IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TITUS HENDERSON,

Plaintiff,

v.

MATTHEW FRANK; PETER HUIBREGTSE; BRIAN KOOL; TRACEY GERBER; J. STARKY; RUSSELL BAUSCH; ROBERT SHANNON; TODD OVERBO; DICK VERHAGEN; and RICHARD SCHNEITER,

Defendants.

ORDER

06-C-12-C

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In an order dated April 13, 2006, I denied a motion plaintiff filed on March 21, 2006, in which he asked me to disqualify myself as the judge in this case. In his motion, plaintiff argued that disqualification was necessary because he intended to call me as a witness "concerning First Amendment claims in this case." In denying the motion, I informed plaintiff that although disqualification may be appropriate when a judge has personal knowledge of disputed evidentiary facts concerning the proceeding, I have no such personal knowledge of any facts underlying his First Amendment claim. Now plaintiff has filed a second motion for recusal. In this motion, plaintiff argues that my recusal is required

because I am personally biased against him. In particular, plaintiff notes that on March 31, 2005, I made the following statements in an order entered in another of his cases, Henderson v. Berge, 04-C-39-C,

> This is not the only case that plaintiff has filed in this court. His actions and averments in this case have shown him to be unreliable and less than forthright. This showing will not help him in the future cases that he prosecutes."

As plaintiff is aware, 28 U.S.C. §455(b)(1) requires that a federal judge disqualify herself as the presiding officer in an action where she has a personal bias or prejudice concerning a party. Ordinarily, a party seeking a judge's recusal in a case must submit an affidavit describing the basis for his claim that the judge has a personal bias or prejudice. 28 U.S.C. § 144. A judge should not recuse herself when an affidavit does not meet the requirements imposed by law. United States v. Faul, 748 F.2d 1204, 1210 (7th Cir. 1984).

Plaintiff did not submit an affidavit in support of his motion. Even if he had, I would not find it legally sufficient under §144 on the basis of his assertions in support of his motion.

> To be legally sufficient, an affidavit must allege bias or prejudice. . . [that] stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case.

Id., citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). In other words, the bias and prejudice must be personal, not based on a particular judicial proceeding; a judge's

unfavorable impressions of a party or belief that a party is dishonest are not grounds for recusal. United States v. Slaughter, 900 F.2d 1119, 1126 n.5 (7th Cir. 1990). "[A]n occasional display of irritation . . . does not suffice to show personal bias or prejudice, whether the irritation was justified or not." Rosen v. Sugarman, 357 F.2d 794, 798 (2d Cir. 1966). The test for impartiality is whether "an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." Pepsico Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985)(cited in Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710, 715 (7th Cir. 1986)).

Plaintiff's assertion of bias and prejudice relate to a previous proceeding in which allegation of constitutional wrongdoing was highly suspect. When he failed to produce any evidence of wrongdoing on summary judgment, I made the following statements,

> In his complaint, plaintiff implied that he had been forced to participate in a Christian study group as a condition of eligibility for transfer to a less secure institution. In his response to defendants' proposed findings of fact, he asserted that defendants implemented Christian programming "in the Level 5 Behavioral Modification Program to change and teach prisoners moral thoughts with the Christian Study group" and denied prisoners parole if they did not complete the "program of Christianity." Plt.'s Resp. to Dfts.' PFOF, dkt. #42, at 5-6, ¶ 34. In an order entered February 6, 2005, I asked plaintiff to clarify whether he was denied parole because he refused to watch Christian television programming and instructed him to cite evidence supporting the truth of his statements instead of relying on bald assertions or conclusory averments in an affidavit. Feb. 5, 2005 Order, dkt. #53. Instead of responding as instructed, plaintiff simply restated his conclusion that he was

> denied parole because of his "refusal to complete the Level 5 Behavior Program with the Christian program," and cited evidence that contradicted his assertion. 2d Aff. of Titus Henderson, dkt. #55, at 2, ¶ 7. For instance, he cited a December 19, 2003 Parole Commission Action recognizing that he had "successfully completed all recommended programming, and more" at the time of his parole review but denying plaintiff's early release because of his unsatisfactory conduct, including "a serious battery to an inmate involving the use of a weapon" just over one year before the parole hearing. Id.
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> It is evident from [plaintiff's] inability to adduce evidence in support of his allegations and the undisputed fact that he has never reached level 4, let alone 5, that plaintiff was not candid or truthful when he drafted his submissions to the court.
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> This is not the only case that plaintiff has filed in this court. His actions and averments in this case have shown him to be unreliable and less than forthright. This showing will not help him in future cases that he prosecutes. Moreover, if he continues to act in the same manner, he is running the risk that defendants will move for sanctions for his misuse of the judicial system or the court will impose them on its own motion.

A party who reveals a lack of candor in one lawsuit inflicts upon himself the consequence: that his assertions in future suits will be eyed with some suspicion. But skepticism about a party's truthfulness is not a legally sufficient ground under §144 to raise a reasonable question of my impartiality. I am bound by legal rules in determining the sufficiency of pleadings. It is up to the jury to assess a party's credibility. Because plaintiff's submission is insufficient to require my recusal from this case, his second motion for recusal will be denied.

ORDER

IT IS ORDERED that plaintiff's second motion for my recusal is DENIED.

Entered this 14th day of April, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge