

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 16, 2014

Elisabeth A. Shumaker
Clerk of Court

In re:

DALE E. HARPER,

Petitioner.

No. 14-6091
(D.C. No. 5:11-CV-00996-HE)
(W.D. Okla.)

ORDER

Before **LUCERO, HARTZ, and TYMKOVICH**, Circuit Judges.

Dale E. Harper is a pro se plaintiff in litigation pending in the United States District Court for the Western District of Oklahoma. He seeks a writ of prohibition or mandamus, asking this court to order the recusal of United States District Court Judge Joe Heaton and United States Magistrate Judge Charles B. Goodwin. He further asks us to prohibit Judge Heaton and Magistrate Judge Goodwin from exercising jurisdiction in that action.

In July 2013, Harper filed a motion in the district court asking Judge Heaton and a different magistrate judge to recuse. The magistrate judge considered and denied Harper's motion. It does not appear that Harper asked Judge Heaton to review that ruling. On April 16, 2014, Harper filed another recusal motion, this time asking Magistrate Judge Goodwin to recuse. That motion remains pending in the district court.

Mandamus is an appropriate vehicle to challenge the denial of a motion to recuse, but a petitioner must satisfy the higher standard applicable to mandamus relief. *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995). First, a petitioner “must demonstrate a clear abuse of discretion, or conduct by the district court amounting to usurpation of judicial authority.” *Id.* Moreover, “[m]andamus is available only upon a showing of a clear and indisputable right to relief.” *Id.* Finally, a mandamus petitioner must also show that he lacks an adequate alternative means to obtain the relief he seeks. *Id.*

“The standards for reviewing petitions for writs of prohibition are similar to the standards for reviewing petitions for writs of mandamus.” *In re McCarthey*, 368 F.3d 1266, 1268 (10th Cir. 2004). We consider the following five nonconclusive factors:

(1) the party seeking the writ must have no other adequate means to secure the relief desired; (2) the petitioning party will be damaged or prejudiced in a way not correctable on appeal; (3) the district court’s order constitutes an abuse of discretion; (4) the district court’s order represents an often-repeated error and manifests a persistent disregard of the federal rules; and (5) the district court’s order raises new and important problems or issues of law of first impression.

Univ. of Tex. at Austin v. Vratil, 96 F.3d 1337, 1339 (10th Cir. 1996).

Harper argues two bases for recusal by Judge Heaton and Magistrate Judge Goodwin: (1) the district court failed to order service of process of his complaint for two years; and (2) Magistrate Judge Goodwin has not ruled on the defendants’

motions for summary judgment, which have been pending before him for more than 120 days.

Harper has not shown grounds for the court to grant a writ of mandamus or prohibition. First, he has not established that he lacks an adequate alternative means to obtain the relief he seeks with respect to Magistrate Judge Goodwin. While he did file a recusal motion in the district court, he did not wait for that court to rule before filing his petition for a writ of prohibition or mandamus in this court.

In addition, Harper fails to demonstrate a clear and undisputable right to relief. In his petition, he argues that a judge in a previous district court action was biased against him. But as to Judge Heaton and Magistrate Judge Goodwin, he claims only that his current case has been delayed. To the extent that Harper speculates these delays are evidence of the judges' bias against him, his claim is unsubstantiated. *See Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986) (stating recusal is not “mandated upon the merest unsubstantiated suggestion of person bias or prejudice” (internal quotation mark omitted)). Nor has Harper established grounds for a writ of prohibition based on the delays in his pending action.

Harper's petition for a writ of prohibition or mandamus is denied. Harper's application to proceed in this matter without prepayment of fees and costs is granted,

but we remind him of his obligation to make partial payments until the full amounts are paid.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written over a set of horizontal dotted lines.

ELISABETH A. SHUMAKER, Clerk