UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

David W. R. Brown,

v. **Case Number: 8:05-CV-2166-T-27EAJ**

United States Patent and Trademark Office, *et al*.,
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MOTION FOR RECUSAL OF MAGISTRATE JENKINS

The plaintiff moves the court to recuse Magistrate Judge Elizabeth A. Jenkins from participation in this case pursuant to 28 USC 455 on the grounds that the magistrate is disqualified under 28 USC 455(a) and (b). The defendants object to this motion.

In support of this motion, plaintiff respectfully presents the following:

MEMORANDUM IN SUPPORT OF MOTION FOR RECUSAL

Plaintiff, David W. R. Brown, submits this memorandum in support of his Motion for Recusal. Recusal is warranted because referral matters in this case have been assigned to U.S. District Court Magistrate Judge Elizabeth A Jenkins. This assignment and her actions to date create a strong appearance of impropriety.

The plaintiff respectfully asks the court to exalt substance over form for the following material.

THE MAGISTRATE'S CONFLICT OF INTEREST

One of the defendants in this action is the U.S. Patent and Trademark Office ("USPTO").

The content of the plaintiff's website, www.PatentOfficeLawsuit.info, is central to the fee waiver test which the court is being asked to judge. Included on the website is the

plaintiff's lament that the USPTO has left the lone inventor to fend for himself while embracing the intellectual property rights of large corporations. This is particular true in the area of maintenance fees.

According to the court's website, Magistrate Jenkins has "financial interests" beyond those excluded by 28 USC (d)(4)(i). These include owning stock in fourteen different corporations including General Electric, Intel, Atlantic Data Service, Microsoft, Texas Instruments and Symbol Technologies. These six corporations have substantial intellectual property rights in the form of patents. And these six corporations have substantial dealings with defendant USPTO.

It is to Magistrate Jenkins' financial advantage that these corporations get preferred treatment from the USPTO over those of the lone inventor, such as the plaintiff.

Her ownership of stock in a number of companies that deal directly with the defendants creates a strong appearance of impropriety - 28 USC 455(a), 455(b)(4) & 455(b)(5)(iii).

THE MAGISTRATE'S ACTIONS ON BEHALF OF HER PREVIOUS EMPLOYER

According to the court's website, Magistrate Jenkins was an Assistant District Attorney before joining the court.

In other words, her former boss (or his present day counterpart) is now the counsel for the defendants!

So far the magistrate has only authored one order (Dkt. 30) in this case. And as will be evident below, she didn't even bother to read the docket to prepare that order. Her actions take her far beyond the impartiality that a judge should exhibit - 28 USC 455(a) & (b).

She has created for herself a strong appearance of impropriety. And actually, it's not just an appearance of impropriety. In truth and fact, she has gone out of her way to defy the Supreme Court and the docket to help her former boss. Here are specific examples:

EXAMPLE ONE:

THE MAGISTRATE'S "FIRST" DISRESPECT FOR

THE SUPREME COURT

As noted several times in the docket, in Haines v. Kerner, *et al.* 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652, the U.S. Supreme Court affirmed that *pro se* pleadings "are sufficient to call for the opportunity to offer supporting evidence." These findings were reaffirmed by the Supreme Court in Estelle, Corrections Director, *et al*. v. Gample 29 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251.

The magistrate is aware that the plaintiff is proceeding *pro se*.

[It should be noted that despite the many, many times that the plaintiff has brought Haines v. Kerner to the attention of the court, the court, including the magistrate, has yet to acknowledge the Supreme Court's ruling even once. Perhaps that's part of the problem.]

And yet, by her docket 30 order the magistrate has demonstrated an undeniable disrespect for the U.S. Supreme Court. Her order restricts the court to the purported "administrative record," rather than the plaintiff's being given "the opportunity to offer supporting evidence" as championed by the Supreme Court. And obviously, such supporting

evidence may be based in part on discoverY of documents, interrogatories, admission and depositions.

The magistrate should have respected the high court's ruling.

EXAMPLE TWO:

THE MAGISTRATE'S "SECOND" DISRESPECT FOR

THE SUPREME COURT

Had the magistrate taken the time to read the docket, she would have also realized that this lawsuit is about two things: (1) Freedom of Information Act fee waivers and (2) the arbitrary, capricious and negligent actions by the individual defendants (see docket 1, paragraphs 109 to 122). One would never know this from her docket 30 order.

In Cruz v. Beto, 405 U.S. 319,322 (1972), the Supreme Court held that for a *pro se* litigant, "the allegations of a complaint are generally taken as true for purposes of a motion to dismiss." And the high court reaffirmed this again in Hughes v. Rowe et al. 449 U.S. 5, 101 S. Ct. 173,66 L. Ed. 2d 163,49 U .S.L. W .3346.

In her docket 30 order, the magistrate totally disregarded the plaintiff's allegations of wrongdoing by the individual defendants. And the defendants sure didn't include any material about the individual defendants in their purported "administrative record," although the plaintiff is aware of many hundreds of pages in their possession that should have been included. Her docket 30 order never even alluded to the plaintiff's allegations of wrongdoing by the individual defendants and it restricts the court to the purported "administrative record."

By her order, she effectively "dismissed" plaintiff's allegations.

On the other hand, the Supreme Court says that the allegations of a *pro se* complaint, "however inartfully pleaded (Haines v. Kerner)," are to be generally taken as true. The magistrate should have respected the high court's ruling.

EXAMPLE THREE:

THE MAGISTRATE HAS CREATED

AN IMPOSSIBLE SITUATION FOR THE COURT

The Magistrate's order seems to be completely detached from the nature of this lawsuit - perhaps because she didn't even take the time to even read the docket. Both the plaintiff (Dkt. 1, page 6) and the defendants (Dkt. 20, page 6) have stated that one of the factors to be considered for the fee waiver test is that the disclosure (such as on the plaintiff's website) must contribute to an understanding of "government operations or activities." As in other fee waiver cases of the exact same nature, the courts have carefully examined the contents of the plaintiffs' websites to make their fee waiver determination. See Docket 1, paragraphs 123 to 129.

The defendants selectively included extraneous material into their purported "administrative record" and selectively excluded **all** of their material about the plaintiff's website and the "operations and activities" of the USPTO which it contains. That is dishonest. And the magistrate accepted their dishonesty.

Metaphorically, it's almost as if Lady Justice is peeking out from under her blindfold to see who's filing what - and then adjusting her scales accordingly.

The magistrate has put the court into an untenable position of not being able to evaluate the fee waiver test because the essential ingredient, i.e., the content of the plaintiff's

website, was intentionally excluded by the defendants from their purported "administrative record." And for the other part of this lawsuit, since the defendants' intentionally left-out their material related to the negligence of the individual defenders, the magistrate has made it impossible for the court to also determine the extent of their wrongdoing.

THE MAGISTRATE'S MOST SERIOUS PROBLEM:

Of all the matters discussed above the one that is most disturbing to the plaintiff, and should be to the court, is the magistrate's ignoring the Supreme Court's ruling in Haines v. Kerner, i.e., that a *pro se* is to be given "the opportunity to offer supporting evidence."

[A query of Haines v. Kerner shows that the Middle District has considered that particular Supreme Court ruling over eighty times.]

Attached as Exhibit A is an article from the October 2005 ABA Journal titled "Judges in the Culture Wars Crossfire - The 'Least Dangerous Branch' Is Becoming the Most Vilified Branch."

It notes that "criticism of the court is wholly justified."

It also notes that if judges are going "to be either free from criticism or independent from the language of the Constitution and **the text of the law itself**, [then] that's the sort of independence that can create a group of philosopher-kings, a government by an oligarchy of the wise and elite." (Emphasis added.)

The magistrate must be held responsible for having ignored the Supreme Court's ruling in Haines v. Kerner, i.e., that a *pro se* is to be given "the opportunity to offer supporting evidence."

In view of all of the foregoing, the plaintiff moves the court to recuse Magistrate Judge Elizabeth A. Jenkins from participation in this case under 28 USC 455.

Dated: Sun City Center, FL
April 29, 2006

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David W. R. Brown, pro se
1805 Burlington Circle
Sun City Center, FL 33573-5219
Phone: (813) 634-6048

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