UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DISABILITY ADVOCATES, INC.,

Plaintiff,

-against-

GEORGE PATAKI, *et al.*,

Defendants.
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MEMORANDUM
AND ORDER

03-CV-3209 (NGG)(RML)

LEVY, United States Magistrate Judge:

This is an action challenging the discharge of psychiatric patients from State hospitals to adult homes. Plaintiffs seek declaratory and injunctive relief, including the removal of patients from adult homes and a prohibition against their use for psychiatric patients in the future. Pending before the court is defendants' motion for recusal pursuant to 28 U.S.C. § 455(a) ("section 455(a)"), which provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Defendants contend that recusal is required because of my prior association with plaintiff Disability Advocates, Inc. ("DAI" or "plaintiff") as a member of its board of directors for a period of approximately one year ending on or about December 31, 1994, and my prior employment as General Counsel to New York Lawyers for the Public Interest ("NYLPI") for a one year period ending on or about December 31, 1994. In addition, defendants argue that disqualification is necessary because plaintiff apparently intends to "rely upon factual matters dating from the period before [my appointment to the bench], when [I] was associated with DAI and New York Lawyers for the Public Interest, and an active participant in litigation raising related issues."

(Letter to court from Barbara Hathaway, Esq., dated Jan. 7, 2004 ("Hathaway Ltr."), at 2.) Finally, they assert that my prior representation of the plaintiffs in New York State Ass'n for Retarded Children, Inc. v. Carey, 551 F. Supp. 1165 (E.D.N.Y. 1982), aff'd in part and rev'd in part, 706 F.2d 956 (2d Cir. 1983) (the "Willowbrook" case) also requires recusal because the claims in this lawsuit were allegedly "inspired" by the Willowbrook case and are purportedly similar in that they involve the deinstitutionalization of people with mental disabilities. Id.

Plaintiff opposes the motion, arguing that the caselaw interpreting section 455(a) does not require recusal because of my former association with either DAI or NYLPI, as courts have found recusal unnecessary where the relationship was closer and more recent than that alleged in this case. (See Letter to the court from Joshua Groban, Esq., dated Jan. 28, 2004.) Nor, they argue, is there any authority holding that prior representation of clients in litigation of similar issues disqualifies a judge from sitting on lawsuits raising the same or related claims.

The recusal motion also implicates ethical issues under the Code of Conduct for United States Judges ("the Code"), which, although similar to section 455(a), requires separate analysis. On January 30, 2004, I sought an advisory opinion from the Committee on Codes of Conduct of the Judicial Conference of the United States as to whether my continuing to sit on this case would violate the Code.

DISCUSSION

The decision whether or not to recuse has both a legal and an ethical dimension. Under section 455(a) a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Similarly, Canon 3C(1) of the Code provides, in pertinent part, that

a judge must disqualify himself "in a proceeding in which the judge's impartiality might reasonably be questioned," including but not limited to several specific instances set forth in subsections (a) through (e). The language of the statute and Canon 3C(1) is identical in all material respects.

In their letter briefs, the parties focus on the case law under section 455(a). I have reviewed the cases and find that they do not require recusal in this instance. The Second Circuit instructs that a judge "considering recusal must balance the need for 'public confidence in the judiciary against the possibility that those questioning [the judge's] impartiality might be seeking to avoid the adverse consequences of [his or her] presiding over their case.'" In re Initial Public Offering Secs. Litig., 294 F.3d 297, 302 (2d Cir. 2002) (quoting In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2d Cir. 1988)). A judge "is as much obliged not to recuse herself unnecessarily as she is obliged to recuse herself when necessary." Id. (internal quotations and citation omitted).

Defendants "do not suggest that [I] would be biased if [I] continued to hear the case." (Hathaway Ltr. at 2.)[1] Rather, their stated concern is that my prior association with DAI and NYLPI, as well as my "active" participation in "litigation raising related issues," would create a public perception of bias toward the plaintiff. Id. ("in a case of this importance, involving the public policy of the State, it is especially important to be sensitive to [the public perception]" of possible bias).

My brief association with DAI and NYLPI lasted approximately one year and ended over nine years ago. At no time during that period did I, or to the best of my knowledge, DAI or NYLPI ever address the issues raised in this litigation. I have never taken a public or private position,

[1] Indeed, there is no question in my mind that I would fairly and impartially hear this case.

either personally or professionally, on the merits of this case. I have no personal knowledge of the claims underlying it.

The mere fact that, in the distant past, a judge was once associated with a law firm now appearing before the court does not, without more, require recusal. See National Auto Brokers Corp. v. General Motors Corp., 572 F.2d 953, 958 (2d Cir. 1978); Estate of Ginor v. Landsberg, No. 95 CIV. 3998, 1997 WL 414114, at *2-3 (S.D.N.Y. July 24, 1997); see also Faulkner v. National Geographic Soc'y, 296 F. Supp. 2d 488, 491 (S.D.N.Y. 2001) (recusal was not required by trial judge's previous membership in law firm in which a trustee of defendant magazine had also been a member, or by judge's prior representation of one defendant); S.E.C. v. Grossman, 887 F. Supp. 649, 658 (S.D.N.Y. 1995) (mere fact that magistrate judge once worked at law firm that employed defendant provided no reasonable basis to question his impartiality), aff'd, 101 F.3d 109 (2d Cir. 1996). To rule otherwise would, for example, require all former federal prosecutors to disqualify themselves in federal criminal cases, not only where the judge had never worked on the matter before the court, but also where the case was not even under investigation in that district until after the judge had left the prosecutor's office. Cf. United States v. Outler, 659 F.2d 1306, 1313 (5th Cir. 1981) (magistrate judge's previous role as prosecutor, in unrelated incident involving same defendant, not sufficient to require recusal); United States v. Waters, 786 F. Supp. 1111, 1117 (N.D.N.Y. 1992) (no basis to invalidate search warrant absent concrete evidence that magistrate judge was involved in his prior capacity as Assistant United States Attorney in an investigation of defendant as an open criminal file to which he was assigned). Similarly, disqualification is not mandated where a judge served on the board of directors of a party many years in the past, and

where neither the board nor the party had ever considered the issues raised in the lawsuit while the judge was a member of the board. Cf. Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 102-03 (4th Cir. 1991) (no disqualification required when judge who had previously served on school board had no personal knowledge about the facts or people involved in the case against the school board before him).

Defendants also suggest that a judge's familiarity with the issues raised in the lawsuit and his past experience litigating issues in the field – in this case mental health law – require recusal, even where the judge had no prior involvement with the claims pending before the court. This argument also cuts too broadly, as it would prohibit judges from sitting on cases in areas in which they practiced as lawyers. Thus, no federal prosecutor or federal defender could ever be appointed to the bench and preside over a federal criminal case. Nor could a former civil rights attorney, such as Robert Carter, Constance Baker Motley, or Thurgood Marshall, ever sit on a civil rights case.

Finally, and in defendants' words, "[p]erhaps most significantly," defendants contend that plaintiff believes the Willowbrook case, in which I last represented plaintiffs nine years ago, is "highly relevant to this case." (Hathaway Ltr. at 2.) However, the Willowbrook case involved people with mental retardation, not mental illness, and consequently somewhat different issues. During my association with the case, the focus of the litigation was on the enforcement of a consent judgment. Here, plaintiffs seek relief under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, a statute that was never applied to the Willowbrook litigation during my association with the case and that was not even enacted until relatively late in my involvement in the case.

Ultimately, defendants' arguments boil down to this: even if, viewed individually, the

factors described above do not require recusal, when examined together, and in light of the totality of the facts and circumstances of this case, "a reasonable person knowing all the facts might reasonably question the court's impartiality." (Hathaway Ltr. at 1.) I disagree for the reasons described above. Under the case law, my association with DAI and NYLPI does not require recusal, and there has been no indication thus far that I have personal knowledge of any disputed evidentiary fact material to this case. Defendants have asserted that issues relating to Willowbrook or other matters with which I was involved as a lawyer might arise and require disqualification. However, this is pure speculation and insufficient to justify recusal at this time. As defendants have presented no persuasive authority to support their assertions, the court finds that recusal is not required under section 455(a).

This, however, does not end the inquiry, as federal judges have ethical duties under the Code that extend beyond the requirements of section 455(a). Although the analyses are similar, a judge's responsibility to protect the integrity of the judicial process may be even greater under the Code than under section 455(a).

Canon 3C(1) of the Code of Conduct for United States Judges provides, in relevant part, that recusal is appropriate "in a proceeding in which the judge's impartiality might reasonably be questioned," including but not limited to several specific instances listed in subsections (a) through (e). Of these, only subsection (a) is relevant to defendants' application. Subsection (a) mandates recusal if a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." As explained above, I have no bias or prejudice concerning any party to this action, and none has been alleged. Nor do I have personal knowledge of

any disputed evidentiary facts now before the court.[2] Any knowledge I may have acquired of general principles of mental health law would not require recusal, even if obtained as a result of my employment at NYLPI or board membership at DAI, "because personal knowledge as to the law at issue, as opposed to disputed evidentiary facts, does not trigger recusal under Canon 3C (1) (a)." Advisory Opinion of the Committee on Codes of Conduct, dated Mar. 5, 2004 ("Advisory Opinion").[3]

The catch-all provision of Canon 3C(1) requires a judge's disqualification from pending litigation if the judge's "impartiality might reasonably be questioned." Code, Canon 3C(1). This standard requires a judge to determine whether a reasonable person informed of all the circumstances would reasonably question the judge's impartiality. See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 850, 860-61 (1988). It is this question that the Committee addressed in the Advisory Opinion, relevant portions of which are excerpted below:

> Various considerations must be weighed in determining whether your impartiality could reasonably be questioned. On the one hand, although Disability Advocates is a party to the pending litigation and NYLPI is counsel of record, it has been more than nine years since you were employed by NYLPI or were on the board of Disability Advocates. Your association with those organizations lasted for only one year and you have had no connection with either organization since 1995. You have not participated in or formed an opinion about the pending litigation and, in your previous legal career, you did not take a position as to the merits of the pending litigation or the underlying claims. Your letter does not state whether you ever had occasion to represent Disability Advocates in any

[2] In the event a situation arose where I did have personal knowledge of a disputed evidentiary fact that would require recusal, the appropriate course would be either recusal from the specific issue before the court, or, if that is impractical, recusal from the case altogether.

[3] The Advisory Opinion is both non-binding and confidential. Nonetheless, the relevant parts will be excerpted in this Order.

litigation or the underlying claims.[4] If you did, the Committee assumes that such representation occurred during the same time period discussed herein. Further, any legal arguments you may have made as a practicing attorney on behalf of a client do not alone suffice to call into question your impartiality as a judge when presiding over a different case in which you had no involvement as a private attorney, even though that case involves related legal issues. These circumstances – the limited time of your association with and possible representation of the plaintiff, the passage of considerable time, the absence of any involvement by you in the preparation of the pending litigation, as well as your belief that can be fair and unbiased in this matter–suggest that your impartiality could not reasonably be questioned.

On the other hand, before becoming a judge you devoted "a significant part of [your] legal career" to the same type of issues that are involved in the pending litigation. For many years, you served as lead counsel in litigation against the State on behalf of people with mental disabilities. You have written a book on the subject. Moreover, you currently teach the subject at law schools. The pending litigation appears to track closely with the issues to which you devoted a significant part of your prior legal career and with the subject to which you continue to devote time and energy through law school teaching. The litigation may implicate the same type of statutes, regulations and standards as were previously involved in your work as lead counsel against the State. The pending litigation also involves the same plaintiff and the same defendant (the State) as did the former litigation.[5] Finally, the State, whom you previously sued in a case involving the treatment of mentally handicapped people, asked that you recuse in the pending litigation under 28 U.S.C. § 455(a). This Committee's authority is confined to interpretation and advice under the Codes of Conduct.

Having weighed these considerations, the Committee is of the opinion that your recusal is not required. However, given your prior professional relationship while in private practice with the plaintiff and plaintiff's counsel, your former position as a board member for the plaintiff, your prior lawsuit against the defendant, the nature of the issues you dealt with at that time, and your involvement with similar topics later in your career, the Committee shares your concern about the public perception that your prior associations might create. Our determination that recusal is not mandated by these circumstances was reached by a very close vote. As you know, the Committee functions in a strictly advisory capacity, the final decision is left to the discretion of the

[4] I had no occasion to represent DAI in this or any other litigation.

[5] The Committee was mistaken in this regard. The Willowbrook case did not involve the plaintiff in this action, DAI, or the same state agency defendant as in this case. In fact, I never represented DAI in any proceeding.

judicial officer.

This motion presents a unique factual situation for which there appears to be no precedent in case law. The critical distinguishing feature is that, for a short period of time in the relatively distant past, I was a member of the board of directors of the plaintiff and the general counsel of one of plaintiff's attorneys. If the issue were actual bias, the decision would be simple: there is none. I am absolutely certain that I can be fair and unbiased in this matter, and that my familiarity with the kinds of issues that typically arise in complex mental health litigation would assist all parties in the fair and efficient resolution of this case.

In deciding this motion, my overriding concern is in maintaining public confidence in the judiciary, which is at the heart of our constitutional system and essential to the ability of the courts to deliver justice. Although by itself one case is unlikely to change that perception, courts must take special care to avoid the erosion of that confidence, particularly at a time where all governmental decisions are coming under close scrutiny. This does not mean that judges should recuse themselves unnecessarily. It does suggest that in some rare instances a decision that is technically correct both legally and ethically may not ensure public confidence in the process. This is such a case.

Like the Committee in its Advisory Opinion, I am concerned about the public perception that my prior associations might create. Standing alone, neither my brief membership on the DAI board nor my equally brief tenure at NYLPI nearly ten years ago should reasonably cause my impartiality to be questioned. Even when viewed together, I agree with the Committee that disqualification is not required. It is, however, advisable. As reflected in the Advisory Opinion and confirmed in numerous discussions after the Advisory Opinion was issued, reasonable people,

including experts in judicial ethics, are closely divided on this matter. Where the question is this close, recusal is, regrettably, the wiser course.

Accordingly, under the unique circumstances of this case, defendants' motion is granted.

SO ORDERED.

Dated: Brooklyn, New York
April 29 2004

/s/
ROBERT M. LEVY
United States Magistrate Judge