UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ADMINISTRATIVE ORDER NO. 91-55

CASE NO. 90-1926-CIV-RYSKAMP

DIAMOND BULLET CORPORATION, et al.,

Plaintiffs,

v.

ZEV BUFMAN SPORTS ENTERTAINMENT AND FACILITY DEVELOPMENT CORP., et al.,

Defendants.
_____/

ORDER DENYING PLAINTIFFS' MOTION TO RECUSE JUDGE RYSKAMP

This cause comes before the Court upon plaintiffs' motion to recuse The Honorable Kenneth L. Ryskamp, United States District Judge for the Southern District of Florida, under 28 U.S.C. §§ 144 and 455. Plaintiffs allege three grounds for recusal: (1) plaintiffs' counsel Steven M. Kramer actively opposed President Bush's nomination of Judge Ryskamp to the Eleventh Circuit Court of Appeals; (2) Judge Ryskamp is allegedly prejudiced against plaintiff Brad Krasner and counsel Kramer due to their religion; and (3) Judge Ryskamp has made allegedly improper remarks.

I. BACKGROUND

Plaintiffs filed a motion for recusal under 28 U.S.C. § 455(a) on April 25, 1991. In a letter to Judge Ryskamp dated April 25, John D. Mallah, co-counsel for plaintiffs, stated that he supports the recusal motion solely on the ground that his co-counsel actively opposed Judge Ryskamp's nomination to the Eleventh

Circuit. Also on April 25, defendants Zev Bufman Sports Entertainment and Facility Development Corp., The Bufman Organization, Inc., Zev Bufman Theater Partnership, Ltd., and Zev Bufman (the "Bufman defendants") filed a memorandum in opposition to plaintiffs' motion. On April 26, 1991, defendants Lynn M. Dannheisser and Rasco & Reininger, P.A. (the "Law Firm defendants") filed a memorandum in opposition to plaintiffs' motion for recusal. On May 15, 1991, plaintiffs filed a supplemental motion for recusal to expressly rely on 28 U.S.C. § 144 in addition to § 455, along with the affidavit of counsel Kramer. On May 30, 1991, the Bufman defendants filed a memorandum in opposition to plaintiffs' supplemental motion for recusal. This matter was then referred to the undersigned judge.

Plaintiffs allege three reasons for recusal. First, counsel Kramer alleges that he opposed President Bush's nomination of Judge Ryskamp to the Eleventh Circuit Court of Appeals. This occurred after the above-styled action was filed and pending before Judge Ryskamp. Second, plaintiffs allege that Judge Ryskamp is prejudiced against plaintiff Brad Krasner and his counsel because they are Jewish. Third, Judge Ryskamp allegedly has made remarks indicating bias against minorities. However, plaintiffs fail to state when, where, and in whose presence these remarks were made; they further fail to indicate that either counsel Kramer or any of the plaintiffs has personal knowledge that any remarks were in fact made. The alleged remarks are not alleged to have concerned any

facts or issues in the above-styled case.

The Bufman defendants in their opposition argue that plaintiffs' claims are outrageous. They state for the record that two of the three attorneys representing the Bufman defendants are Jewish, as are Mr. Bufman himself and his general counsel. One of the attorneys representing the Law Firm defendants is Jewish, as is defendant Dannheisser. "None of us has the slightest hesitation about appearing before this Court," they state. They also say they will move for sanctions at the appropriate time.

The Court will consider the §§ 144 and 455 motions in turn.

II. SECTION 144 MOTION

Section 144 provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

To begin with, plaintiffs have failed to comply with the formal requirements of § 144, which requires that a party submit an affidavit which is (1) timely filed, (2) accompanied by a certificate of counsel stating that it is made in good faith; and (3) legally sufficient. See Parrish v. Board of Comm'rs, 524 F.2d 98, 100 (5th Cir. 1975)[1] (en banc), cert. denied, 425 U.S. 944

[1]In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the court adopted as binding precedent all decisions of the former Fifth Circuit, including UNIT A, handed down prior to October 1, 1981.

(1976). The Court's role in ruling on a § 144 motion is limited to a determination of whether the facts alleged are legally sufficient to require recusal. The Court may thus pass on the sufficiency of the affidavit but not on truth of matters alleged. United States v. Roca-Alvarez, 451 F.2d 843 (5th Cir. 1971), reh'g granted, 474 F.2d 1274 (5th Cir. 1973). However, initially there must be an affidavit by a party to a proceeding. As the Bufman defendants point out in their memorandum in opposition to the supplemental recusal motion, plaintiffs' counsel is not a party to the proceeding, nor is the affidavit accompanied by a certificate of good faith. Thus, counsel Kramer's affidavit does not meet the requirements of § 144. See Davis v. Board of School Comm'rs, 517 F.2d 1044, 1050 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976) (the term "party" as used in § 144 does not include counsel as such); United States v. Alabama, 571 F. Supp. 958 (N.D. Ala. 1983), aff'd, 762 F.2d 1021 (11th Cir. 1985) (motion filed by named defendants overruled insofar as based on § 144 because recusal affidavits were made and filed by attorneys, and signed by attorneys so legally insufficient; however, trial judge must determine whether recusal appropriate under § 455).[2]

[2]Indeed, "[e]ven if a disqualification affidavit is in fact signed by a party, if it is in substance a 'lawyer motion' as distinguished from a party motion, it is legally insufficient." United States v. Alabama, 571 F. Supp. at 961.

The Bufman defendants also argue that neither the affidavit nor the recusal motion is timely filed, an argument that will be addressed infra. With respect to the affidavit, this Court need not reach the question of timeliness.

For these reasons, the § 144 motion must be denied. The Court now turns to the § 455 motion.

III. SECTION 455 MOTION

As a threshold matter, the Bufman defendants contend that the motion for recusal is untimely. Although § 455 contains no express timeliness requirement, the federal courts have recognized an implicit one. E.g., Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987). Plaintiffs waited until after Judge Ryskamp's nomination to the Eleventh Circuit was rejected on April 11, 1991, to file this motion, rather than filing when they learned of the information forming its basis. This amounted to a wait of more than four months from the date of the earliest letter to the Senate Judiciary Committee, December 12, 1990. Assuming that this delay is excusable, the Court now moves to the merits.

Section 455 provides, in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party . . . .

In Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989), the Eleventh Circuit

announced an objective standard for § 455 cases: "The test is whether an objective, disinterested lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a sufficient doubt about the trial judge's impartiality."[3] Clearly the goal of the judicial disqualification statute is to ensure not only actual impartiality but also the appearance of impartiality. Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir. 1980), cert. denied, 449 U.S. 820 (1980).

The substantive test for impartiality is essentially the same for cases brought under § 144 and those brought under § 455. Davis, 517 F.2d at 1052. However, in contrast to § 144 cases, in § 455 cases the Court is "not required to assume that the allegations of the affidavits of counsel are true." United States v. Alabama, 571 F. Supp. at 962 (citing Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1019 n.6 (5th Cir. 1981)).[4] There seem to be two types of claims here: alleged bias caused by

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[3]The Court may properly consider as an aid to the exercise of informed discretion any codes of judicial conduct and any advisory directives of the Judicial Conference of the United States. In re Virginia Elec. & Power Co., 539 F.2d 357 (4th Cir. 1976). Canon 3 of the Code of Conduct for United States Judges states: "A judge should perform the duties of the office impartially and diligently." The Advisory Opinions, however, provide little guidance in a case like this one, instead focusing primarily on cases of conflicts of interests due to the court's financial interests or relationships with those before the court.

[4]"If a party could bind a judge by his factual allegations in a second [sic] 455 motion, free from the formal requirements and more demanding standard of proof of section 144, the result would be a virtual open season for recusal." United States v. Alabama, 571 F. Supp. at 962 n.6.

counsel Kramer's actions, his lobbying efforts; and alleged bias indicated by alleged remarks of Judge Ryskamp.

First, with respect to the lobbying efforts by Kramer, it is well settled that an allegation of bias sufficient to require disqualification must demonstrate that the bias is personal as distinguished from judicial in nature, except when "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." Davis, 517 F.2d at 1051; see United States v. Phillips, 664 F.2d 971, 1002 (1981). Thus, for example, "a motion for recusal may not ordinarily be predicated upon the judge's rulings in the same or a related case." United States v. Phillips, 664 F.2d at 1002-03. It seems to this Court at odds with the idea of disqualification that an attorney could in this manner create the situation which requires recusal. In United States v. Phillips, the Eleventh Circuit held that comments made by the trial judge concerning the defendants' attempts to disrupt the trial were of a judicial, rather than personal, nature where they resulted from information conveyed to the judge by attorneys in his capacity as judge. Id. at 1004. Cf. United States v. Zagari, 419 F. Supp. 494 (N.D. Cal. 1976) (not purpose of disqualification statutes to enable lawyer to engage in conduct in course of litigation that would cause conscientious judge to express disapproval, and thereby put himself in position to successfully urge disqualification). A party or an attorney cannot create a basis for disqualification simply by attacking the judge in his official capacity. To rule otherwise would permit litigants

to cause recusal of judge after judge, until they found one to their liking. This would place the stamp of judicial approval on the odious practice of judge shopping.

Moreover, even if bias resulted from this, bias against an attorney is insufficient to require disqualification under § 455 unless it amounts to prejudice so virulent or pervasive as to constitute bias against a party. See Hamm v. Members of Bd. of Regents, 708 F.2d 647, 651 (11th Cir. 1983); Davis, 517 F.2d at 1052. Accord United States v. Jacobs, 855 F.2d 652, 656 n.2 (9th Cir. 1988); In re Beard, 811 F.2d 818, 830 (4th Cir. 1987); In re Cooper, 821 F.2d 833, 838 (1st Cir. 1987); Gilbert v. City of Little Rock, 722 F.2d 1390, 1399 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984). This Court finds that this alleged bias is not so virulent as to constitute bias against the plaintiff.

Second, plaintiffs' allegations regarding Judge Ryskamp's remarks are wholly unsupported; there is no statement as to when or where these statements were made, nor who was present. These allegations do not rise to the level of competent evidence.[5] In addition, even if it were shown that these statements were made, this Court finds that they do not show prejudice to disqualify a judge. As the former Fifth Circuit observed in a similar case:

> [The] affidavit contains nothing pertaining to the parties or subject matter of [this] case; it could be repeated, word for word, by literally any black civil rights plaintiff from now until Judge Cox's retirement.

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[5]Even if this Court were to take counsel Kramer's affidavit as fact, there would still be no proof because he does not allege any knowledge that these statements were made, but rather only how he feels about them.

> With only minor modifications, it could be used by any black party -- a black criminal defendant, say. This is a type of recusal for whole classes of cases, without the constitutional safeguards that protect a judge from removal from office save by impeachment. The Constitution does not contemplate that we dispense with a judge's service on such a grand scale on any but the most compelling showing.

Phillips v. Joint Legislative Comm., 637 F.2d at 1021 (citations omitted).[6] Plaintiffs have not made a showing of bias of any kind on the part of Judge Ryskamp.

Therefore, plaintiffs' motion under § 455 must be denied as well.

IV. CONCLUSION

For the reasons stated, the recusal of Judge Ryskamp is not warranted under either § 144 or § 455. Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that plaintiff's motion for recusal is found to be totally without merit, and is hereby **DENIED**. It is further

ORDERED and ADJUDGED that the matter is returned to the calendar of the original presiding judge for all further proceedings in the above-styled case.

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[6]As the Phillips v. Joint Legislative Committee court also noted, this does not mean to imply that prejudice against a class, as opposed to a particular litigant, can never form the basis of recusal. 637 F.2d at 1021.

DONE and ORDERED in chambers at the United States Courthouse, Federal Courthouse Square, Miami, Florida, on this 25th day of July, 1991.

James Lawrence King

JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: All Southern District Judges
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