No. 2010-1406

United States Court of Appeals for the Federal Circuit

THE ASSOCIATION FOR MOLECULAR PATHOLOGY, THE AMERICAN COLLEGE OF MEDICAL GENETICS, THE AMERICAN SOCIETY FOR CLINICAL PATHOLOGY, THE COLLEGE OF AMERICAN PATHOLOGISTS, HAIG KAZAZIAN, MD, ARUPA GANGULY, PHD, WENDY CHUNG, MD, PHD, HARRY OSTRER, MD, DAVID LEDBETTER, PHD, STEPHEN WARREN, PHD, ELLEN MATLOFF, M.S., ELSA REICH, M.S., BREAST CANCER ACTION, BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, LISBETH CERIANI, RUNI LIMARY, GENAE GIRARD, PATRICE FORTUNE, VICKY THOMASON, and KATHLEEN RAKER,

Plaintiffs-Appellees,

v.

UNITED STATES PATENT AND TRADEMARK OFFICE,

Defendant,

and

MYRIAD GENETICS, INC.,

Defendant-Appellant,

and

LORRIS BETZ, ROGER BOYER, JACK BRITTAIN, ARNOLD B. COMBE, RAYMOND GESTELAND, JAMES U. JENSEN, JOHN KENDALL MORRIS, THOMAS PARKS, DAVID W. PERSHING, and MICHAEL K. YOUNG, in their official capacity as Directors of the University of Utah Research Foundation,

Defendants-Appellants.

Appeal From The United States District Court
For The Southern District of New York
In Case No. 09-CV-4515, Senior Judge Robert W. Sweet

DEFENDANTS-APPELLANTS' RESPONSE TO PLAINTIFFS-APPELLEES' MOTION FOR RECUSAL OF CHIEF JUDGE RANDALL R. RADER

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Defendants-Appellants Myriad Genetics, Inc. and the Directors of the University of Utah Research Foundation (Messrs. Betz, Boyer, Brittain, Combe, Gesteland, Jensen, Morris, Parks, Pershing, and Young) respond to the Motion by Plaintiffs-Appellees for Recusal of Chief Judge Rader with the following observations.

1. The standard for recusal is a rigorous and exacting one. "Absent a factual showing of a reasonable basis for questioning his or her impartiality, or allegations of facts establishing other disqualifying circumstances, a judge should participate in cases assigned. Conclusory statements are of no effect. Nor are counsel's unsupported beliefs and assumptions. Frivolous and improperly based suggestions that a judge recuse should be firmly declined." *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) (denying motion to recuse Chief Judge Markey). Under 28 U.S.C. § 455(a), "[t]he decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported." *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 914 (2004) (Scalia, J., respecting recusal) (declining to recuse). *See also Microsoft Corp.* v. *United States,* 530 U. S. 1301, 1302 (2000) (Rehnquist, C. J., respecting recusal) (declining to recuse and noting: "This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."); *Liljeberg v. Health Servs. Acquisition*

Corp., 486 U.S. 847, 860-61 (1988) ("'[R]ecusal is required . . . if a reasonable person, *knowing all the circumstances*, would expect that the judge would have actual knowledge [of disqualifying facts].'") (emphasis added) (quoting decision below).[1]

2. Plaintiffs-Appellees base their recusal motion upon two factual assertions: *First*, based upon a single "widely circulated press report of the event" (Mot. 5), Plaintiffs-Appellees aver that Chief Judge Rader attended the annual conference of the Biotechnology Industry Organization (BIO), observed a popular vote of conference attendees regarding whether they agreed with the district court's decision in this case, and, "[a]ccording to the news reports . . . participated directly in th[e] discussion" of this case and "expressed his view of the district court's decision." (Mot. 5-6 (citing a BNA report regarding the BIO conference).) *Second*, Plaintiffs-Appellees assert that Chief Judge Rader attended a recent Fordham University School of Law conference, and "interjected with a question hinting at disagreement with [opposing counsel's] expected remarks and position in the case." (Mot. 7.)

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[1] Plaintiffs-Appellees also cite *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), as "a very similar circumstance" in which "Justice Scalia recused himself from a case pending before the Supreme Court." (Mot. 3.) But, unlike the case in *Cheney*, Justice Scalia issued no memorandum respecting his reasons for recusing himself (or, in the case of *Cheney*, declining to recuse himself). The cited decision is the opinion of the Court in *Elk Grove*, which is not at all illuminating as to the proper legal standard for recusal under 28 U.S.C. § 455(a).

3. It does not appear that Plaintiffs-Appellees assert that Chief Judge Rader's attendance at such legal symposia, by itself, renders Chief Judge Rader's impartiality reasonably questionable. Nor would that be an appropriate ground for recusal under § 455(a). *See, e.g., In re Aguinda*, 241 F.3d 194, 204-05 (2d. Cir. 2001); U.S. Judicial Conference Committee on Codes of Conduct, Advisory Opinion No. 67 (June 2009) ("The education of judges in various academic and law-related disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not necessarily preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to consider and analyze them.") (1998 version quoted in *Aguinda*, 241 F.3d at 201).[2]

[2] Advisory Opinion No. 67 goes on: "Canon 4 of the Code of Conduct for United States Judges permits judges to engage in a wide range of outside activities, both law-related and non-law-related. Under Canon 4 and its Commentary, judges are encouraged to take part in law-related activities. The Commentary to Canon 4 observes, '[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives.' Judges who engage in extrajudicial activities are expected to conform their conduct to the standards set forth in Canon 4, which advises judges to ensure that their activities 'do not detract from the dignity of judicial office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification. . . .' Consistent with these standards, judges are permitted to speak, write, lecture, teach, and participate in other extrajudicial activities concerning legal and non-legal subjects."

To the extent that Plaintiffs-Appellees' complaint regarding the BIO conference (but not the Fordham conference) is that the "audience . . . was heavily biased in favor of one party," that, too, is not a valid basis for recusal. *Id.*; *see also Aguinda*, 241 F.3d at 205 ("A holding that an appearance of partiality was created in the present circumstances would as a practical matter mean that attendance by a judge at any presentation on a debated issue might lead to recusal, at least where a party or counsel to a party has provided any financial support, no matter how minor or remote."). Indeed, despite their intimations that the BIO panel in question was a one-sided one, Plaintiffs-Appellees fail to point out that the BIO panel in question also included Robert Cook-Deegan, who submitted a declaration in support of Plaintiffs-Appellees in the district court. (*See* Docket Entry #227 in the district court.)

4. Nor do Plaintiffs-Appellees argue that Chief Judge Rader was forbidden from expressing his opinions on legal issues in general. Indeed, they admit that judges may "enunciat[e] [their] views on general legal matters" (Mot. 9-10 (citing cases)), and, tellingly, they have not moved for the recusal of Judge Newman of this Court, even though the Fordham transcript attached to their Motion indicates that she expressed her own views regarding the lack of discernable legal standards in this area of the law. *See* Mot. Exh. 2 at 45 ("JUDGE NEWMAN: We are really at the stage where we are talking about public policy

and economic policy, rather than law. From that viewpoint, just about every decision that a court makes has a policy premise. We try to say that we are applying the law, but every law has a policy premise."). Indeed, if Chief Judge Rader were required to recuse himself because he expressed his views on such general legal matters, it would follow, from Plaintiffs-Appellees' logic, that he would have to recuse himself in every future case involving the scope and application of 35 U.S.C. § 101.

5. Instead, it appears that Plaintiffs-Appellees' complaint is that "Chief Judge Rader expressed his view of the district court's decision" at the BIO conference (Mot. 6), and "interjected with a question hinting at disagreement with [Plaintiffs-Appellees' counsel's] expected remarks and position in the case." (Mot. 7.) Each of these allegations depends on a subjective and unreasonable gloss placed upon the reported remarks by Plaintiffs-Appellees and their counsel, and fall far short of the requirement that the statements would cause a reasonable and informed observer to "reasonably . . . question" Chief Judge Rader's impartiality in this case.

a. As to the BNA report of the proceedings at the BIO conference (Mot. Exh. 1), that does not purport to be a full transcript of the proceedings. To the contrary, it is a page-long summary of a breakout session that lasted a full hour. *See* http://bio2010.bdmetrics.com/SOW-29100530/Patenting-genes-In-Search-of-

Calmer-Waters/Overview.aspx (visited June 30, 2010). To the extent that anything can be gleaned from this summary press account, it is this: then-Judge Rader "had been mostly quiet in the discussion," but then spoke in response to a comment made by George Washington University Law School Associate Dean John Whealan. The comment of Dean Whealan that triggered Judge Rader's response was a general comment about the state of the law—as reported, "Whealan added part of the problem was that the U.S. Supreme Court has laid out the exceptions to patentability 'without a lot of detail about what they were.'" (Mot. Exh. 1 at 1.) Judge Rader then responded that the "troublesome question for me is the lack of legal standard for making this decision. In an obviousness analysis, there are some neutral steps that I can apply. But using Section 101 to say that the subject matter is unpatentable is so blunt a tool that there is no neutral step to allow me to say that there is a line here that must be crossed and that this particular patent claim crosses it or does not." (*Id.*)

This statement could not reasonably be read as prejudging the case now before the Court. Indeed, it does not even suggest how Chief Judge Rader might vote, were he a member of the panel assigned to decide this case. To the contrary, this statement expressed precisely the sort of "views on general legal matters," "expressions of opinion on legal issues," and "[a] judge's views on legal issues" that Plaintiffs-Appellees concede "may not serve as the basis for motions to

disqualify." (Mot. 9-10 (citations and internal quotations omitted).) Judge Rader's comment was aimed at the difficulties *he* encounters in identifying a neutral principle for applying Section 101 because of the state of the law; his references to "the troublesome question for *me*," "neutral steps that *I* can apply," and "no neutral step to allow *me* to say that there is a line here" make that crystal clear.

Indeed, it is telling that the comments attributed to Judge Rader do not, on their own, make Plaintiffs-Appellees' case for them; rather, they draw their own subjective—and unjustified—conclusion about what those words mean: "*In other words*, without reading the briefs submitted by the parties or hearing argument, Chief Judge Rader expressed his view of the district court's decision." (Mot. 6 (emphasis added).) There is nothing in that press account that ties Judge Rader's generalized comments about the state of the law to "the district court's decision" in this case. Rather, if the BNA report is assumed to be wholly accurate, Judge Rader appears to have acted entirely appropriately (he "had been mostly quiet," as the press report indicates, but spoke up only when he could offer a salient comment on a generalized legal question). The fact that Plaintiffs-Appellees have chosen their own "other words" to recast Judge Rader's reported comments are of no moment; those "other words" are the same sort of "unsupported beliefs and assumptions" (*Maier*, 758 F.2d at 1583), or "facts . . . as they were surmised or reported" (*Cheney*, 541 U.S. at 914) that cannot support recusal.

b. Plaintiffs-Appellees' allegations with respect to the Fordham conference proceedings are even more far afield. Mr. Ravicher, one of the counsel for Plaintiffs-Appellees, had begun speaking about "patent eligible subject matter" generally (Mot. Exh. 2 at 13); he had not even mentioned this case in his remarks when Judge Rader made his allegedly offending "hin[t] at disagreement with Prof. Ravicher's expected remarks and position in the case." (Mot. 7.) Rather, Mr. Ravicher had pointed at a bottle of purified water before him and posed the question: "Was that [purification] sufficient intervention between what God gave us . . . and what man created to merit a patent?" Judge Rader, it was reported, asked in response, "How many people have died of water pollution over the course of human events?", then added, "Probably billions." (Mot. Exh. 2 at 14.)

This case, of course, does not involve purification of water, and so it is difficult to see how this brief exchange—which did not in any way involve the facts or decision in this case—could cause a reasonable and well-informed observer to conclude that Judge Rader had pre-judged this case, which involves not bottled water, but the patent-eligibility of isolated DNA and associated methods. Again, this comment was, at most, directed to the complex policy issues surrounding patents generally and Section 101 in particular; no reasonable, informed observer would take that as a comment on the merits of this particular case.

6. When Plaintiffs-Appellees' allegations here are compared to the facts of the cases they cite in support, the absence of a valid ground for recusal here becomes even clearer. Both of Plaintiffs-Appellees' principal authorities involve the very unusual circumstance of judges granting public media interviews that touched on the substance of the cases before them; neither involved the common and encouraged situation where a judge attends a legal symposium and offers general comments on the legal issues being addressed there.

a. In *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), the Tenth Circuit ordered a Kansas district judge to recuse himself from the criminal prosecution of abortion protesters, where the judge had voluntarily appeared as an interview subject on ABC News' "Nightline" program, and, in an interview conducted by Barbara Walters, had asserted that he would "se[e] to it, both in and out of court, that 'these people whose purpose it is to close these clinics by illegal means . . . understood fairly so, firmly so, that this order [the court's injunction prohibiting obstruction of access to the clinics] would be honored.'" *Id.* at 995. The Tenth Circuit concluded that the judge's "deliberat[e] . . . choice" to take the unusual step of granting a nationally televised interview with a famous journalist, "at a sensitive time to deliver strong views on matters which were likely to be ongoing before him," "unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters,

rather than remaining as a detached adjudicator." *Id.* The court added that granting such a nationally televised interview was "an unusual thing for a judge to do." *Id.*

b. Similarly, in *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001), the First Circuit ordered recusal under 28 U.S.C. § 455(a) where the district judge had given a quote to a Boston newspaper reporter describing the differences between the putative class-action case then pending before her (a case involving allegations of racial discrimination in Boston's schools), and another case, *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000), that had recently been before the same district court (involving strip searches of women in a local prison). The district judge told the Boston *Herald* reporter: "In the [*Mack*] case, there was no issue as to whether [the plaintiffs] were injured. It was absolutely clear every woman had a claim. This is a more complex case." *Boston's Children First*, 244 F.3d at 165-66. Noting that "the media contact in this case was less inflammatory than that in *Cooley*," the three-judge panel of the First Circuit nonetheless saw "the same factors at work, albeit on a smaller scale," *id.* at 169, granted mandamus, and ordered the district judge to recuse herself. *Id.* at 171.

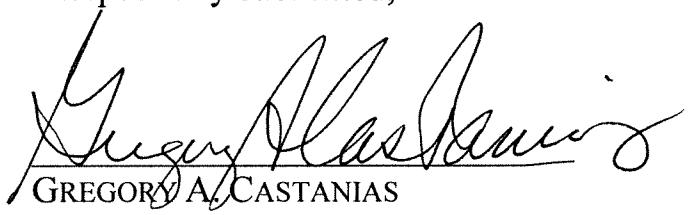
Notably, however—and unmentioned by Plaintiffs-Appellees in their motion—the other three active judges of the First Circuit disagreed; they "are currently of the view that, even if the district court's statement to the reporter

comprised a comment on the merits, it does not create an appearance of partiality such as to require mandatory recusal under 28 U.S.C. § 455(a). They are particularly concerned that section 455(a) not be read to create a threshold for recusal so low as to make any out-of-court response to a reporter's question the basis for a motion to recuse." *Id.*

c. In contrast to *Cooley* and *Boston's Children First*, here there is no basis for a reasonable and informed observer to conclude that Chief Judge Rader's two isolated comments were tied to the merits of this particular case. Moreover, in further contrast to *Cooley* and *Boston's Children First*, Chief Judge Rader here did not affirmatively make comments to the press; rather, he stands accused of nothing more than attending and participating in legal symposia. That is not "an unusual thing for a judge to do." Quite to the contrary, as noted above, attending and participating in legal colloquia is something that the law both allows and encourages. *See, e.g.*, *Aguinda*, 241 F.3d at 201 (quoting the Judicial Conference Committee on Codes of Conduct Advisory Opinion No. 67). There was nothing "unusual" (*Cooley*, 1 F.3d at 995) or "unwise" (*Boston's Children First*, 244 F.3d 171) about Chief Judge Rader's attendance at or participation in those seminars, and there is no basis for the Chief Judge to recuse himself in this case.

Dated: July 2, 2010

Respectfully submitted,



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CERTIFICATE OF INTEREST

Counsel for the appellants certifies the following:

1. The full name of every party or amicus represented by me is:

Myriad Genetics, Inc.; Lorris Betz, Roger Boyer, Jack Brittain, Arnold B. Combe, Raymond Gesteland, James U. Jensen, John Kendall Morris, Thomas Parks, David W. Pershing, and Michael K. Young, in their formal capacity as Directors of the University of Utah Research Foundation.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in thiscourt are:

Jones Day (Brian M. Poissant, Barry R. Satine, Laura A. Coruzzi, Eileen E. Falvey, Lynda Q. Nguyen, and Gregory A. Castanias).

CERTIFICATE OF SERVICE

I hereby certify that on the 2d day of July 2010, the foregoing Defendants-Appellants' Response to Plaintiffs-Appellees' Motion for Recusal of Chief Judge Randall R. Rader was served by overnight mail through a third-party commercial carrier (UPS) upon the following principal counsel:

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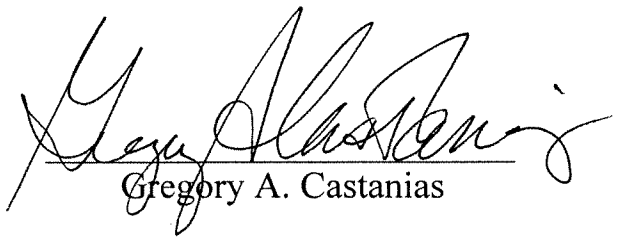

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