UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL LINDSEY GAMBUZZA, etc., et al.,

Plaintiff,

v.

JAMES HIGGINBOTHAM, etc., et al.,

Defendants.
_____/

CASE NO. 8:09-cv-1891-T-17TBM

DEFENDANTS' MOTION FOR DISQUALIFICATION FOR BIAS OR PREJUDICE
(And Memorandum of Law)

The Defendants MAJOR JAMES HIGGINBOTHAM, LT. PARMENTER, CAPTAIN ACKLES, and SHERIFF BRAD STEUBE, solely in their official capacity, by and through their undersigned attorneys, pursuant to 28 U.S.C. §455, file this their Motion for Disqualification for Bias or Prejudice, and as grounds therefore would state as follows:

1. On or about September 4, 2009, the Plaintiffs, MICHAEL LINDSAY GAMBUZZA and CHRISTOPHER DRESCHER, who were proceeding *pro se*, filed their §1983 Civil Rights Complaint alleging violations of their rights secured by the United States Constitution. [D.E. #1]. Specifically, they alleged that the "Postcard Only" incoming mail policy at the Manatee County Jail violates their First Amendment rights.

2. Although the case at bar was filed on September 4, 2009, the history of this case starts on June 29, 2009 when the Plaintiffs MICHAEL LINDSAY GAMBUZZA and CHRISTOPHER DRESCHER filed a §1983 Civil Rights Lawsuit on behalf of themselves and "All Others Similarly Situtated." In Michael Gambuzza, et. al. v. Lt. Diane Parmenter, et. al., case no.: 8:09-cv-01229-EAK-TBM, the Plaintiffs' initial complaint alleged various violations of their constitutional rights by numerous members of the Manatee County Sheriff's Office. See Exhibit "A", Complaint.

3. On July 8, 2009, the Honorable Judge Elizabeth A. Kovachevich, entered an order *sua sponte* dismissing the case directing the Plaintiffs to clearly identify the defendants and the factual allegations that support their claims against each of the defendants. See Exhibit "B", Order dated July 8, 2009.

4. On July 24, 2009, GAMBUZZA and DRESCHER filed their Amended Complaint, on behalf of themselves and "all others similarly situated", alleging two claims; first, that the newly implemented "Postcard Only" policy at the Manatee County Jail violated their First Amendment rights; and, second, that the Jail's practice of removing certain articles, advertisements, and classifieds from the daily newspaper violated their constitutional rights. See Exhibit "C", Amended Complaint.

5. On July 28, 2009, Sheila McNeill, who identified herself as calling from the United States District Court for the Middle District of Florida-Tampa Division, left a message for Michele Hall, General Counsel for Manatee County Sheriff Brad Steube, inquiring about

case law supporting the Manatee County Jail's "Postcard Only" policy. See Exhibit "D", Copy of Phone Message dated July 28, 2009.

6. On July 31, 2009, Judge Kovachevich entered an order dismissing the Plaintiffs' Amended Complaint because the Plaintiffs sought to bring claims on behalf of "all others similarly situated" and they were not represented by counsel. See Exhibit "E", Order dated July 31, 2009.

7. When Michele Hall returned Ms. McNeill's phone call, she identified herself as a staff attorney for the Honorable Elizabeth Kovachevich and asked Ms. Hall to provide her with all authority supporting the new mail policy. See Exhibit "F", Affidavit of Michele Hall, ¶¶4-5.[1] Ms. Hall stated she was unaware of a lawsuit filed challenging the constitutionality of the "Postcard Only" policy. Id at ¶5. Ms. McNeill told Ms. Hall that if she had authority supporting the policy, then "we can take care of this right now." Id. Ms. McNeill also stated "more than once" that the conversation was "just between [Ms. McNeill and Ms. Hall]." Id.

8. Approximately a week later, Ms. Hall provided Ms. McNeill with legal precedent from the Arizona District Court holding that the "Postcard Only" policy of the Maricopa County Jail did not violate the First Amendment rights of inmates. When Ms. McNeill called Ms. Hall back, she was not persuaded by the authority provided by Ms. Hall and

[1]As the factual assertions contained in the Affidavit of Michele Hall are sufficient to support "that the judge before whom the matter is pending has a personal bias or prejudice ... against [the defendants]", this Motion should be referred to another judge. See 28 U.S.C. §144 (2010).

stated that Ms. Hall was going to have a problem.[2] Ms. McNeill stated that she had a Ph.D., that she was an expert on inmate rights and that the Eleventh Circuit was "nothing like the Ninth Circuit." See Exhibit "F", ¶¶6-9.

9. On August 21, 2009, MICHAEL GAMBUZZA, proceeding *pro se*, filed another §1983 Civil Rights Complaint based on alleged excessive and arbitrary use of strip searches and body cavity searches at the Manatee County Jail (Case no.: 8:09-cv-1717).

10. On September 4, 2009, MICHAEL LINDSAY GAMBUZZA and CHRISTOPHER DRESCHER, who were proceeding *pro se*, filed a §1983 Civil Rights Complaint alleging the "Postcard Only" incoming mail policy at the Manatee County Jail violated their First Amendment rights. [D.E. #1].

11. On September 10, 2009, Sonya Rietz, assistant to General Counsel Michele Hall, emailed Sheila McNeill[3] the Manatee County Sheriff's Office "Inmate Handout." See Exhibit "G", Email correspondence dated September 10, 2009.

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[2]During the call, Ms. McNeill also stated that Mr. Gambuzza had filed a lawsuit regarding illegal strip searches and cavity searches, she had called and spoken to several employees at the jail and "it doesn't look good", and the Manatee County Sheriff's Office was "going to have a problem." See Exhibit "F", ¶8.

[3]The email was sent to sheila_mcneill@flmd.uscourts.gov.

12. On October 26, 2009, Katherine Yanes[4],Esquire; James E. Felman, Esquire; and Kynes, Markman & Felman, P.A. filed their "Motion to Be Appointed as *Pro Bono* Counsel"[5], which was granted by the Court two (2) days later. That motion states "[u]ndersigned counsel was contacted by the Court and requested to accept appointment as counsel on behalf of the Plaintiffs in this case.[6]

13. Staff Attorney Sheila McNeill's *ex parte* communications with the Manatee County Sheriff's Office, which constituted an independent investigation of a lawsuit and prejudgment of the constitutionality of the Defendants' policies, coupled with the referral of the case to a former coworker, who is now Plaintiffs' counsel, demonstrate that the Honorable Judge Elizabeth Kovachevich's impartiality might reasonably be questioned. Therefore, it is proper that the Honorable Judge Elizabeth A. Kovachevich be disqualified from presiding over the case at bar.

WHEREFORE, the Defendants MAJOR JAMES HIGGINBOTHAM, LT. PARMENTER, CAPTAIN ACKLES, SHERIFF BRAD STEUBE, solely in their official

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[4]According to her attorney profile on her law firm's website, located at http://www.kmf-law.com/, Ms. Yanes clerked for the Honorable Judge Kovachevich after her graduation from law school in 1997 and worked with Ms. McNeill who apparently has been staff counsel to the Court for many years. According to Ms. Yanes, she knows Sheila McNeill well. See Exhibit "H", Michele Hall's handwritten notes from telephone conversation with Katherine Yanes.

[5] Plaintiff's counsel also filed a similar motion in case no.: 8:09-cv-1717.

[6]It is unclear who contacted Kynes, Markman & Felman about representing the Plaintiffs in this case; However, based on Ms. McNeill's personal beliefs regarding the constitutionality of the Defendants' policies and Ms. Yanes's prior employment, the Defendants reasonably believe Ms. McNeill contacted Ms. Yanes.

capacity, respectfully request this Honorable Court enter an order disqualifying the Honorable Judge Elizabeth Kovachevich for bias.

Further, and in support of this motion, the Defendants would refer the Court to the Memorandum of Law attached hereto and by reference made a part hereof.

MEMORANDUM OF LAW

The governing statute is 29 U.S.C. §455, which reads, in pertinent part:

> (a) Any justice, judge, or magistrate judge 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 concerning the proceeding.
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> See 28 U.S.C. §455 (2010).

Based on the actions of Sheila McNeill and the *sua sponte* request for counsel to represent the Plaintiffs, the Honorable Judge Kovachevich's impartiality might reasonably be questioned.

The goal of section 455 is to avoid even the appearance of partiality. "Inherent in §455(a)'s requirement that a judge disqualify himself if his impartiality might reasonably be questioned is the principle that our system of 'justice must satisfy the appearance of justice.'" See Parker v. Connors Steel Co., 855 F.2d 1510, 1523 (11th Cir. 1988)(quoting Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11 (1954)). "The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 865

, 108 S.Ct. 2194, 2205 (1987)(citing H.R.Rep. No. 93-1453, at 5). "Thus, it is critically important ... to identify the facts that might reasonably cause an objective observer to questions [the judge's] impartiality." Id.

In the current case, those facts consist of the actions of Sheila McNeill, staff attorney to the Honorable Elizabeth A. Kovachevich. Ms. McNeill undertook a factual investigation and determined that the Sheriff's "Postcard Only" policy was unconstitutional despite the existence of case law on the subject. This investigation included contacting employees of the Sheriff at the jail and General Counsel to the Sheriff, Michele Hall. Ms. McNeill also apparently made a *sua sponte* request for counsel to represent the Plaintiff. Ms. McNeill, after learning of the Manatee County Jail's "Postcard Only" mail policy and while case no.: 8:09-cv-01229-EAK-TBM was pending before the Court, contacted Sheriff Brad Steube's General Counsel, who was unaware of the pending litigation, to seek out legal authority supporting the policy. By the time Ms. Hall returned the phone, case no.: 8:09-cv-01229-EAK-TBM had been dismissed by Judge Kovachevich including the Plaintiffs' claims regarding the "Postcard Only" policy. However, Ms. McNeill requested the legal authority Ms. Hall relied on in implementing the new policy. As if this investigation wasn't enough, Ms. McNeill called Ms. Hall to provide her with her opinions regarding the policies at the Manatee County Jail. In not so many words, she stated that this was not "the Ninth Circuit"[7] and the Manatee County Jail mail policy would not pass constitutional muster in the

[7]According to Michele Hall, Ms. McNeill stated that "that the Eleventh Circuit was nothing like the Ninth Circuit." See Exhibit "F", ¶7.

Eleventh Circuit. Further causing the Defendants to be concerned about the impartiality of the Court, when the Plaintiffs re-filed their lawsuit regarding the "Postcard Only" policy, the Court, *sua sponte*, contacted a law firm requesting that they file a motion to be appointed as *pro bono* counsel for the Plaintiffs.[8] These facts and circumstances might reasonably cause an objective observer to question Judge Kovachevich's impartiality.

Although the Defendants are unaware of any actions taken by Judge Kovachevich in this matter, it is impossible for the Defendants to know whether Sheila McNeill was acting independently, or under direction from Judge Kovachevich. Further, the Fifth Circuit Court of Appeals has noted that law clerks can play a significant role in deciding cases:

> Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor [her] most intimate family members may be. We agree with the Sixth Circuit that the clerk is forbidden to do all that is prohibited to the judge. It is the duty of the law clerk as much as that of the trial judge to avoid any contacts outside the record that might affect the outcome of the litigation."
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> See Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983)

Further, Ms. McNeill's contact with Michele Hall and employees of the Manatee County Jail are prohibited actions under the Judicial Code of Conduct, which apply to law clerks and other personnel as well.

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[8]In addition, the attorney who the Court contacted is a former law clerk for Judge Kovachevich and presumably a former coworker of Ms. McNeill, who has already prejudged this policy as unconstitutional. The record also reflects that the Plaintiffs did not seek appointment of counsel in this matter.

> The law clerk learned of the litigation and of the disputed issues by virtue of his employment as law clerk to the trial judge. It was his duty as much as that of the trial judge to avoid any contacts outside the record that might affect the outcome of the litigation. This we perceive to be the basis, so far as related to the judge himself, of the existing Canon 3(A)(4) of the Code of Judicial Conduct for the United States Judges which provides: 'A judge should ... neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.'[9]
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> See Kennedy v. Great Atlantic & Pacific Tea Co., Inc., 551 F.2d 593, 596 (5th Cir. 1977).

To the extent Judge Kovachevich was unaware of Ms. McNeill's actions in this matter, the Supreme Court in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988), held that scienter is not required in order to find a violation of §455(a). The Supreme Court stated:

> The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that [her] impartiality might reasonably be questioned by other persons. Moreover, advancement of the purpose of the provision-to promote public confidence in the integrity of the judicial process, does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew.
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> Id at 2002-03 (internal citations and quotations omitted).

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[9]The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision. See Code of Conduct for United States Judges, Canon 3(A)(4), *effective July 1, 2009*.

CONCLUSION

"[S]ection 455(a) embodies an objective standard. 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 significant doubt about the judge's impartiality." See Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988). In this case, the "appearance of partiality" is apparent to a reasonable person. Ms. McNeill, a self described long-time member of the presiding judge's staff evaluated a *pro se* prisoner complaint and conducted an independent investigation going so far as to call employees of the defendant Sheriff and interviewed them regarding issues in this case. Ms. McNeill, who described herself as an expert in prisoner's rights, discussed the case with General Counsel for the Manatee County Sheriff and advised her that the Sheriff's Office was going to have a problem. When counsel provided her with legal authority in support of the policy[10], Ms. McNeill commented that the policy isn't going to fly in the Eleventh Circuit because it is "nothing like the Ninth Circuit." Further, it is reasonable to conclude Ms. McNeill was instrumental in the decision to contact a former law clerk and co-worker, who is now Plaintiffs' counsel, requesting that she file a motion to be appointed *pro bono* counsel, which potentially exposes the Defendants to an award for attorneys' fees. Potentially, Ms.

[10]The only opinion available at the time on this legal issue holding an identical policy to be constitutional. See Gibbons v. Arpaio, 2008 WL 4447003 (D.Ariz. 2008). On September 24, 2009, the United States District Court in Arizona held, for a second time, held that the "Postcard Only" policy at the Maricopa County Jail was constitutional. See Covell v. Arpaio, 662 F.Supp.2d 1146 (D.Ariz. 2009).

Yanes would be entitled to an award of attorney's fees, pursuant to 42 U.S.C. §1988, despite her "*pro bono*" status should the Plaintiffs prevail. All of these factors cause the Defendants, and would cause a casual observer, to reasonably question the partiality of the Court. This motion should be granted.

Local Rule 3.01(g) Statement

Undersigned counsel has contacted opposing counsel who has indicated that they are opposed to the relief sought in this Motion.

CERIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed a copy of the foregoing with the Clerk of the Court by using the CM/ECF system, which will forward a true and correct copy of the foregoing to: Katherine Earle Yanes, Esquire, KYNES, MARKMAN & FELMAN, P.A., Post Office Box 3396, Tampa, Florida 33601-3396, this ***12th*** day of May, 2010.

PURDY, JOLLY, GIUFFREDA & BARRANCO, P.A.
Attorneys for Defendants
2455 East Sunrise Boulevard, Suite 1216
Fort Lauderdale, Florida 33304
Telephone (954) 462-3200
Telecopier (954) 462-3861
E-Mail: jason@purdylaw.com

By: ***s: Jason L. Scarberry***
JASON L. SCARBERRY
Florida Bar No.: 0693375

By: ***s: Richard A. Giuffreda***
RICHARD A. GIUFFREDA
Florida Bar No.: 705233