

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

JIM SISNEY, an individual,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 09-CV-253-TCK-PJC
)	
INDEPENDENT SCHOOL DISTRICT)	
NO. 3 OF TULSA COUNTY, a Political)	
Subdivision; and the BROKEN ARROW)	
SCHOOL BOARD,)	
)	
Defendants.)	

**DEFENDANT’S RESPONSE IN OPPOSITION TO
PLAINTIFF’S MOTION FOR RECUSAL OF
THE HONORABLE TERENCE C. KERN**

Defendant Independent School District No. 3 of Tulsa County, Oklahoma (the “School District” or “Broken Arrow School District”), submits this response in opposition to the plaintiff’s “Motion for Recusal of Judge Terrance[sic] C. Kern” [Doc. # 32]. The plaintiff’s untimely motion is completely devoid of any legitimate basis warranting Judge Kern’s recusal under 28 U.S.C. § 455. Accordingly, it should be denied.

I.

**Judge Kern’s Recusal is Not Mandated by the
Provisions of 28 U.S.C. § 455(b)(5).**

The plaintiff contends that recusal is mandated under Section 455(b)(5) because “a person within the third degree of relation is known by Judge Kern to have an interest that

could be substantially affected by the outcome of the proceeding.” Motion to Recuse, p.

3. In support of this claim, the plaintiff asserts that Judge Kern is the first cousin of Shirleen Sisney, the wife of Lee Sisney - Lee Sisney being the brother of plaintiff Jim Sisney.

Section 455(b)(5) provides that a judge shall recuse himself where:

- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; [or]
 - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Clearly, Section 455(b)(5) is inapplicable because the plaintiff has wholly failed to establish that either Judge Kern or his wife are within a third degree of relationship to the plaintiff.¹

First cousins are within the fourth degree of relationship, not the third. *See In re Humphrey's Estate*, 1943 OK 306, ¶ 3, 141 P.2d 993; OKLA. STAT. tit. 84, § 221 (2001) (“Thus brothers are related in the second degree, uncle and nephew in the third degree,

¹ In his motion, the plaintiff has not presented any argument, evidence, or claim that anyone else but the plaintiff has an interest that could be substantially affected by the outcome of this proceeding. Accordingly, the School District interprets this statement to be an assertion by the plaintiff that **he** is the person within the third degree of relationship to Judge Kern.

cousins german[sic] in the fourth degree, and so on.”). Assuming Judge Kern’s relationship with Shirleen Sisney is that of first cousins, as claimed by the plaintiff, the plaintiff’s relationship to Judge Kern is even further removed than the fourth degree because plaintiff is in a relation to the second degree, by affinity (marriage), to Shirleen Sisney. Therefore plaintiff, at best, has a sixth degree of relationship with Judge Kern, which is not a prohibited relationship under Section 445(b)(5). *See United States vs. Halat*, 2008 WL 1776491, *1 (S.D. Miss. April 18, 2008) (unpublished) (“Under the Table of Consanguinity, a First Cousin is related in the Fourth Degree, which is not a prohibited relationship under 28 U.S.C. § 455(b)(5).”).² Accordingly, the plaintiff’s argument that Section 455(b)(5) mandates Judge Kern’s recusal is clearly without merit.

II.

Plaintiff’s Motion to Recuse is Untimely and Fails to Set Forth any Legitimate Basis Warranting Judge Kern’s Recusal.

The plaintiff also asserts recusal is mandated under Section 455(a). Section 455(a) states that:

Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

However, the recusal of Judge Kern is not warranted under Section 455(a) because (i) the plaintiff’s recusal motion is untimely, and (ii) Judge Kern’s distant familial relationship to the plaintiff is insufficient, by itself, to require recusal.

² A copy of this unpublished opinion is attached as Exhibit 1.

A. Plaintiff's recusal motion is untimely.

“A motion to recuse under section 455(a) must be timely filed.” *Wilmer v. University of Kansas*, 848 F.2d 1023 (10th Cir. 1988). In *Wilmer*, the plaintiff brought an employment discrimination suit against the University of Kansas. Wilmer filed her action on December 1, 1982. Eleven months later on October 11, 1983, Wilmer sought, unsuccessfully, the recusal of the trial judge based upon his participation in University of Kansas alumni activities. On appeal, the Tenth Circuit determined that Wilmer's motion to recuse was untimely. In doing so, the court noted that “[g]ranting a motion to recuse many months after an action has been filed wastes judicial resources and encourages manipulation of the judicial process.” *Id.* at 1029.

Much as in *Wilmer*, the plaintiff's motion to recuse is untimely. It comes some nine months after suit was filed, six months after the entry of a Scheduling Order, a month after the close of discovery, two weeks after the deadline for dispositive motions, and mere days before the plaintiff is to respond to the School District's motion for summary judgment.³ Additionally, it comes some three months after the plaintiff filed his motion for leave to dismiss without prejudice – a motion under which he requested

³ Interestingly, the plaintiff does not state in his motion when he first became aware that Judge Kern is the first cousin of Shirleen Sisney. The plaintiff's brother, Lee Sisney, who is not an attorney of record in this action, (i) attended the plaintiff's deposition on December 22, 2009, and (ii) was identified by the plaintiff as a trial witness, although he was subsequently stricken as a witness by Magistrate Judge Cleary due to his untimely identification by the plaintiff. Deposition of Jim Sisney, p. 4 lines 4-23; p. 14, lines 4-20, Exhibit 2; Minute Sheet dated January 20, 2010 [Doc. # 30] (“Lee Sisney is stricken as a witness due to Plaintiff's untimely identification of him as a possible witness in this case.”). Due to Lee Sisney's involvement in the case on behalf of his brother, the cousin relationship certainly had to have been known to the plaintiff for some time, if not from the time the lawsuit was filed on April 30, 2009.

relief from the same judge he now seeks to recuse.⁴ Given the current procedural status of this action, plaintiff's motion to recuse is not only untimely, but is frivolous.

B. Plaintiff has failed to establish any basis warranting Judge Kern's recusal under Section 455(a).

Under Section 455(a), recusal is warranted if a reasonable person, knowing all of the relevant facts, would harbor doubts about the judge's impartiality. *Nichols v. Alley*, 71 F.3d 347, 350-51 (10th Cir. 1995). However as the Tenth Circuit cautioned in *Nichols*:

The statute must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice. **Neither is the statute intended to bestow veto power over judges or to be used as a judge shopping device.** Further, we are mindful that a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require. [internal quotations and citations omitted] [emphasis added].

Id. at 351. Recusal motions under Section 455(a) are "extremely fact driven 'and must be judged on [their] unique facts and circumstances more than by comparison to situations considered in prior jurisprudence.'" *Id.* quoting *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995).

In support of recusal under Section 455(a), the plaintiff presents no facts supporting recusal apart from Judge Kern's distant familial relationship. According to plaintiff, "[t]he fact that *any* relation exists between the Plaintiff and the presiding judge would cause a reasonable person to question the propriety of the judge's decisions and

⁴ Plaintiff's Application for Order of Dismissal without Prejudice to Refiling [Doc. # 16].

ability to remain impartial.” Motion to Recuse, p. 2. However, a distant familial relationship is insufficient, by itself, to warrant recusal under Section 455(a). As the United States Supreme Court noted in *Liteky v. U.S.*, 510 U.S. 540, 553 (1994):

It would obviously be wrong, for example, to hold that “impartiality could reasonably be questioned” simply because one of the parties is in the fourth degree of relationship to the judge. Section 455(b)(5), which addresses the matter of relationship specifically, ends the disability at the third degree of relationship, and that should obviously govern for purposes of § 455(a) as well.

See also Nichols, 71 F.3d at 351 (recognizing that the Tenth Circuit has compiled a nonexhaustive list of various matters not ordinarily sufficient to require Section 455(a) recusal, one of which is a mere familiarity with a party). Accordingly, the plaintiff has failed to set forth a sufficient factual basis warranting Judge Kern’s recusal under Section 455(a).

Conclusion

Neither Judge Kern nor his wife is within a third degree of relationship with the plaintiff. Therefore, Judge Kern’s recusal is not required under Section 455(b). Additionally, the plaintiff’s recusal motion is untimely. Even assuming timeliness, the sole basis stated for recusal - the distant familial relationship between Judge Kern and the plaintiff – is legally insufficient, standing alone, to warrant recusal under Section 455(a).

WHEREFORE, the School District⁵ requests that the plaintiff’s motion to recuse be denied.

⁵ In his deposition the plaintiff testified that he intended to sue the School District when he named the Broken Arrow School Board as a defendant. Deposition of Jim

Respectfully submitted,

s/ Kent B. Rainey

Kent B. Rainey
Oklahoma Bar Number: 14619
Attorney for Defendant
Rosenstein, Fist & Ringold
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211
Fax: (918) 583-5617
borainey@rflaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2010, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Gary L. Richardson
Charles L. Richardson
Denise P. Jones
6450 S. Lewis, Suite 300
Tulsa, OK 74136

Attorneys for the Plaintiff

s/ Kent B. Rainey
Kent B. Rainey

Sisney, p.24 line 1 through p.25, line 2, Exhibit 2. The Board of Education of the Broken Arrow School District (the "School Board") is the governing body of the Broken Arrow School District. OKLA. STAT. tit. 70, § 5-106 (2009 Supp.). It has no independent legal existence apart from the Broken Arrow School District and is not an entity capable of being sued separately from the School District. OKLA. STAT. tit. 70, § 5-105 (2001). .