.S.C. § 455(b)(1) requiring recusal where there is "a personal bias or prejudice concerning a party." 28 U.S.C. § 455(a) and (b)(1). "Recusal is 'appropriate only where a reasonable person, were he to know all the circumstances, would harbor doubts about the judge's impartiality.'" *Gaiters v. City of Catoosa*, 226 Fed. Appx. 826, 828 (10th Cir. 2007) (quoting *United States v. Mendoza*, 468 F.3d 1256, 1262 (10th Cir. 2006)). In *Gaiters*, "[t]he district court denied Mr. Gaiters' motion because he failed to provide any facts to show that a reasonable person could question the district court judge's impartiality." *Id.* The Tenth Circuit affirmed the district court's denial. *Id.*

4. In the case at bar, Plaintiff has not alleged facts in his motion to support a finding of partiality or bias. Instead, Plaintiff references Judge Ebel's recusal in a different matter involving Plaintiff in which Judge Ebel is a named Defendant. *See* Doc. 43, at 3. Plaintiff then argues that Judge Ebel's recusal "logically warrants" Judge Krieger's recusal in the case at bar because the injunctive relief Plaintiff seeks in the case against Judge Ebel (a "minimum standard of conduct" by the judges who handle his cases) would apply to Judge Krieger as well as Judge Ebel. *See id.* This argument does not provide sufficient grounds for recusal. In a case in which the movant alleged partiality and bias under § 455(a) and (b)(1) because the judge was a member of an Episcopal church and defendant was an Episcopal church in the Diocese of Colorado, the Tenth Circuit upheld the district court's denial of the motion to recuse because

membership in an Episcopal church was only one suggestion of partiality. *See Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 660 (10th Cir. 2002). Here, Plaintiff lacks even one suggestion of partiality because Plaintiff does not allege a basis for partiality or bias on the part of Judge Krieger that is based on the facts and issues in the case at bar. And because Defendant is unaware of any facts or issues in the case at bar that would warrant recusal at this time, Defendant would oppose Plaintiff's motion in any event. Mere "unsubstantiated suggestions of personal bias or prejudice" do not suffice. *Id.* (citing *Switzer v. Berry*, 198 F.3d 1255, 1258 (10th Cir.2000)). Because all of Plaintiff's bases for recusal are "unsubstantiated suggestions," they do not overcome Judge Krieger's "strong [] duty to sit when there is no legitimate reason to recuse." *See id.* at 659 (internal quotation omitted). Accordingly, Plaintiff's motion should be denied.

WHEREFORE, the United States opposes Plaintiff's Motion for Recusal of Judge Krieger.

DATED this 11th day of March, 2008.

Respectfully Submitted,

TROY A. EID
United States Attorney

s/Marc A. Bonora

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on March 11, 2008, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following e-mail address:

Christine K. Wilkinson
christine.wilkinson@state.co.us, steve.morrow@state.co.us

and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participant(s) in the manner (mail, hand delivery, etc.) indicated by the nonparticipant's name:

Kenneth L. Smith
23636 Genesee Village Road
Golden, CO 80401

s/ Marc A. Bonora
For the United States Attorney's Office