UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL., Plaintiffs,	:	
v.	:	Case No. 3:10-mc-37 (PCD)
JOHN DESTEFANO, ET AL., Defendants.	:	

RULING ON MOTION FOR RECUSAL

On February 23, 2010, Plaintiffs moved to recuse Judge Janet Bond Arterton from this case, claiming that Judge Arterton's judicial and extrajudicial conduct created the appearance of bias. Judge Arterton recused herself from deciding the motion, and the motion was assigned to this Court pursuant to the District of Connecticut's random case assignment policy. For the reasons stated herein, the motion to recuse [Doc. No. 1] is **denied**.

I. PROCEDURAL HISTORY

Plaintiffs, a group of white and Hispanic firefighters who took written examinations to qualify for promotions to lieutenant and captain, sued the City of New Haven after it threw out the examination results because of a statistical racial disparity. Plaintiffs alleged that the city's failure to certify the test results violated their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., the Equal Protection Clause, the First Amendment and 42 U.S.C. § 1985. The complaint was filed on July 8, 2004 and originally assigned to Judge Janet C. Hall, was subsequently assigned to Judge Mark. R. Kravitz, and then assigned to Judge Arteron when the case became ripe for disposition on the parties' cross motions for summary judgment. On September 26, 2009, Judge Arterton denied Plaintiffs' summary judgment motion, granted Defendants' summary judgment motion as to all of Plaintiffs' claims, and dismissed the

case. The court found that the city's motivation in disregarding the test results–a fear of lawsuits based on the test's racially disparate impact– did not, as a matter of law, constitute discriminatory intent. On February 15, 2008, the Second Circuit issued a summary order affirming Judge Arterton's opinion. On June 29, 2009, the Supreme Court reversed summary judgment for Defendants and granted summary judgment for Plaintiffs. The Court held that the city violated Title VII by disregarding the test results because there was no strong basis in evidence for concluding that the city would have been liable under Title VII if it had certified the results. The case was remanded to the district court for further proceedings consistent with the Court's decision.

On November 5, 2009, Judge Arterton ordered the parties to confer and file a joint stipulated order if they agreed on how to proceed with the remedial promotions or separate proposed orders if they disagreed. The court also ordered the parties to brief the scope and nature of Plaintiffs' damages under Title VII and whether any counts remained for liability adjudication. On November 24, 2009, Judge Arterton entered a judgment for Plaintiffs on their disparate treatment claim. The court also ordered the New Haven Civil Service Board to certify the results of the examination for the positions of lieutenant and captain and to promote eight Plaintiffs to lieutenant and six Plaintiffs to captain.

During the same time period, two sets of individuals sought to intervene as Plaintiffs. The first motion to intervene, which was filed on November 16, 2009 by seven black firefighters employed with the New Haven fire department ("Tinney Movants"), claimed that the city was required to conduct a rigorous analysis of the examination's validity pursuant to Title VII and EEOC guidelines before certifying the test results and promoting Plaintiffs. On November 30,

2009, the Tinney Movants moved to stay the promotions articulated in the November 24th order until the court ruled on its pending motion to intervene. The second motion to intervene was filed by Michael Briscoe, another black firefighter with the New Haven fire department, on December 1, 2009 ("Briscoe Movant"). The Briscoe Movant simultaneously filed a separate action in the District of Connecticut, which was assigned to Judge Charles S. Haight Jr. His motion indicated that he "move[d] to intervene in this case simply to forestall any argument by the City that the resolution of his underlying claim should be dictated by the choice to file a separate suit rather than moving to intervene now." [Doc. No. 173.]

On December 2nd, the court denied the Tinney Movants' motion to stay the promotions, holding that the Tinney Movants "misapprehen[ded] . . . the limited scope of both this remanded case and the November 24th Order." Judge Arterton held that the remedial promotions of the fourteen Plaintiffs identified in the November 24th order were required by the Supreme Court's opinion and were not subject to challenge on the basis that the examination that produced the eligibility lists was flawed. Therefore, the Tinney Movants' claims could only affect any lieutenant and captain vacancies remaining after the city promoted the fourteen Plaintiffs, but "[a]ny disparate-impact challenges to the City's plans for any remaining vacancies is not a matter within the remaining scope of this case." [Doc. No. 175.]

On December 7, 2009, the Tinney Movants filed another motion to stay any promotions subsequent to the promotions of the fourteen Plaintiffs listed in the court's November 24th order. The Tinney Movants argued that the city should be barred from using its eligibility lists until such time as the written examination used to determine the eligibility lists could be subjected to thorough scrutiny. On December 9th, Judge Arterton denied the motion to stay for the reasons

articulated in the December 2nd order. On January 13, 2010, the Tinney Movants moved to withdraw their motion to intervene, arguing that the court's orders denying their motions to stay any promotions "make clear the Court's view that the remand was for the specific purpose of certifying the eligibility lists and promoting 14 Plaintiffs, and that no other outside claims would be entertained." On January 14, 2010, the motion to withdraw was granted.

On December 4, 2009, Plaintiffs requested a status conference with Judge Arterton to assess whether the Judge should be asked to recuse herself from this case. A status conference was held on January 20, 2010, during which Plaintiffs' counsel indicated that she wished to question Judge Arterton about certain issues that might be the basis for the Judge's recusal. Among other issues, counsel expressed concern over Judge Arterton's relationship with David Rosen, the attorney representing the Briscoe Movant in his motion to intervene and in the separate action before Judge Haight, and Judge Arterton's former firm's prior representation of the New Haven Firebirds Society ("Firebirds Society"), an organization representing the interests of black firefighters. Judge Arterton scheduled a hearing for February 4, 2010 to respond to Plaintiffs' inquiries. During the hearing, Judge Arteron explained the extent of her relationship with Attorney Rosen and the Firebirds Society and concluded that these relationships were too remote to create an appearance of bias. On February 23, 2010, Plaintiffs filed this motion to recuse.

II. APPLICABLE LAW AND STANDARD OF REVIEW

Subsection (a) of 28 U.S.C. § 455 provides: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." According to the Second Circuit, the relevant questions in

determining whether recusal is appropriate are: "Would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could be reasonably 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?" United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992) (internal citations omitted). "Like all legal issues, judges determine appearance of impropriety–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." In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir. 1988).

"[A] judge has an affirmative duty to inquire into the legal sufficiency of [the evidence in support of recusal] and 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.'" Nat'l Auto Brokers Corp. v. Gen. Motors Corp., 572 F.2d 953, 958 (2d Cir. 1978) (quoting Rosen v. Sugarman, 357 F.2d 794, 797-98 (2d Cir. 1966)). "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 at 1312. This is because "[l]itigants are entitled to an unbiased judge; not to a judge of their choosing." Id. The rules and regulations governing recusal "must be applied in an adversarial context in which counsel will seek to steer cases to judges deemed favorable to their cause-in the lexicon of the profession, 'judge-shopping.' As a result, the grounds asserted in a recusal motion must be scrutinized with care, and judges should not recuse themselves solely because a party claims an appearance of partiality." In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001). In fact, "the most salient advice

propagated by the appellate courts is for the trial courts to review warily such motions of recusal." New York v. Nat'l Railroad Passenger Corp., No. 1:04-CV-0962 (DNH/RFT), 2007 WL 655607, at *4 (N.D.N.Y. Feb. 23, 2007).

III. DISCUSSION

Plaintiffs argue that the following issues create an appearance of bias requiring Judge Arteron's recusal: 1) Judge Arterton's former firm's representation of the Firebirds Society, an organization connected to the Tinney Movants; 2) Judge Arterton's relationship and out-of-court communications with Attorney David Rosen, the Briscoe Movant's counsel; 3) Judge Arterton's conduct and rulings in the Ricci case; and 4) Judge Arteron's extrajudicial public statements regarding gender and racial discrimination. The first two issues were raised and discussed at the February 4, 2010 hearing, while the last two appear to be raised for the first time in Plaintiffs' motion. The Court addresses each of these issues in turn.

A. Relationship with Tinney Movants and New Haven Firebirds Society

Plaintiffs argue that Judge Arterton has a relationship with the Tinney Movants that raises an appearance of bias. Gary Tinney, one of the seven Tinney Movants, is the president of the Firebirds Society, an organization that promotes the interests of black firefighters. Before her appointment to the federal bench in 1995, Judge Arteron was a member of the law firm Garrison, Kahn, Silbert & Arterton, which represented the Firebirds Society in an action commenced in 1989. Judge Arterton did not personally represent the Firebirds Society in that action or at any other time.

The Court finds a number of problems with Plaintiffs' argument that Judge Arterton's relationship with the Tinney Movants is questionable because of her former firm's prior

representation of the Firebirds Society. Other than the city of New Haven, none of the parties from the 1989 case–including the Firebirds Society–is a party to, or has sought to intervene in, this case. Gary Tinney has moved to intervene in his individual capacity, not in his capacity as president of the Firebirds Society. Plaintiffs nevertheless argue that Gary Tinney's interests are intertwined with the interests of the Firebirds Society because, as the Firebird Society's president and chief spokesperson, he publicly denounced the Supreme Court's decision and vowed to challenge it, and because any rulings in this case will inevitably affect the rights and interests of the Firebird Society's members.

Even if this Court accepted Plaintiffs' argument that the Tinney Movants and the Firebirds Society are one in the same, Judge Arterton's relationship with the Firebirds Society is too remote to create an appearance of bias. A federal judge's representation of a party prior to her appointment to the federal bench is usually not a basis for recusal. Nat'l Auto Brokers Corp., 572 F.2d at 958. This is especially the case where, as here, the judge had no involvement in her former firm's representation of the party and the representation occurred several years ago. See, e.g., Cipollone v. Liggett Group, Inc., 802 F.2d 658, 659 (3d Cir. 1986) ("Even if American Tobacco Company were a party to [this case], the [twenty-year] passage of time since [an appellate judge's] last representation of that Company requires the conclusion that no reasonable person could question his impartiality."); Chitimacha Tribe of Louisiana v. Harry L. Lewis Co., 690 F.2d 1157, 1166 (5th Cir. 1982) (holding that "the fact that the [trial] judge once represented [the defendant] Texaco in an unrelated matter does not forever prevent him from sitting in a case in which Texaco is a party" and "[t]he relationship between [the judge] and Texaco, terminated at least six years ago, is too remote and too innocuous to warrant disqualification . . .").

Plaintiffs, however, argue that the similarity between the issues raised in this case and issues raised in the 1989 action is a cause for concern. In the 1989 action, the Firebirds Society challenged certain promotional practices of the New Haven fire department, claiming that they violated the city charter and civil service rules. New Haven Firebird Soc'y v, Board of Fire Commissioners of the City of New Haven, 593 A.2d 1383, 1384 (Conn. 1991). In a broad sense, the 1989 action and this action are similar because both sought to change the fire department's promotional practices and black firefighters' chances for promotion. Unlike the pending case, however, the 1989 action did not allege violations of Title VII, any other federal law, or the Constitution.

More important, however, is Plaintiffs' counsel's complete reversal on this issue. During a hearing in May 2006, Judge Arterton addressed the appropriateness of her adjudication of this case, including her former firm's representation of the Firebirds Society. Plaintiffs' counsel expressly waived their right to recusal, stating that Judge Arterton's former firm's prior representation of the Firebirds Society was irrelevant to this case. She said:

> I am familiar with the litigation and the issues raised in it, and I do not see either the litigation or any issue raised there as in anyway (sic) related to this case, but I do point it out because apparently Attorney Garrison did represent a group of New Haven firefighters. *But nothing about that case reemerges, so to speak, as an issue in this case. In fact, it's completely irrelevant.*

(Def.'s Ex. A. Tr. 8:1-8) (emphasis added). Having disavowed any similarity between the two cases in 2006, Plaintiffs cannot now claim that the similarity between the two cases raises an appearance of bias.

Plaintiffs argue that the remarks made by their counsel in 2006 are not relevant because the Firebirds Society was not a party to this case at that time. The Tinney Movants' motion to

intervene, Plaintiffs contend, has changed the recusal analysis completely because the president of the Firebirds Society might become a party to this lawsuit. However, the Tinney Movants have withdrawn their motion to moved to intervene and therefore will not be parties to this case. Therefore, even if this Court accepted Plaintiffs' argument that the motion to intervene renders the 2006 comments irrelevant (which it does not), the question of whether the Firebird Society's involvement in this lawsuit creates an appearance of bias is now moot.

B. Relationship with Attorney David Rosen

Plaintiffs also argue that Judge Arteron has had a friendly relationship and inappropriate communications with Attorney David Rosen, who represents the Briscoe Movant in his motion to intervene and in the separate lawsuit pending before Judge Haight. Plaintiffs submit the following as evidence of a friendly relationship and/or inappropriate communications between Judge Arterton and Attorney Rosen: 1) Attorney Rosen's appearance in three of Judge Arterton's *pro se* cases in the past couple of years even though the District of Connecticut's procedure requires random assignment of attorneys to *pro bono* cases; 2) an award conferred by Judge Arterton upon Attorney Rosen for his *pro bono* work; 3) Attorney Rosen's public expression of support for Judge Arterton's summary judgment ruling in Ricci after the Supreme Court granted certiorari; 4) a conversation between Judge Arterton and Attorney Rosen at the Second Circuit Judicial Conference in June 2009, during which Attorney Rosen discussed disparate impact cases he had litigated involving testing validation; and 5) "a conversation [involving Judge Arterton, Attorney Rosen, and other individuals] of a non-substantive, generalized nature having to do with Ricci's high-profile status and pendency before the Supreme Court." (See Pl.s Mem. at 30.)

With respect to Judge Arterton's purportedly questionable relationship with Attorney

Rosen, their limited contacts–especially given the fairly small number of attorneys who regularly litigate in the District of Connecticut–are simply insufficient to raise any appearance of bias. As Judge Arterton explained during the February 4, 2010 hearing, Attorney Rosen funds a fellowship program that matches up new lawyers with *pro bono* opportunities in state and federal court. Judge Arterton twice appointed Attorney Rosen and his fellows to represent *pro se* parties in cases ready for trial. In recognition of this service to the community, Judge Arterton presented him with a *pro bono* award at the Federal Practice Section's bar bench retreat on September 19, 2008. See Def.'s Ex. E, Feb. 4, 2010 Tr. 5:10-6:4.

Moreover, Judge Arteron's communications with Attorney Rosen about the Ricci case, or subject matter related to the Ricci case, were not inappropriate. The fact that Attorney Rosen may have discussed disparate impact cases he had litigated in the past with Judge Arterton does not raise any implications of bias in this case. Judge Arteron's one conversation with Attorney Rosen about Ricci only concerned the case's high-profile status. Moreover, during a teleconference on January 27, 2010, Judge Arterton emphasized to Plaintiffs' counsel that she had never spoken about the substance of the Ricci case to anyone, including Attorney Rosen. See Pls' Mot. at 31. Therefore, the Court concludes that no reasonable observer would question Judge Arterton's impartiality because of her relationship with Attorney Rosen.

C. Adjudication of the Ricci Case

Plaintiffs also argue that Judge Arteron's adjudication of Ricci creates an appearance of bias and/or lack of judicial detachment. Plaintiffs' principal example is the timing and reasoning of Judge Arteron's December 2nd order, which Plaintiffs claim suggests a bias in favor of the Briscoe Movant and Attorney Rosen. Given that the December 2nd order denied the Tinney

Movants' motion to stay the promotions and therefore ruled in Plaintiffs' favor, Plaintiffs' reasoning for claiming a bias against them is rather convoluted. According to Plaintiffs, a discovery hearing in the separate action filed by Briscoe was scheduled for December 3rd before Judge Haight. Attorney Rosen wanted to proceed with discovery immediately. The city, however, believed the case could conflict with the remand proceedings in Ricci and wanted to stay discovery until the Ricci proceedings finished. In her December 2nd order denying the Tinney Movants' motion to stay the promotions, Judge Arterton interpreted the scope of the remand proceedings narrowly. This order, Plaintiffs contend, gave Attorney Rosen a strong argument at the December 3rd hearing as to why discovery in the Briscoe case should not be stayed. Plaintiffs also contend that the timing of the order–the night before the Briscoe hearing,[1] two days after the motion to stay had been filed, and before Plaintiffs had an opportunity to respond or any hearings on the scope of remedial relief had been held–is especially suspect.

Thus, Plaintiffs insinuate that either Judge Arteron has been secretly communicating with Attorney Rosen about pending matters in the separate Briscoe action or has been independently scrutinizing the docket and filings in the separate Briscoe action to determine how her rulings in this case can be most advantageous to the Briscoe Movant in his separate action. This Court finds that Plaintiffs' suspicions of Judge Arteron's motives in issuing the December 2nd order lack any basis in fact. This Court sees Judge Arteron's December 2nd order for what it is—a ruling denying a putative intervenor's motion to stay because the proposed stay was outside the

[1] Plaintiffs' motion mentions several times not only that the order was entered the day prior to the Briscoe hearing but that it was entered at 10:16 pm. The Court fails to see what this information indicates other than that Judge Arteron's chambers is very hardworking.

scope of the court's proceedings. Thus, it is insufficient to raise any appearance of bias. See Liteky v. United States, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.").

The other examples of Judge Arterton's purported bias and/or lack of judicial detachment in her adjudication of Ricci are also unpersuasive. Plaintiffs criticize Judge Arterton for issuing a remedial order on November 24th despite their request for a status conference before the issuance of an order. Aside from the fact that Judge Arterton had complete discretion to refuse the request for a status conference, her November 24th order adopted Plaintiffs' proposed order submitted on November 13th in its entirety. Thus it is unclear how the lack of a status conference prejudiced Plaintiffs in any way. Plaintiffs also quibble with Judge Arterton's failure to respond to their December 4, 2009 request for a status conference on their potential recusal motion until December 22nd. A few weeks delay in responding to a party's request is not uncommon, let alone evidence of any impropriety. Finally, Plaintiffs claim that Judge Arterton's attendance at the Supreme Court's oral argument in Ricci is highly unusual conduct that evinces a lack of judicial detachment from the case and parties. Regardless of whether or not such conduct is unusual, the Court fails to see how Judge Arterton's interest in the Supreme Court's ruling in Ricci suggests any partiality.

D. Extrajudicial Comments on Discrimination

Finally, Plaintiffs claim that Judge Arterton's extrajudicial speeches and comments on racial and gender discrimination and reverse discrimination lawsuits create the appearance of bias. Plaintiffs cite three examples of such speeches. First, in March 2007, Judge Arterton was the keynote speaker at a conference of women lawyers and law students sponsored by Yale Law

School, during which she described her personal experiences with gender discrimination, suggested that female judges can be treated less deferentially than male judges, and criticized the statistical gender disparity in the composition of the federal bench. Second, in 2005, Judge Arterton, along with two other federal judges and a state court judge, gave an address to plaintiff-side employment lawyers at the annual convention of the National Employment Lawyers Association ("NELA"). In that address, she opined that racially diverse juries are important in employment discrimination cases because white jurors may believe that racial discrimination is no longer a significant problem. She also noted that she had discerned an uptick in reverse discrimination cases and stated: "I will also add ambivalently that the verdicts [in reverse discrimination cases] are rather large." Third, in November 2007, Judge Arterton was a panelist at an event sponsored by the University of Connecticut commemorating Professor Charles Lawrence, a scholar on racial discrimination who believes that unconscious discrimination should guide disparate impact jurisprudence. In a speech given before Judge Arterton's address, Professor Lawrence opined that the current state of disparate impact law reflected notions of white supremacy and criticized judges for ignoring unconscious discrimination in deciding disparate impact cases. Plaintiffs criticize Judge Arterton for failing to excuse herself from the event "upon hearing Lawrence's diatribe" and opining during her own address that the Professor's work had clear value. Pls.' Mot. at 37. Judge Arterton's address expanded on the problem of unconscious racial discrimination and her view that racially diverse juries are a way to combat it.

Federal judges do not lose their right to express their opinions on legal and policy issues once they are appointed to the bench. In fact, the notion that a federal judge who has expressed a

particular opinion on a legal or policy issue should recuse herself from any cases involving that issue is both nonsensical and impractical. Federal judges' views on such issues–whether expressed through speeches, published articles or participation in organizations–are often considered invaluable contributions to the legal community and public policy dialogue. Thus, such speech should be encouraged, not chilled. Furthermore, "our judicial system would be paralyzed if judges were disqualified from deciding cases because of views about, or differences over, abstract policy issues." Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 491 (1st Cir. 1989) (holding that trial judge's speeches advocating statehood for Puerto Rico were not a basis for recusal in case analyzing whether a federal law trumped Puerto Rican law); see also Rosquist v. Soo Line Railroad, 692 F.2d 1107, 1112 (7th Cir. 1982) (holding that district judge was not required to recuse himself from a case involving the issue of contingent attorney's fees simply because he had expressed certain views on the subject in speeches and writings).

According to the speeches described by Plaintiffs, Judge Arteron believes that racial and gender discrimination continue to be problems in our society and in the legal system. Her comments did not reference Ricci or any other cases currently pending before her. No reasonable observer would have considered her comments outside the mainstream, let alone of such an inflammatory nature as to suggest that Judge Arterton cannot be impartial in employment discrimination lawsuits.[2] Far more controversial speech by a federal judge has been held

[2] In particular, Plaintiffs take exception to Judge Arterton's statement expressing ambivalence towards large jury awards in reverse discrimination lawsuits. They believe that the use of the word "ambivalently" strongly suggests Judge Arterton's aversion to such lawsuits. On the contrary, the word ambivalence suggests conflicting views on a matter, and thus the most logical interpretation of her statement is that she has not made up her mind as to the value of large awards in such cases. The statement therefore suggests the opposite of bias.

insufficient to warrant recusal. See, e.g., United States v. Antonelli, 582 F. Supp. 880, 882 (N.D. Ill 1984) (holding that federal judge's speech before the American Bar Association in which he referred to prisoners litigating *pro se* as "psychopaths" was not basis for recusal in case involving *pro se* defendant because the speech did not indicate personal animosity toward defendant).[3] Therefore, the Court concludes that these speeches do not cast doubt on Judge Arterton's impartiality in this matter.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion to recuse [Doc. No. 1] is hereby **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, this 19th day of April, 2010.

/s/_____

Peter C. Dorsey, U.S. District Judge
United States District Court

[3] The cases cited by Plaintiffs are not to the contrary. They involve instances where the judge's public comments were directed at particular cases or parties appearing before him or were inflammatory and hostile toward certain parties. See Pls' Reply Mem. at 9. In United States v. Cooley, 1 F.3d 985, 992 (10th Cir. 1993), the trial judge, who presided over a criminal trial where defendants were convicted of blocking access to a medical clinic during an abortion protest, appeared on the news program "Dateline" to express his resolve in seeing his injunction against conduct that blocks clinic access enforced. The Tenth Circuit held that "the judge's volunteer appearance on national television to state his views regarding the ongoing protests, the protesters, and his determination that his injunction was going to be obeyed . . ." would lead a reasonable observer to harbor doubt as to his impartiality. Id. at 995. In Hathcock v. Navistar Int'l Transp. Corp. 53 F. 36, 39 (4th Cir. 1995), the judge's remarks at a tort seminar were "pointedly hostile toward defendants and defense counsel" by, *inter alia*, referring to defense counsel as "son-of-a-bitches". The judge also engaged in *ex parte* communications with plaintiffs' counsel about a default order. Id. at 41.