UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re:	
LODGE #93 OF THE FRATERNAL ORDER OF POLICE,	No. 02-5142
Petitioner.	
CITY OF TULSA, OKLAHOMA,	No. 02-5154
Petitioner.	94-CV-39-H ✓

ORDER
Filed November 26, 2002

Before **BRISCOE**, **LUCERO**, and **HARTZ**, Circuit Judges.

Under 28 U.S.C. § 455, a judge must recuse not only from any proceeding in which he or she has actual personal bias or prejudice or extrajudicial knowledge of disputed evidentiary facts, but also must recuse if the circumstances are such that the judge's "impartiality might reasonably be questioned." Petitioners in these consolidated actions request a writ of mandamus from this court directing the recusal of Judge Sven Erik Holmes in *Johnson v. City of Tulsa*, No. 94-CV-39-H(M), now pending in the United States District Court for the

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Northern District of Oklahoma. Because petitioners have failed to demonstrate "a clear and indisputable right to relief . . . [and] a clear abuse of discretion, or conduct by the district court amounting to a usurpation of judicial authority," *see Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995) (citations omitted), the demanding standard for mandamus relief has not been satisfied, and the petitions are denied.

Background Summary

This case began in January of 1994 when certain African-American members of the Tulsa Police Department filed suit against the City of Tulsa (City) alleging race discrimination in various aspects of their employment. The case was originally assigned to Judge Terry C. Kern, and, almost from the beginning, the parties engaged in a series of settlement negotiations. In April 1995, the case was reassigned from Judge Kern to Judge Holmes. A series of settlement conferences was held in the summer of 1998 under the direction of a magistrate judge and later, in the fall of 1998, under the direction of Judge Holmes. When those efforts failed, the case returned to the "trial track" with Judge Holmes continuing as the trial judge assigned. After almost three years of discovery, the parties requested another opportunity to settle the case in 2001, and Judge Lee R. West was assigned to preside over further settlement negotiations. As will be discussed more fully below, by the spring of 2002 the

parties had arrived at a consent decree which, although initially accepted by the court, was eventually rejected. The case has now been set for a bench trial before Judge Holmes.

On May 2, 2002, the Fraternal Order of Police Lodge # 93 (the FOP) filed a motion to intervene which has since been granted. On August 14, 2002, two days before the court rejected the consent decree, the FOP filed a motion to disqualify Judge Holmes under 28 U.S.C. § 455(a) and § 455(b)(1). The City filed a similar motion limited to disqualification under 28 U.S.C. § 455(a). Judge Holmes denied both motions. The FOP and the City have now both filed mandamus petitions with this court requesting an order directing Judge Holmes to recuse from further involvement in this matter based on his earlier participation in the settlement negotiations.

Analysis

Recusal Generally

Ordinarily, we review a refusal to recuse for abuse of discretion. *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1508 (10th Cir. 1995). Where, however, a final order in the underlying case has not been issued and the order denying a motion to recuse is interlocutory and thus not immediately appealable, a petition for writ of mandamus is the proper vehicle by which to challenge a refusal to recuse. *Nichols*, 71 F.3d at 350. Because this case comes to us in the

form of petitions for writ of mandamus, the higher standard dictated by mandamus jurisprudence applies. *Id.* Thus, petitioners can prevail only by demonstrating "a clear and indisputable right to relief . . . [and] a clear abuse of discretion, or conduct by the district court amounting to a usurpation of judicial authority." *Id.*

Two statutes can be involved in recusal matters: 28 U.S.C. § 144 and 28 U.S.C. § 455. Petitioners did not file the affidavits required under § 144, choosing instead to proceed exclusively under § 455.

Section 455, in relevant part, provides:

> (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, or personal knowledge of disputed evidentiary facts concer

28 U.S.C. § 455.

"In order to promote public confidence in the integrity of the judicial process, the statute was broadened in 1974 by replacing the subjective standard with an objective test." *Nichols*, 71 F.3d at 350 (quotation omitted). While the two subsections of § 455 quoted above are similar, subsection (a) is broader in scope.

> [W]hile subsection (b)(1) requires recusal if the judge has actual personal bias or prejudice or extrajudicial knowledge of disputed evidentiary facts, subsection (a) requires recusal merely if the circumstances are such that the judge's impartiality might be reasonably questioned. . . . Under section 455(a), the judge is under a continuing duty to ask himself what a reasonable person knowing all the relevant facts would think about his impartiality.

Franks v. Nimmo, 796 F.2d 1230, 1234 (10th Cir. 1986) (quotations omitted).

The "appearance of impartiality is virtually as important as the fact of impartiality." *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977). "[W]hat matters [under subsection (a)] is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994).

> The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988) (quotation and citation omitted).

Recusal cases are extremely fact intensive. *Nichols*, 71 F.3d at 351. One of the facts that will be insufficient to force recusal, however, is mere familiarity with the parties or facts of a case that a judge has acquired from earlier participation in judicial proceedings. *Frates v. Weinshienk*, 882 F.2d 1502, 1506

(10th Cir. 1989). The corollary to this principle is the extra-judicial source doctrine.

In oversimplified terms, the extra-judicial source doctrine requires that, in order to be the basis for disqualification, the alleged judicial bias or prejudice must have arisen from a source outside judicial proceedings. In *Liteky*, the Supreme Court noted the idea is less than clear and that "it would be better to speak of the existence of a significant (and often determinative) 'extrajudicial source' *factor*, than of an 'extrajudicial source' *doctrine*." *Liteky*, 510 U.S. at 554-55. *Liteky* held that the "extrajudicial source" doctrine applies to § 455(a), as well as to § 455(b)(1), but in the course of the opinion Justice Scalia explained that "there is not much doctrine to the doctrine." *Id.* at 554.

> The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for "bias or prejudice" recusal, since *some* opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice.

Id. Justice Scalia concluded that "neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias." *Id.*

Thus, under *Liteky*, the source of a judge's knowledge is a factor in the analysis, although not a dispositive one. "[O]pinions formed by the judge on the

basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display *a deep-seated favoritism or antagonism that would make fair judgment impossible.*" *Id.* at 555 (emphasis added).

Application to this Case

Actual bias under § 455(b)(1)

As mentioned above, the FOP argues that, under § 455(b)(1), Judge Holmes is actually biased in this matter. In support of this position, the FOP cites us to various comments and questions from Judge Holmes made during the course of proceedings and upon the court's initial acceptance of the consent decree. When the judge's comments and questioning are put in the context of the proceedings where the statements and comments occurred, however, the FOP's contention of actual bias fails.

In its questioning of the FOP counsel and in questioning members of the Tulsa Police Department (most importantly Officer Rink) at the hearing on the FOP's motion to intervene, the court was only trying to determine in the first instance what counsel for the FOP knew and when he knew it in order to understand why the FOP delayed so long in seeking to intervene as a party to this litigation. As regards the questioning of Officer Rink, the court was trying to understand whether Officer Rink was acting on behalf of the City in gathering

information from police personnel files and, if so, whether by these acts the City was working to subvert the proposed settlement decree through information gathered by Officer Rink and given to the FOP, when counsel for the City and representatives of the City were telling the court that the City supported and agreed to the settlement provisions. This inquiry was valid and, indeed, was required by the court in order to determine if there was truly an agreement and whether that agreement would be workable.

Further, the FOP's actual bias argument is much deflated by two rulings of the district court. The district court is alleged by the FOP to be championing the terms of the settlement decree. The FOP argues the 2002 proposed settlement decree was similar to the 1998-99 attempted settlement in which Judge Holmes was involved. But, the fact that Judge Holmes *rejected* the 2002 proposed settlement is strong evidence that the court had no actual bias concerning its terms or the terms of the 1998-99 discussion. Further, the FOP was concerned that the court was prejudiced against it and would not permit its intervention. The chronology of events is important here. The FOP had filed a motion to intervene on May 2, 2002. The FOP filed its motion to disqualify in district court on August 14, 2002. The court denied its motion to disqualify and that of the City on August 29, 2002, in two separate orders. But, the court *granted* the FOP's motion to intervene on September 10, 2002. We agree with plaintiffs that it is

difficult for the FOP to show actual bias by the court when the court ruled in its favor at two critical junctures: (1) rejection of the proposed settlement decree, and (2) permission to intervene. The portions of the record cited to us by the FOP do not sustain a showing of actual bias.

Appearance of Bias under § 455(a)

In analyzing petitioners' argument that Judge Holmes should recuse because of the appearance of bias, we determine "what a reasonable person knowing all the relevant facts would think about [the judge's] impartiality," *Franks*, 796 F.2d at 1234 (quotation omitted). After our review of the particular circumstances presented here, we cannot agree that a reasonable person knowing the facts would conclude there is an appearance of bias.

Here, again, chronology is important. Judge Holmes' involvement in the first round of negotiations occurred in 1998. Although the judge noted there was no evidence that he was involved in any negotiations in 1999, he was certain he was not involved after February 1999. After February 1999, the case returned to the "trial track" with Judge Holmes as the trial judge, and discovery ensued. The docket sheet of the district court shows Judge Holmes was actively involved in the resolution of discovery disputes and other pretrial motions during this approximately three-year period. The parties came to the court on November 28, 2001, and asked that the case be returned to mediation, referencing in part that

further work on the case by both sides, including additional discovery, caused them to believe settlement might now be possible. At that point, a new settlement negotiation began with Judge Lee R. West serving as the settlement judge. On April 1, 2002, a proposed consent decree signed by all parties was filed with the court under seal. On May 2, 2002, the FOP sought to intervene and on May 22, 2002, the FOP filed a motion asking the court to reject the decree. After the fairness hearing, which was conducted July 15, 16, & 17, 2002 (and in which the FOP was permitted to fully participate), the City withdrew its support of the settlement on August 16, 2002, and therefore the court rejected the proposed decree on that same date.

With this chronology in mind, we conclude that a reasonable person viewing this case and the representations made by the FOP and the City would not find that Judge Holmes continuing as the trial judge in this case presents the appearance of bias. His involvement in settlement conferences was in late 1998 through February 1999, followed by almost three years of discovery and then settlement negotiations before a different judge, commencing sometime after November 28, 2001, which did not produce a proposed settlement until April 1, 2002. Judge Holmes' prior contact with settlement negotiations is simply too attenuated to give rise to the appearance of bias. There are policy concerns strongly favoring the separation of trial functions from settlement negotiations;

nevertheless, while we would discourage the trial bench from trying cases in which a judge has participated at the settlement stage, we see nothing in the circumstances of this case that would create an appearance of bias. Further, as we have stated in *Willner v. University of Kansas*, 848 F.2d 1023, 1028 (10th Cir. 1988), a motion to recuse under § 455(a) must be timely filed. The City, which was a party throughout, did not raise any objection to Judge Holmes presiding as trial judge when the case returned to the discovery and trial track in February 1999 after the settlement negotiations over which he had presided failed.

Conclusion

Because Judge Holmes' knowledge arises from proceedings conducted pursuant to Fed. R. Civ. P. 16, and is thus not "extra-judicial," petitioners must show that the opinions formed by Judge Holmes on the basis of his participation in early settlement talks "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Given all the facts and circumstances of this case, petitioners have failed to meet this standard and have similarly failed to demonstrate their clear and indisputable right to mandamus relief.

The City's motion to supplement the appendix is GRANTED. The petitions for writ of mandamus are DENIED. The emergency motion for stay of court proceedings filed with this court on November 15, 2002, is DENIED.

Entered for the Court
PATRICK FISHER, Clerk

By: _____
Deputy Clerk

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November 26, 2002

NOTIFICATION OF MAILING

Re: 02-5142, In re: Lodge #93 FOP
02-5154, In re: City of Tulsa
Dist/Ag docket: 94-CV-39-H

A COPY OF THE ATTACHED ORDER HAS BEEN PLACED IN THE UNITED STATES MAIL THIS DATE, ADDRESSED AS FOLLOWS:

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