

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

*In re*  
DR. CARL BERNOFSKY  
Petitioner

versus

ADMINISTRATORS OF THE TULANE  
EDUCATIONAL FUND  
Defendant

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PETITION FOR WRIT OF MANDAMUS

Petitioner, Dr. Carl Bernofsky, plaintiff in Civil Action No. 98-1792 c/w 98-2102, captioned as Dr. Carl Bernofsky v. Administrators of the Tulane Educational Fund, in the United States District Court for the Eastern District of Louisiana, hereby applies, pursuant to the provisions of section 1651, Title 28, United States Code, and Rule 21(a) of the Federal Rules of Appellate Procedure, for a writ of mandamus to be issued by this court directing the Honorable Ginger Berrigan, Judge of the United States District Court for the Eastern District of Louisiana, to vacate her order denying Petitioner’s motion for recusal and disqualify herself from presiding in the above-named action now pending before her.

Statement of Facts and Order Challenged

Petitioner was plaintiff in a series of four lawsuits against Tulane University in which the Hon. Ginger Berrigan presided. In the first lawsuit, Civil Action No. 95-358, filed Jan. 31, 1995, Petitioner alleged discrimination under 42 U.S.C. section 1981 and joined various state law

claims. The complaint asserted that Petitioner was a professor at Tulane University Medical School where he had been a faculty member for 20 years and that a new Departmental Chairman, who arrived in Nov., 1991, had harassed him, interfered with his staff, hindered his performance causing him to lose grant funding, and threatened termination. The complaint further alleged that this action was based on the fact that Petitioner was Jewish and that all three older Jewish faculty members in the Department of Biochemistry were being discriminated against on the basis of their Jewish parentage by the new Chairman, who was of Lebanese descent.

A First Amended Complaint, adding an age discrimination claim under state law, was filed Feb. 27, 1995. A trial date was initially set for Jan. 22, 1996, but was continued to July 8, 1996 because of Petitioner's treatment for cancer. A Second Amended Complaint was filed on Nov. 21, 1995, adding an ADEA claim and a claim for conversion of laboratory equipment and materials.

Defendant filed a Motion for Summary Judgment on May 14, 1996, and a Reply Memorandum on May 31, 1996. Petitioner filed an Opposition Memorandum to Summary Judgment on May 21, 1996, and a Reply Memorandum Opposing Summary Judgment on June 5, 1996. In response to issues raised by the District Court, Petitioner filed a Supplemental Memorandum Opposing Summary Judgment on July 1, 1996, a Memorandum in Response to Court's Request, and a letter setting forth each of Petitioner's claims, also in response to the District Court's directive. Defendant delivered a Pre-trial Memorandum on July 1, 1996, and Petitioner responded on July 2, 1996.

A status conference was held July 5, 1996, at which time the District Court informed Petitioner's counsel that Defendant's motion for summary judgment would be denied and that the trial would commence as scheduled on July 8, 1996. However, as a result of Defendant's complaints

concerning the Exhibit Books assembled by Petitioner, the parties agreed to continue the trial until the next available date which, after a series of scheduling conflicts, was set for Sept. 8, 1997. Although Petitioner is unaware that any conferences took place during the interim, the District Court nevertheless decided to grant summary judgment in favor of Defendant Apr. 15, 1997, and final judgment was rendered Apr. 21, 1997.

Petitioner timely appealed but the Fifth Circuit, in an unpublished opinion, affirmed the District Court for "substantially" the same reasons Jan. 8, 1998. The Appellate Court further denied Petitioner's motion for a rehearing Feb. 5, 1998. Subsequently, the U.S. Supreme Court denied Petitioner's petition for *certiorari* Oct. 5, 1998.

Petitioner filed two other lawsuits in State Court (Nos. 97-20805 and 98-6317). These were removed by Defendant to Federal Court, where they were docketed as Civil Actions 98-2102 and 98-1577, respectively, and assigned to Judge Berrigan. A fourth lawsuit, Civil Action 98-1792, was filed directly in U.S. District Court on June 18, 1998. Civil Actions 98-1792 and 98-2102 were later consolidated under the former docket number and is currently pending. In this lawsuit, Petitioner alleges retaliatory conduct by Defendant for making false and malicious statements to prospective employers in violation of 42 U.S.C. section 1981 and 1981(b), 42 U.S.C. section 2000e-3(a), and 29 U.S.C. section 623(d).

Because Petitioner was previously unapprised of Judge Berrigan's relationship with Defendant, he was precluded from addressing the conflict of interest issue until the matter now pending before her. Petitioner filed a motion to recuse Judge Berrigan Oct. 15, 1998 [Exh. 1], and Defendant filed a memorandum in opposition Nov. 9, 1998 [Exh. 2]. Petitioner's motion to recuse was denied Nov. 23, 1998 [Exh. 3], and the Judge's order, which here is being challenged, was

appealed. The Fifth Circuit denied the appeal Feb. 2, 1999 [Exh. 4], and at this juncture, Petitioner's legal counsel withdrew from the case Feb. 8, 1999.

Petitioner, in proper person, then filed a Complaint of Judicial Misconduct against Judge Berrigan based on her material and continuing association with Defendant throughout the above proceedings and her failure to disclose this association. The complaint was dismissed Feb. 23, 1999 [Exh. 5], and upon appeal, the dismissal was affirmed Apr. 19, 1999 [Exh. 6].

### Statement of Issues

In the employment discrimination matter that was the subject of Petitioner's first lawsuit, the District Court Judge who rendered summary judgment in favor of Defendant was an adjunct faculty member of Tulane University Law School during the time this matter was before the court, and the Judge continues her adjunct professorship to the present day. The Judge was also on the Board of Directors of one of Tulane University's research centers during the period she rendered summary judgment in favor of Defendant. Under Canon 3 of the Code of Judicial Conduct, Judge Berrigan not only had an obligation to disclose her association with Tulane University, she had a duty to disqualify herself pursuant to 28 U.S.C. section 455(a) and section 455(b)(5)(i). From Jan. 31, 1995 onward, Judge Berrigan continuously violated statutes regulating disqualification in all four of Petitioner's lawsuits where she presided and failed to make any disclosure.

### Professorship

Federal District Court Judge Ginger Berrigan is Adjunct Associate Professor of Law at Tulane University and taught the course, *Trial Advocacy*, during the 1995-96 academic year [Exh. 7, 8]. Since then, Judge Berrigan has maintained a professional association with Tulane through her continued participation in the Law School's Judicial Externship Program [Exh. 9-11]

and as a substitute instructor for the course, *Federal Practice & Procedure: Trials* [Exh. 12], taught by 77-year-old Adjunct Professor, Federal District Court Judge Charles Schwartz, Jr. [Exh. 13]. Under ordinary circumstances, Judge Berrigan would be expected to carry on this course when Judge Schwartz retires from teaching.

An inference of affinity for a university exists when a judge devotes the time and effort needed to prepare lecture materials, travel to the university campus, and teach classes, all without financial compensation. Nevertheless, Judge Berrigan has defended her qualification to sit by stating that her teaching activities in Tulane's Law School involve no [financial] compensation [Exh. 12]. Generally, adjunct professors are not paid by Tulane for their service in academic programs. However, with a lifetime salary already provided, monetary compensation would appear to be secondary to the prestige a federal judge may derive from a university professorship. Moreover, interacting with university officials and prominent jurists in a university setting is a professional benefit that allows a judge to keep abreast of academic politics and current legal developments. Finally, participating in a teaching program, or acting as a mentor, may satisfy a judge's sense of professional duty, the discharge of which is deemed compensation enough.

#### Board Membership

In 1990, Judge Berrigan, then an attorney, was appointed to the Board of Directors of Tulane University's Amistad Research Center, a position she occupied until 1997 [Exh. 14]. Significantly, Judge Berrigan recently altered her curriculum vitae by deleting three years from the time she previously claimed to serve on the board of Tulane's Amistad Research Center. The altered vitae now shows board membership only through 1994 [Exh. 15], whereas her previous vitae showed membership through 1997 [Exh. 14]. This change creates a new record indicating that Judge Berrigan did not serve as a director of a Tulane research center at any time from Jan. 31, 1995,

onward, when she presided in Petitioner's lawsuits against Tulane. The alteration of the record implies that Judge Berrigan believed there was something improper about her relationship with Tulane during that period. More importantly, as a "director" of one of Defendant's research centers, Judge Berrigan was automatically disqualified pursuant to U.S.C. 28 section 455(b)(5)(i).

The Amistad Research Center occupies a complete wing of Tilton Memorial Hall on the campus of Tulane University [Exh. 16]. Tulane not only furnishes the Center with a rent-free physical site, it funded \$200,000 in improvements and contributed \$12,000 in relocation costs [Exh. 17]. Tulane also provides a budget of about \$63,200 in 1986 dollars, which is adjusted annually for inflation and used for unrestricted operating expenses [Exh. 17]. Two members of Amistad's Board of Directors are appointed by Tulane [Exh. 18], which publically represents the Center as a Tulane affiliate [Exh. 19-21]. In addition, Amistad's Executive Director, Comptroller and other key administrative personnel [Exh. 22] are listed in the Tulane Faculty and Staff Directory [Exh. 23].

Judge Berrigan defended her qualification to sit by inferring that the Amistad Research Center is an entity that is independent from Tulane [Exh. 12]. This statement ignores Tulane's investment in the Center, Tulane's annual budgeting for the Center, Tulane's appointments to the Center's Board of Directors, and Tulane's control over the Center's key personnel. The facts demonstrate that the Amistad Center, as other Tulane centers, is materially dependent on Tulane for its existence.

According to Tulane's 1995 Faculty Handbook [Exh. 24], the Amistad Research Center is one of many such centers affiliated with the University, and since publication of that handbook, other centers have been added [Exh. 21]. Like most other Tulane centers, Amistad Center derives funding from extramural sources, but such funding does not confer independence. For example, the Tulane

Regional Primate Research Center and the Center for Bioenvironmental Research receive government grants in addition to the support they receive from Tulane and, like the Amistad Research Center, they are considered integral parts of the University [Exh. 21, 24].

#### Abuse of Judicial Discretion

Judge Berrigan's pervasive bias against Petitioner is evident from numerous rulings that went beyond the formation of impartial judgment based on considerations of law and fact alone.

As plaintiff, Petitioner's rights under the Due Process Clause of the 14<sup>th</sup> amendment were severely abridged in his civil suits against Tulane University. Judge Berrigan's failure to disclose her association with Defendant deprived Petitioner of the opportunity to bring this association to the attention of the Appellate and U.S. Supreme Courts. Had the District Court's strong appearance of impropriety been addressed, its impartiality might reasonably have been questioned and affected the outcome of the appellate process. Thus, Petitioner complained that deceptive and untruthful statements were employed by Tulane during oral arguments before the Appellate Court. When these falsehoods were pointed out in a brief that requested a rehearing, the Appellate Court declined to rehear the case. Had the Appellate Court been aware of the District Court's willful concealment of its association with Defendant, it might have been more inclined to examine those strongly disputed material facts. The U.S. Supreme Court may also have been more receptive to the petition for *certiorari* had it known that the Judge was disqualified under 28 U.S.C. section 455(a) and section 455(b)(5)(i) at the time she made her rulings and entered judgment in favor of Tulane.

At every critical junction, Judge Berrigan's reasoning appeared to be guided along a path that led to Defendant's goal of denying Petitioner a trial on the merits of his case. In some instances, this process involved treating as "undisputed facts" facts that were sharply disputed by Petitioner's sworn testimony and contradicted by documentary evidence. An egregious example of the District Court's

abuse of authority may be seen in its treatment of Petitioner's grant funding in his first lawsuit against Tulane. That Petitioner received notice of a new \$250,000 grant award from the Air Force 10 weeks before he was terminated is a fact that was thoroughly substantiated by documentation. The grant was officially accepted by Tulane and not returned to the Air Force until eight months after Petitioner was terminated. Nevertheless, Defendant argued that Petitioner had no grant funds with which to support his research, leading Judge Berrigan to state in her Order and Reasons: "...Bernofsky was not qualified because of his lack of extramural funding..." (p. 18), and "...all undisputed facts support the simple explanation that Bernofsky was terminated for his inability to meet his salary needs..." (p. 28).

Petitioner can cite other examples where Judge Berrigan acceded to Tulane's version of a fact even though it was strongly disputed and contradicted by Defendant's own documents. A full accounting is beyond the scope of this petition.

#### Statement of Relief Sought

Petitioner, Dr. Carl Bernofsky, plaintiff in Civil Action No. 98-1792 c/w 98-2102, captioned as Dr. Carl Bernofsky v. Administrators of the Tulane Educational Fund, respectfully moves this court, pursuant to the provisions of 28 U.S.C. section 1651, to grant a writ of mandamus directing the Honorable Ginger Berrigan, Judge of the United States District Court for the Eastern District of Louisiana, to vacate her order of Nov. 23, 1998 denying Petitioner's motion for recusal [Exh. 3] and disqualify herself from presiding in the above-named action now pending before her. Recusal is justified on ground that the Judge was disqualified under 28 U.S.C. section 455(a) and section 455(b)(5)(i) at the time she ruled and entered judgment in favor of Defendant, with which she was, and continues to be, materially associated. Judge Berrigan's continued participation in the matter



now before her creates the strong appearance of impropriety for which relief through disqualification is warranted. Petitioner further prays that the instant case be reassigned to a Judge who is not associated with Defendant.

#### Reason Why Writ Should Issue

The writ should issue because the District Court has indisputably abused its discretion, and Petitioner has failed to obtain relief through an ordinary appeal.

According to Shaman, *et al.*<sup>1</sup> and the case law cited to support his determination, "...it is the obligation of a judge to disclose all facts that might be grounds for disqualification." Further, Canon 3C of the Code of Judicial Conduct of the American Bar Association, codified with modifications as 28 U.S.C. section 455 and extensively reviewed by Abramson,<sup>2</sup> states, in part, "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned... ." Under Canon 3 of the Code of Judicial Conduct, Judge Berrigan had a duty to disclose her association with Tulane before sitting in any case in which Tulane was a defendant. However, from Jan. 31, 1995 onward, Judge Berrigan continuously violated this Code with respect to the Petitioner's lawsuits against Tulane University when she sat and failed to make any disclosure. More importantly, as a member of the Board of Directors of a Tulane research center during the time she ruled and entered judgment in favor of Tulane, Judge Berrigan was specifically disqualified pursuant to U.S.C. 28 section 455 (b)(5)(i).

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<sup>1</sup> *Judicial Conduct and Ethics*, 2 ed., Shaman, J.M., Lubet, S., Alfini, J.J.; Michie Law Pub., Charlottesville, VA (1995), p. 146.

<sup>2</sup> *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct*, 2 ed., Abramson, L.W., American Judicature Soc., Chicago, IL (1992), pp. 1-48.

Once the facts of her association with Defendant were discovered by Petitioner and brought to her attention, Judge Berrigan responded, “There is no basis for the plaintiff’s suggestion that [my] impartiality might reasonably be questioned by virtue of these . . . circumstances...” [Exh. 12]. In addition to her failure to disclose, Judge Berrigan’s actions contradicted the ethical principle, elaborated by Shaman, *et al.*<sup>3</sup> and supported by case law, that “It is not the duty of the parties to search out disqualifying facts about the judge . . . it is the judge’s obligation to disclose all possibly disqualifying facts.” Worse yet is the fact that Judge Berrigan attempted to conceal the extent of her association with Defendant by altering her curriculum vitae to create the appearance that her membership on the board of Defendant’s research center ended before Petitioner’s first lawsuit was filed on Jan. 31, 1995.

A reasonable person *would* question the impartiality of any judge who was an adjunct faculty member at a defendant university and had a continuing association with that university during even part of the time the case was before him or her. U.S. Senator John Breaux recently indicated that he would be receptive toward legislation “...establishing a presumption of conflict of interest and automatic recusal for judges... [who are] ...adjunct professors presiding as judges over civil cases in which the school at which that professor teaches is named as a defendant.” [Exh. 25].

Judge Berrigan’s failure to make any disclosure of her material and continuing association with Defendant over the course of four-and-one-half years as Presiding Judge must be seen as a violation of U.S.C. section 455 that goes beyond mere negligence or harmless error; it suggests that she has an interest in the outcome of the proceedings that derives from her relationship with Defendant.

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<sup>3</sup> See footnote 1, p. 146.

In conclusion, the writ must issue because Judge Berrigan's conduct has cast a long shadow on the litigation that is before her. Under the circumstances of this case, recusal is the only remedy that will promote the public's faith in the integrity and fairness of the federal judicial system, prompt other judges to more carefully search for and disclose grounds for disqualification, restore impartiality to the litigants in the judicial process, and secure the relief that Petitioner deserves.

#### List of Attached Exhibits

1. Petitioner/Plaintiff's Motion for Recusal, and Memorandum in Support of Motion for Recusal (Civil Action No. 98-1792, Oct. 15, 1998).
2. Defendant's Memorandum in Opposition to Plaintiff's Motion for Recusal (Civil Action No. 98-1792, Nov. 9, 1998).
3. Judge's order denying Petitioner/Plaintiff's motion for recusal (Civil Action No. 98-1792, Nov. 23, 1998).
4. Appellate Court's denial of appeal from Judge's order denying Petitioner/Plaintiff's motion for recusal (Docket No. 98-31417, Feb. 2, 1999).
5. Appellate Court's dismissal of Petitioner/Plaintiff's complaint against Judge Berrigan (Docket No. 99-05-372-0118, Feb. 23, 1999).
6. Judicial Council's affirmation of Appellate Court's dismissal of Petitioner/Plaintiff's complaint against Judge Berrigan (Docket No. 99-05-372-0118, Apr. 19, 1999).
7. *Tulane [Online] Law School Catalog, 1995-96*, Trial Advocacy Faculty.
8. *Tulane Law School Catalog for 1995-96*, p. 104.
9. *Tulane Law School Catalog for 1996-97*, p. 107.
10. *Tulane Law School Catalog for 1997-98*, p. 103.
11. *Tulane Law School Catalog for 1998-2000*, p. 103.
12. *Minute Entry*, Bernofsky v. Tulane, Civil Action No. 98-1792, Nov. 23, 1998.
13. *Tulane Law School Catalog for 1998-2000*, p. 55.

14. *Almanac of the Federal Judiciary, 1997*, Vol. 1, 5th Circuit, p. 3.
15. *Almanac of the Federal Judiciary, 1998*, Vol. 1, 5th Circuit, p. 3.
16. *The Amistad Log; 1990 Annual Report*, pp. 1-2.
17. *The Amistad Log; 1990 Annual Report*, p. 22.
18. *Defendant's Memorandum in Opposition to Plaintiff's Motion for Recusal*, Civil Action No. 98-1792, Nov. 9, 1998, p. 4.
19. *Gambit Weekly*, July 21, 1998, p. 47.
20. *Greater New Orleans White Pages, 1998-99*; Business section, p. 283.
21. *Tulane [Online] Academic Resources - Centers*.
22. *Amistad Research Center [Online] Home Page - Staff*.
23. *Tulane [Online] X-500 Directory*.
24. *Tulane Faculty Handbook, 1995*, Section VI, pp. 1-5.
25. Letter from U.S. Senator John Breaux to Carl Bernofsky, May 24, 1999.

WHEREFORE, petitioner, Dr. Carl Bernofsky, respectfully prays that a writ of mandamus be issued by this court directed to respondent, the Honorable Ginger Berrigan Judge of the United States District Court for the Eastern District of Louisiana, directing her to vacate her order denying Petitioner's motion for recusal and disqualify herself from presiding in the above-captioned action now pending before her, and for such other and further relief as the court may deem proper.

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Carl Bernofsky, Petitioner  
(In Proper Person)

Certificate of Petitioner

The undersigned declares under penalty of perjury that, to the best of his knowledge, the statements in the above petition are true.

New Orleans, Louisiana, this 14<sup>th</sup> day of June, 1999.

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Carl Bernofsky, Petitioner  
(In Proper Person)

Certificate of Interested Parties

The undersigned certifies that the following listed persons have an interest in the outcome of this petition.

Dr. Carl Bernofsky  
- Petitioner/Plaintiff

Victor R. Farrugia, Esq.  
- Counsel for Plaintiff

The Honorable Ginger Berrigan, Judge  
United States District Court for the Eastern District of Louisiana  
- Respondent

Administrators of the Tulane Educational Fund  
- Defendant

Julie Livaudais, Esq.  
- Counsel for Defendant

G. Phillip Shuler, III, Esq.  
- Counsel for Defendant

Richard B. Ramirez, Esq.  
- Counsel for Defendant

John R. Beal, Esq.  
- Counsel for Defendant

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Carl Bernofsky, Petitioner  
(In Proper Person)

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Certificate of Service

I certify that a copy of the above and forgoing has this day, June 14th, 1999, been forwarded to respondent and all counsel of record by HAND DELIVERY.

The Hon. Ginger Berrigan, Judge  
U.S. District Court for the Eastern District of Louisiana  
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