UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL.	:	
plaintiffs	:	
	:	
v.	:	NO: 3:04-CV-1109 (JBA)
	:	
JOHN DESTEFANO, JR, ET AL.	:	
defendants	:	MARCH 16, 2010

DEFENDANTS' OBJECTION TO PLAINTIFFS' MOTION FOR RECUSAL

The defendants, the City of New Haven ("the City"), John DeStefano, Jr., Tina Burgett, Karen Dubois-Walton, Thomas Ude, Jr., Boise Kimber, Malcolm Webber and Zelma Tirado, respectfully object to the plaintiffs' February 23, 2010 Motion for Recusal.

This nation's commitment to the rule of law is second to none. Implicit within this notion is the guarantee that issues of law will be determined by a fair and impartial tribunal. The plaintiffs, however, appear to seek not a fair and impartial tribunal, but one that is unabashedly partial to them. Indeed, given the plaintiffs' delay in raising this issue, their previous waiver of any claim for recusal, and the severe weaknesses in their efforts to pursue relief under any claim other than Title VII of the Civil Rights Act of 1964 ("Title VII"), it appears that the real reason for this motion is gamesmanship that should not be countenanced by the Court. The plaintiffs' motion should be denied.

BACKGROUND

Any legitimate issues regarding this Court's impartiality were raised and addressed nearly four years ago. All of the other issues raised by the plaintiffs' motion could have and should have been dealt with at that time or, at the very latest, immediately upon the remand of this case from the United States Court of Appeals for the Second Circuit ("Second Circuit"), following the decision of the United States Supreme Court on June 29, 2009.

On May 24, 2006, upon receiving this case, the Court held a status conference where any suggestion about the presiding judge's impartiality was directly addressed and resolutely rejected *by* the plaintiffs, through their counsel. The Court asked, "is there anything else about the fire department and my firm's representation of anybody in the fire department that has come to your attention . . . " (Transcript of May 24, 2006 status conference, p. 7, attached as Exhibit A.) In response, the plaintiffs' counsel stated: "Yes, your Honor . . . . Although I do not believe it meaningful." Id. Counsel then went on to explain that the Court's prior firm previously represented the Firebirds in a lawsuit, but stated, "I do not see either the litigation **or any issues raised there** as in anyway related to this case . . . .[N]othing about that case reemerges, so to speak, as an issue in this case. In fact, **it's completely irrelevant**." Id. at 8 (emphasis added). When asked whether anyone thought the prior representation was a problem, the plaintiffs' counsel stated, "I do not, your Honor." Id. Moreover, the Court asked counsel to determine "within a week if there is any

additional information that you want me to consider." Id. at 9. Counsel for both sides agreed to do so, but did not raise any concerns at that time. See id.

Nevertheless, having conceded the lack of relevance of the issue almost four years ago, this motion represents the second time in the last two months in which the plaintiffs have tried to raise the representation of the Firebirds by the Court's prior firm as a basis for recusal. The first time occurred on January 20, 2010, when the plaintiffs, through their counsel, raised this issue orally along with several others. At that time, the plaintiffs made no reference whatsoever to their prior concession on the issue and instead acted as if the May 24, 2006 status conference never occurred. A week later, after the defendants brought the prior status conference transcript to the Court's attention, the plaintiffs, through their counsel, apologized for the omission, but nevertheless continued to press for the Court's recusal on this ground and others. (See Doc. Nos. 213, 217.) During the conferences on January 20th and 27th, 2010, the Court answered a number of questions posed by the plaintiffs and provided clarification on a number of issues raised.

Significantly, none of the issues raised then or now were raised when this matter returned to the Court from the Second Circuit. Shortly after remand, the Court held a status conference on November 5, 2009. At that conference, the plaintiffs did not raise the issue of recusal, nor did they suggest in any way that an issue existed that would require the disqualification of the presiding judge. In fact, prior to the status conference, the plaintiffs'

counsel filed a request for entry of judgment on their claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and sought an order from the Court during the status conference. (Transcript of November 5, 2009 status conference, p. 8, attached as Exhibit B.) ("The plaintiffs' position is for a whole host of reasons judgment should enter immediately on the Title VII claims, and there is no point in delaying it because it's not appealable.").

In addition, the plaintiffs, along with the defendants, sought relief from the Court in order for fourteen of the twenty plaintiffs in the case to be promoted. See id. at 16-22. The parties endeavored to work together to provide an order for the Court. Ultimately, the parties submitted separate proposed orders, necessitating a ruling from the Court. On November 24, 2009, the Court ordered the certification of the 2003 promotional examination results for the ranks of Lieutenant and Captain and the promotion of fourteen of the twenty plaintiffs. (November 24, 2009 Order, attached as Exhibit C). The plaintiffs did not object to, or otherwise raise a concern about, the propriety of the Court issuing this order. Again, they had sought an order providing for promotions, as did the defendants.

On Monday, November 30, 2009, the second business day after receiving the November 24th Order, the New Haven Civil Service Board ("Civil Service Board") certified the exams and, on the very next day, Tuesday, December 1, 2009, the New Haven Board of Fire Commissioners ("Fire Commissioners") promoted the fourteen plaintiffs. Before the

Civil Service Board certified the list and before the Fire Commissioners promoted the fourteen plaintiffs, however, a group of putative intervenors – eight African-American firefighters who would not be promoted as a result of certification and who sought to have the results of the 2003 examinations nullified – filed a motion to stay the promotions. The City nevertheless moved ahead and promoted the fourteen plaintiffs subject to the Court's order.

The very next day, the Court rejected the challenge to the promotion of these fourteen plaintiffs, holding that "the Movants cannot show any possibility of success on claims challenging the legality of those promotions or that they will be irreparably injured in a legally cognizable way by them." (Ruling and Order on Motion To Stay, Doc. Nos. 170, 172, attached as Exhibit D). Thus, without requiring *any* action on their part, the Court protected the promotion of the fourteen plaintiffs from *any* collateral attack. The plaintiffs did not object to, or otherwise raise any concerns about, the legal merits of the Court's decision denying the stay at that time.

Later, in electronic correspondence to the Court, the plaintiffs' counsel raised the issue of recusal, but did not file a written motion or otherwise identify any basis for recusal at that time. Indeed, even when the plaintiffs' counsel first articulated her alleged bases on January 20, 2010, it was *after* the Court had received briefing and heard oral argument from all parties from another putative intervenor, Michael Briscoe. After the issues were raised at

that proceeding and another one on January 27, 2010, the Court on February 4, 2010 ruled from the bench on the issue of the Firebirds as well as the other alleged bases for recusal raised orally by the plaintiffs' counsel.

In its February 4, 2010 ruling, the Court expressly addressed whether recusal was warranted under either 28 U.S.C. Section 455(a) or 28 U.S.C. Section 455 (b) for any of the following reasons: (1) any prior representation of the Firebirds by a firm with which the judge was formally affiliated; (2) the relationship between the judge and Attorney David Rosen, counsel for the putative intervenor Michael Briscoe; and (3) whether the judge's husband ever worked for Mayor John DeStefano, Jr. (See Doc. No. 223; Transcript attached as Exhibit E.).

Recognizing that the plaintiffs' counsel expressed an intention to file a recusal motion irrespective of the Court's ruling, the Court requested that any motion should be filed "forthwith" because the Court was delaying rulings on any other matters in the interim. The plaintiffs' counsel explained that she was not prepared to file the motion immediately and asked for two weeks from the date of the February 4, 2010 hearing. Having missed that self-imposed deadline, the plaintiffs' counsel then filed the motion *nunc pro tunc*, a motion to which the defendants did not object.[1] While the plaintiffs' motion is forty pages long and

[1] Additionally, the plaintiffs did not file their motion and memorandum of law simultaneously, but electronically filed one and then the other several hours later.

accompanied by nineteen exhibits,[2] the memorandum of law in support thereof is only eighteen pages long. The plaintiffs' motion, the memorandum of law and the various attachments scarcely address the Court's February 4, 2010 ruling, much less the plaintiffs' prior concession of the lack of relevance of any prior representation of the Firebirds by the judge's former law firm. Instead, in support of their motion for recusal, the plaintiffs raise yet again the issue of the representation of the Firebirds and the proposed involvement in the case by Attorney David Rosen, as well as a host of other issues already addressed by the Court. (See Doc. Nos. 213, 217, 223, 228.) Only two of those other issues are supported by the memorandum of law: (1) the Court's December 2nd ruling denying a stay of the promotion of the fourteen plaintiffs; and (2) extra-judicial comments by the Court.

ARGUMENT

Recusal of a judge who has presided over a case for several years is rarely, if ever, appropriate. "A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2d Cir. 1988). Moreover, a judge has "an affirmative duty . . . not to disqualify himself unnecessarily, particularly where the request for disqualification was not made at the threshold of the litigation and the judge has acquired a valuable background of experience." McCann v. Kelly, 891 F. Supp. 128, 137 (S.D.N.Y. 1995) (quoting United States v.

[2] Notably, within these 19 exhibits are tape recordings incapable of being included in either a paper or electronic filing.

Yonkers Bd. Of Educ., 946 F.2d 180, 183 (2d Cir. 1991) (internal quotation and citation omitted).

"[28 U.S.C.] Section 455(a) requires a showing that would cause an objective, disinterested observer fully informed of the underlying facts to entertain significant doubt that justice would be done absent recusal. . . . Where a case, by constrast, involves remote, contingent, indirect or speculative interests, disqualification is not required." In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001) (internal punctuation marks and citation omitted). As another Circuit Court recognized:

> A thoughtful observer understands that putting disqualification in the hands of a party, whose real fear may be that the judge will apply rather than disregard the law, could introduce a bias into adjudication. Thus the search is for a risk substantially out of the ordinary.

Hook v. McDade, 89 F.3d 350, 355 (7th Cir. 1996) (internal quotation marks and citation omitted). No extraordinary circumstances exist in this case warranting recusal.

As a result, under the applicable law, the plaintiffs' motion should be denied for several reasons. First, the plaintiffs' motion is untimely, as they failed to raise the issue of possible recusal until after the case was remanded and substantial relief was provided to a number of the plaintiffs – in some instances, years after the alleged extra-judicial conduct took place. Second, in May of 2006, the Court addressed the issue of the appropriateness of her hearing the case, including her former firm's prior representation of the Firebirds, and

the plaintiffs expressly waived their right to recusal. Finally, the plaintiffs fail to establish that a reasonable person, after a thorough examination of the relevant law and facts, would conclude that the Court's impartiality could reasonably be questioned; this failure was exacerbated by the plaintiffs' decision to ignore almost all of this Court's prior recusal ruling (reproduced in an 18 page transcript). This ruling, issued from the bench, included a thorough examination of the facts and is replete with citation to the relevant law.

A. The Plaintiffs Unreasonably Delayed Seeking Recusal

The plaintiffs' recusal motion should be denied because it is untimely. Although Section 455 does not specify a time limit for application, a timeliness provision has been judicially implied. Apple v. Jewish Hosp., 829 F.2d 326, 333 (2d Cir.1987); In re I.B.M., 618 F.2d 923, 932 (2d Cir.1980). A party must bring a disqualification motion "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." Apple, 829 F.2d at 333. See also, Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait…."), cert. denied, 481 U.S. 1016 (1987); E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1296 (9th Cir. 1992) ("They knew at the time of the transfer to Judge Coyle that McCormick, Barstow had represented the Winery in the Gallo Salame matter while Judge Coyle was a partner, but once again did not act on the information until they lost on the merits. This unexplained delay suggests that the

recusal statute is being misused for strategic purposes."). Here, the plaintiffs' counsel appears to have waited for her clients' promotions to occur before raising issues relating to "events" from years before. This type of legal maneuvering goes against the letter and spirit of the recusal provisions of the Federal Rules as interpreted by the courts.

Acknowledging that judicial acts alone cannot form the basis for recusal, the plaintiffs now distort and twist a number of so-called extra-judicial acts in an attempt to create the appearance of impropriety. Each of these "extra-judicial acts," however, took place long before the plaintiffs made any mention of recusal. Thus, reliance on these issues is untimely and calls into question the motivation behind raising them at this late juncture.

As for the prior representation of the Firebirds by the Court's prior firm, the plaintiffs were aware of this representation in 2006. To avoid the obvious conclusion that the plaintiffs already waived their right of recusal, they now claim that their position has changed due to the attempted intervention by Briscoe and eight other African-American firefighters. This argument is specious and untimely. The plaintiffs represented in their motion that, as early as 2004, Attorney Rosen advised the plaintiffs' counsel that he had been contacted by black firefighters for counsel. (Mot., pp. 18-19; Pl. Ex. 6.) The actions of the Firebirds in response to the Supreme Court granting *certiorari* took place in January of 2009. The International Association of Black Professional Firefighter's amicus brief was

filed on March 25, 2009. Thus, any concerns relating to the Firebirds were known to the plaintiffs long before they formally filed a motion to intervene.

The same is true of the other alleged extra-judicial acts with which the plaintiffs now take issue. The Court's attempts to settle the case took place prior to July 27, 2006. (Pl. Mot., pp. 3-4.) The allegedly improper appointments of Attorney Rosen took place in April and October of 2008. See Wrighten v. New London, 07-cv-257 and Arzuaga v. Choinski, 05-cv-1688. The Court's remarks about race issues took place in 2005 (NELA); March of 2007 (Yale) and November of 2007 (UCONN). (Pl. Ex. 19; http://connecticutlawreview.org/UR_symposium.html; http://opa.yale.edu/news/article.aspx?id=2444.). The Court's attendance at the Supreme Court oral argument and the conference at Northwestern took place in April of 2009. Finally, an e-mail between the plaintiffs' counsel and Attorney Rosen shows that counsel questioned Attorney Rosen's intentions, as well as his relationship with the Court, as early as June 9, 2009. (Pl. Ex. 6.)

The plaintiffs, however, did not even raise the issue of recusal until December 4, 2009. Interestingly, this was only days after the plaintiffs obtained what they wanted – the promotions. Thus, it appears that, despite the plaintiffs' knowledge of the supposed grounds for recusal that they have now raised, they did not raise these issues until they believed that the Court was foreshadowing "its views regarding the scope of equitable relief to be considered in this case," which the Court characterized as "limited" at the

very first status conference after remand. (See Pl. Mot., pp. 16-17.) This timing suggests that the plaintiffs are not concerned with impartiality, but rather, are concerned that the Court will not award them all of the relief they seek. Such a blatant attempt at judge shopping should not be sanctioned by the Court. There is no basis for it under the law, and it undermines the judicial process.

B. The Plaintiffs Waived Their Recusal Argument

The plaintiffs' recusal motion should also be denied because the plaintiffs already expressly waived their right to seek recusal. "Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." 28 U.S.C. § 455(e). "Waiver is a renunciation-whether expressly through words or implicitly through behavior-of the right to seek recusal." U.S. v. Bayless, 201 F.3d 116, 127 (2d Cir. 2000). The plaintiffs previously waived any right of recusal.

It cannot be disputed that the plaintiffs have already conceded that the issues in the prior case are not related to this case and are "completely irrelevant." (Transcript of Status Conference, Exhibit A, p. 8) ("I do not see either the litigation **or any issues raised there** as in anyway related to this case….[N]othing about that case reemerges, so to speak, as an issue in this case. In fact **it's completely irrelevant**."). Now, in seeking recusal almost four years later, the plaintiffs claim, "Here, the matters are hardly unrelated." (Pl. Memo.,

p. 10.) Having previously conceded that the prior litigation is completely irrelevant, plaintiffs expressly waived any appearance of impartiality. Accordingly, recusal is not warranted.

C. The Plaintiffs Fail To Sustain The Burden of Proof Necessary To Justify Recusal

Apart from the plaintiffs' unreasonable delay and waiver, the plaintiffs' recusal motion should also be denied because they cannot carry the heavy burden required by law to justify the extraordinary step of requiring a federal judge to recuse herself from a matter. Again, there was no appearance of impropriety back in 2006 and there is none now.

Simply put, the present motion should be denied because it fails to meet the legal standard for recusal. "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The Second Circuit has described the standard for recusal as follows: "Would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned? Or phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?" Bayless, supra, 201 F.3d at 126, citing Diamondstone v. Macaluso, 148 F.3d 113, 120-21 (2d Cir. 1998). "[T]he existence of the appearance of impropriety is to be determined 'not by considering what a straw poll of the only partly informed man-in-the-street would show, but by examining the record facts and

the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.'" Id. at 126-27, quoting In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir.1988). The plaintiffs have failed to meet this standard since no reasonable person, knowing all the facts, would question Judge Arterton's impartiality.

As to the prior representation of the Firebirds, the facts are clear – the Court was not involved in the prior litigation; none of the plaintiffs in the prior litigation are parties to the present action, nor have they attempted to intervene in the present action; here, the Firebirds organization is not a party, nor has it attempted to become a party; none of the firefighters adversely affected by the prior litigation are parties to the present litigation; and there is no overlap of issues between the state law claims at issue in the prior litigation and the race-based claims at issue here. See, New Haven Firebird Soc. V. Board of Fire Com'rs of City of New Haven, 219 Conn. 432, 435 (1991); Doc. No. 223, pp. 6-9, 10-11. Moreover, the representation of the Firebirds ended nearly two decades ago. This passage of time strongly militates against any appearance of impropriety. See Cipollone v. Liggett Group, Inc., 802 F.2d 658, 659 (3rd Cir. 1986) ("the long passage of time [20 years] since Judge Hunter's last

representation of that Company requires the conclusion that no reasonable person could question is impartiality.")[3]

Likewise, the other conduct at issue, when taken together, is plainly insufficent to demonstrate an appearance of impropriety and hardly warrants a response. Clearly, to the extent that the plaintiffs believed that the Court erred in deciding and ultimately denying the Tinney movants' motion to stay the plaintiffs' promotions, they could have sought further relief. See L.Civ.R. 7(c)(1) ("Motions for reconsideration shall be filed and served within ten (10) days of the filing of the decision or order from which such relief is sought, and shall be accompanied by a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court overlooked in the initial decision or order."). Similarly, to the extent that plaintiffs take issue with the judge's allegedly improper extra-judicial remarks, they could have and should have raised their concerns immediately upon remand. Their failure to do so only furthers the notion that the plaintiffs' "real fear may be that the judge will apply rather than disregard the law . . . ." Hook, supra, 89 F.3d at 354.

For the foregoing reasons, the plaintiffs have failed to establish that a reasonable person, after a thorough examination of the relevant law and facts, would conclude that the Court's impartiality could reasonably be questioned. Therefore, recusal is not warranted.

[3] The Court, in concluding that recusal was not warranted, cited six cases which similarly stand for the proposition that there is not an appearance issue where there has been a long passage of time. See Doc. No. 223, pp. 11-14. However, the plaintiffs' motion only addresses one of those cases.

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CERTIFICATION

This is to certify that on March 16, 2010, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court(s) electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

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