

28 U.S.C. § 144
29 U.S.C. § 455

In re Ronald E. and Joyce D. Shaw

Case No. 395-30683-psh7

7/24/95

PSH

Unpublished

This case came before the court on the motion of the debtors' attorney to disqualify the presiding judge on the grounds that she was prejudiced against the debtor's counsel. The basis for the motion was an letter sent to the attorney by the court in an unrelated case. In that letter the court advised the attorney that the court would not issue an order based on the attorney's unilateral representation that the debtor's employer had mistakenly withheld funds after cancellation of a wage order. The debtor's attorney took the position that by sending this letter the court had called his veracity into question.

The court denied the motion to recuse holding that bias against a party's attorney is not grounds for recusal. Rather, the recusal must be against the party himself. The court further held that recusal based on prior rulings or proceedings would only be appropriate if the proceedings showed deep seated antagonism toward the party. Finally, the court held that under the facts of this case a reasonable person would not conclude that the challenged judge's impartiality might reasonably be questioned.

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3 "...[W]hether or not Judge Higdon thinks her impartiality
4 can be reasonably questioned, I have my pride and will not
5 appear before a judge who has doubts about my integrity
6 and the integrity of the representations I make."

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8 I) FACTS

9 The facts alleged in the affidavit filed with the motion for
10 disqualification arose in the matter of In Re Jean and William
11 Grosley District of Oregon Case No. 394-32213-psh13. In May of 1995
12 the court granted a motion for suspension of plan payments and
13 entered an order terminating the wage order in effect in the case
14 for the month of May, 1995. Thereafter the movant wrote a letter to
15 the Chapter 13 trustee advising the trustee that despite the order
16 terminating the wage order the employer had deducted money from the
17 debtor's first pay check for the month of May and sent that money to
18 the trustee. In the letter the movant asked that the trustee not
19 disburse any of the money paid to him from the employer until he
20 could get a court order requiring that the money be returned to the
21 debtor. The movant sent a copy of this letter to the court along
22 with a form of proposed order which stated:

23 "On the basis of the representation of the debtor's
24 attorney, it is ORDERED that:

25 Any funds erroneously captured by the wage order after May
26 10, 1995 be refunded to the Debtor or her attorney."

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3 The challenged judge responded to this correspondence by
4 writing to the movant advising him that:

5 "If an error has been made in collecting funds from the
6 debtor's employer, the court will issue an order directing
7 refund of the erroneously withheld funds. However, I will
8 not grant an ex parte order based solely on your
9 unilateral representations that a mistake occurred."

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11 II) LEGAL ANALYSIS

12 28 U.S.C. § 455 provides, in relevant part:

13 "(a) Any ... judge ... shall disqualify himself in any
14 proceeding in which his impartiality might reasonably be
15 questioned.

16 (b) he shall also disqualify himself in the following
17 circumstances:

18 (1) Where he has a personal bias or prejudice concerning
19 a party."

20 This statute complements 28 U.S.C. § 144 which provides:

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

"The test for personal bias or prejudice in Section 144 is identical
to that in Section 455(b)(1), and the decisions interpreting this

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3 language in Section 144 are controlling in the interpretation of
4 Section 455(b)(1)." United States v Sibla 624 F2d 864 (9th Cir 1980)

5 Upon filing of an affidavit under § 144 "a judge against whom
6 an affidavit of bias is filed may pass on its legal sufficiency
7 Only after the legal sufficiency of the affidavit is determined does
8 it become the duty of the judge to 'proceed no further' in the
9 case." United States v Azhocar 581 F2d 735,738 (9th Cir 1978).
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12 A) TO JUSTIFY RECUSAL ALLEGED BIAS MUST BE AGAINST A PARTY,
13 NOT THE PARTY'S ATTORNEY

14 "As with [28 U.S.C.] §144, the provisions of Section 455(a) &
15 (b)(1) require recusal only if the bias or prejudice is directed
16 against a party...." Sibla at 868 Bias against a party's attorney
17 is not grounds for recusal under either § 144 or § 455. United
18 States v Burt 765 F2d 1364, 1368 (9th Cir 1985). In this case the
19 affidavit filed by the movant fails to allege any bias against a
20 party. Therefore, this affidavit is not legally sufficient to
21 require recusal.

22 B) ALLEGED BIAS ARISING FROM PRIOR RULINGS OR PROCEEDINGS
23 MUST SHOW DEEP SEATED ANTAGONISM TO JUSTIFY RECUSAL.
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25 Assuming, arguendo, that recusal could be required based on
26 bias toward an attorney rather than a party, the movant's affidavit
is not legally sufficient to require recusal. Generally an
affidavit of prejudice or bias is not legally sufficient unless it
specifically alleges facts that fairly support the contention that
the judge exhibits bias or prejudice ... that stems from an

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3 extrajudicial source." United States v Sibla 624 F2d 864, 868 (9th
4 Cir 1980) [emphasis added]. Only "'in the rarest of circumstances'
5 where they evidence the requisite degree of favoritism or
6 antagonism" can judicial rulings support a motion for recusal.... In
7 addition, information and belief formed during current or prior
8 proceedings may serve as the basis of a [recusal] motion, but only
9 when 'they display a deep-seated favoritism or antagonism that would
10 make fair judgment impossible.'" United States v Chischilly 30 F3rd
11 1144, 1149 (9th Cir 1994). In this case, the bias alleged by the
12 movant arises from prior judicial proceedings. Thus they may serve
13 as grounds for recusal only if "they display a deep-seated ...
14 antagonism that would make a fair judgment impossible." The court
15 does not believe that the facts in this case show that the
16 challenged judge has any antagonism toward the movant and certainly
17 none that would justify recusal under this test.

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19 C) A REASONABLE PERSON WITH KNOWLEDGE OF ALL THE FACTS WOULD
20 NOT CONCLUDE THAT THE CHALLENGED JUDGE'S IMPARTIALITY
21 MIGHT REASONABLY BE QUESTIONED.

22 The court finds that the facts as cited by the movant are not
23 legally sufficient to establish that the challenged judge is biased
24 against the movant. The standard to be applied in determining
25 whether an affidavit establishes that a judge is biased or
26 prejudiced is whether "a reasonable person with knowledge of all the
facts would conclude that the judge's impartiality might reasonably
be questioned." United States v Studley 783 F2d 934, 938 (9th Cir
1985)

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3 The facts alleged by the movant in support of his recusal
4 motion are that the challenged judge advised him that she would not
5 grant an order for turnover of funds based on his "unilateral
6 representations that a mistake occurred." Based on this statement
7 the movant contends that "to put it bluntly Judge Higdon is calling
8 me a liar. In my view there are no ifs, ands, buts or maybe about
9 this interpretation." The court disagrees.

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11 In ruling on matters which come before the court the judge is
12 bound by the rules of evidence. Therefore, absent a stipulation of
13 the parties, a judge can rule on a matter only on the basis of facts
14 which are presented in evidence. A unilateral, ex parte out of
15 court factual statement does not constitute evidence. A fair
16 reading of the letter in which the challenged judge allegedly called
17 the movant a liar shows that what she actually did was to advise the
18 movant that she would not treat his factual representations about
19 the error in payment as evidence. Thus a reasonable person with
20 knowledge of all the facts would not conclude that the challenged
21 judge's letter evidenced any bias against the movant. For these
22 reasons the court finds that the movant's motion is frivolous. The
23 motion to disqualify will be denied.

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POLLY S. HIGDON
Bankruptcy Judge