05-35023

United States Court of Appeals

For the Ninth Circuit

Bill Walker, pro se

Appellant

v.

Members of Congress, et al.

Appellees

Opposition to Motion for Appearance by Ms. Karen Utiger

Of Department of Justice To Represent Appellees in this Suit

Appellant files opposition to motion by Ms. Karen Utiger and Mr. Bruce Ellisen of the Department of Justice for appearance “on behalf” of appellees. As Ms. Utiger is listed as lead counsel, her name shall be intended to include both counsels unless otherwise noted. Appellant’s grounds for opposition are Ms. Utiger has failed to provide any evidentiary proof to this court as required by federal statute and/or court rule that she is statutorily empowered to make such appearance. Therefore the court must deny her motion for appearance.

The question of law in this issue is not whether Ms. Utiger has been “assigned” to represent the appellees by the Department of Justice as she has on numerous times asserted, but whether the appellees as required by federal statute have *requested* the United States government and hence the Department of Justice, represent them. Whether that representation is individual or in an official capacity, federal statutes 2 U.S.C. 118, 28 U.S.C. 2679 and the district court Waivers of Summons sent the appellees by appellant are explicit: the individual named must, on his own initiation, request representation by the United States Department of Justice before that department is statutorily empowered to represent them. Ms. Utiger has failed to present documentary evidence of such empowerment and must therefore be denied appearance based on the lack of statutory empowerment to do so.

Ms. Utiger's request for appearance before this court "on behalf" of the appellees is apparently limited to representing the appellees in their official capacities only. Ms. Utiger, who employed as a United States government attorney, has presented no evidence appellees have hired her individually as a private legal representative. She has returned no Waivers of Summons sent appellees at the beginning of the district court process either to appellant or to district court proving her legal representative for appellees. This failure to provide this required documentary proof to this court therefore voids her making appearance based on the presentation of the Waivers of Summons, as they have not been presented.

Ms. Utiger's initial statement on her filing her "notification" with this court was that she was "assigned to this case." This clearly implies her employer, the United State government, made the decision she should appear "on behalf" of the appellees, not the individual appellees. Hence, it is clear Ms. Utiger's actual client is the United States government[1] not the appellees. The laws appellant cites in this

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[1] Ms. Utiger has failed to prove that, as required by law, she was assigned to this suit to represent the appellees by the Attorney General of the United States. At the time of her sworn statement to the court January 24, 2005, making such claim, there was no Attorney General in sworn in office. Former Attorney General, Mr. Ashcroft had resigned in November, 2004. Mr. Gonzales, his replacement, was not even confirmed by the Senate of the United States until February 3, 2005 and was not sworn into office until February 15, 2005. Thus, her sworn statement stating she was "assigned" to this suit as authorized by law, may have been a false statement to the court as such assignment could not have complied with applicable law. Further, Ms. Utiger alleged court instructions alleged to have been made by a court

matter were laws cited by Ms. Utiger in her response. In each instance, the law specifies the Attorney General must make the decision, not a subordinate. The law does not provide for any delegation of this duty by the Attorney General by any means including the promulgation of regulations. Ms. Utiger has cited regulations but fails to show a statute where the Attorney General is permitted to delegate this specific authority. Appellant merely wishes Ms. Utiger to obey the laws she cited herself. Obviously, Ms. Utiger is attempting to substitute the United States as a party to this suit rather than the individual appellees without bothering with the encumbrances of federal law, which she has described as "patiently frivolous" to this court. The court cannot allow this. It is well-settled law the United States, and hence Ms. Utiger, may make appearance only if the United States is a party to a suit. This means an agency or official body of the United States government must be named as a defendant/appellee to this suit before the United States can appear. The Congress of the United States, an official body of the United States government, was not named in this suit as a defendant/appellee. No agency of the United States was named as a defendant/appellee. As no agency or official body of the United States government was named in this suit, there is no automatic basis for

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clerk in a letter to this court regarding the submittal of her answering brief. The facts demonstrate clearly this instruction did not occur. Ms. Utiger blamed this false statement, which appellant requested the court investigate as to impropriety, on a typographical error she made while typing the single page letter to the court.

representation or admission as party to this suit. Court rules provide for individual to be sued in their official capacities but it is up to the Attorney General to certify the acts in question are with the scope of official duties of office before the United States may enter a suit. Even if parties were named in official capacity only, the United States would be limited to representation of these persons and could not simply extend itself to include every party without this certification. Thus, the statutory requirement that such actions are with the scope of office and have been certified as such by the Attorney General still remains in effect and there is no such certifications provided by Ms. Utiger either in her brief or motion for appearance. The law is clear: representation must be made by individual action on the part of government employees or officers before the government can so represent and such acts must be certified.

As appellant levied a claim against appellees as individuals in district court, 28 U.S.C. 2679 provides for the basis of legal representation appellees as government officials or employees. The text of the statute is clear:

> "*Upon certification by the Attorney General that the defendant employee was acting with the scope of his office or employment at the time of the incident out of which the claim arose,* any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all reference thereto, and the United states shall be substituted as the party defendant." 28 U.S.C. 2679(d)(1). (Emphasis added).

Because Ms. Utiger is not representing the appellees as private individuals but only in their official capacity, this federal statute makes it clear representation

by the United States can only occur based on whether or not appellees' actions "at the time of the incident out of which the claim arose" are within the scope of their duties of office. As such, for Ms. Utiger to represent the appellees solely in their official capacity, 28 U.S.C. 2679 requires that it first must be established that the actions of the appellees, which are being challenged in this suit, are duties of the office that the appellees hold. To establish this under the statute requires that the Attorney General of the United States certify such actions are duties of office.

The statute then continues:

> "In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." 28 U.S.C. 2679(d)(3).

If the Attorney General does not certify the actions of the appellees are within the scope of their office, or a duty of office, and, as the appellees have never requested certification by the district court to have that court certify the actions as within the scope of office, the text of the statute makes it clear the United States, and hence Ms. Utiger, cannot represent nor be substituted as a party for the appellees.

The fundamental point of law is this: Ms. Utiger, in her capacity as government attorney is limited to defending the appellees' office or official actions rather than the individuals who occupy that office. The statutes makes it clear the indi-

vidual officeholder has the responsibility to request representation by the United States enabling them to become a party to a suit. This has not been done in this instance. The statute requires the United States Attorney General must certify the actions of appellees are within the scope of their office thus permitting the United States and hence, Ms. Utiger to appear. Neither method to allow appearance has been utilized by the government. Therefore as Ms. Utiger has not presented evidence of such requests or certification, the burden of defense, according to statute, still rests with the individuals named in the original district court suit. The United States, by statute, is excluded as a party to this suit.

It is well settled law that unless an accusation in court is refuted, it is presumed to be true. Hence, any action related to the individual appellee, such as the criminal accusations reported to this court and district court by appellant, which are not denied by those individual appellees, must be judged as true. The court is reminded that no individual appellee has made appearance to defend the charges nor request certification, either at appellate or district court, “to find and certify that the employee was acting with the scope of his office or employment.”

Ms. Utiger has failed to provide the certification required by 28 U.S.C. 2679. Without this certification, Ms. Utiger lacks any legal basis on which to make claim for an appearance before this court representing the appellees in their official capacities by substituting the United States as a party for the individuals named in

the original district court suit. Instead of simply presenting this required evidence to the court, which in her case involves no more than sending a memo to her boss, Ms. Utiger has attempted to slander the law by attacking the appellant maintaining his arguments, which are nothing more than his quoting appropriate statutory language, as "frivolous" or "without merit."

Ms. Utiger is incorrect. Federal law procedures are neither frivolous nor without merit. Neither this court, the district court nor the Attorney General has issued the required certification necessary to allow the United States to be made a party to these proceedings. Therefore the United States cannot be a party to this suit utilizing the terms of 28 U.S.C. 2679. The statute does not provide an alternative basis for appearance by the United States, i.e., having a federal suit dismissed at district court, failing to appear at district court, having the suit appealed, then bursting in at appellate court without filing the required certifications and terming the entire due process of law of the statute as "frivolous." Like all of us Ms. Utiger is obligated to obey the law. As such she cannot simply insert herself or the United States into this proceeding without obeying that law. As Ms. Utiger has provided no Attorney General certification, there is no evidentiary proof that the acts of appellees here at suit are within the scope of office of appellees and therefore a duty of office that may be defended by Ms. Utiger.

The text of the statute makes it clear the United States Attorney General must certify the actions of the appellees, that of refusing to obey the direct language of a clause of the Constitution, which was specifically designated by the Founders as "peremptory" on the actions of the appellees, are a duty of office. The Attorney General must certify that despite the fact the Founders stated there was to be "no discretion" nor "consent" by the appellees as to whether to call an amendment convention is a duty of office allowing the appellees to entirely ignore constitutional clauses at their political whim. He must certify that any violations of federal criminal law as result of these actions all are within the scope of their office and therefore a duty of office. All this is based, of course, on the assumption that the appellees have requested the Department of Justice to represent them in this manner, that is, the appellees publicly assert this veto of the Constitution as a duty of office.

Ms. Utiger has not even proved she has even discussed this suit with any appellee to ascertain their individual position on this matter. While appellant's suit may at first seem dubious in that he basically asserts an entire branch of the United States government is in revolt against the Constitution, the actions Ms. Utiger only lend weight to his assertion. While it may seem incredulous to assume all members of Congress sincerely wish to void the Constitution and commit federal criminal acts, the actions of Ms. Utiger lead this court to no other conclusion by the fact she

provides no evidence to the contrary. She obviously is opposing the suit brought by appellant before this court, which in essence is that appellees cannot commit federal crimes and must obey the Constitution. Hence, her position must be that she asserts the appellees can commit federal criminal acts and do not have to obey the Constitution. The issue of obedience to law is so absolute that no other conclusion is possible. The court must assume this assertion of constitutional and criminal defiance is appellees' stance. Lack of evidence to the contrary by Ms. Utiger only confirms this fact. At no time has Ms. Utiger even suggested her clients obey the Constitution and call an amendment convention. She has indicated no remorse whatsoever on the part of the appellees even as much as a concession that her clients may have inadvertently committed illegal acts. She has provided no written evidentiary proof that this position of defiance is the intent and state of mind of the appellees which forces the court to presume it is. We are left with the fact that an incompetent attorney who has already admitted to this court she can't even type a simple one page letter correctly is asking this court to assume an entire branch of the government is in a state of rebellion against the sovereign authority of this nation, the Constitution of the United States based on her say so alone.

On the most critical issue of this suit, who actually speaks for the appellees and what is their legal position is on this issue, the court is left with nothing more than an assumption of constitutional defiance by the appellees and Ms. Utiger's

word that she is speaking for all of them. Why? Because Ms. Utiger refuses to provide evidentiary proof as required by federal law which when examined for completeness by the court and appellant might provide evidence to the contrary that appellees have deliberately set out on this course of constitutional defiance. It is possible when appellees actually have to declare in writing and for public court record that they are individually opposing a clause of the Constitution are refusing to obey it, and are made aware of the possible criminal charges as well as removal from office which might ensue as a result of this defiance that some of these appellees might have second thoughts. This fact alone would mean Ms. Utiger could not possibly be representing all appellees named in this suit.

Appellant's brief has been in Ms. Utiger's possession since February 16, 2005. Certainly this is a long enough period of time for her to have acquired the certification required by statute from the Attorney General. The need to satisfy this statutory requirement was brought to the attention of Ms. Utiger in an appellant's motion made to this court on February 1. 2005 (pp.3-4). Her response to the court in a reply to appellant's motion was to term the law "patiently frivolous." As she has not furnished any Attorney General certification, this must be yet another example of due process of law being considered "patiently frivolous" by Ms. Utiger. Despite her opinion, the law is clear: without the required certification, Ms. Utiger has no basis of statutory empowerment to allow her appearance before this court.

Ms. Utiger has no excuse due to lack of time as to why she could not acquire the proper evidence of appellee request. Ms. Utiger has not even bothered to assert the provisions of 2 U.S.C. 118 which require no more than two sentences stating appellees have requested representation.

The statute states:

"In any action brought against any person for or on account of anything done by him while an officer of either House Of Congress in the discharge of his official duty, in executing any order of such House, the United States attorney for the district within which the action is brought, on being thereto requested by the officer sued, shall enter an appearance in behalf of such officer…and the defense of such actions hall thenceforth be conducted under the supervision and direction of the Attorney General."

On at least two occasions, Ms. Utiger has made sworn statements before this court asserting she has been assigned by the government to this suit. At no time has she asserted the individual appellees have made request under 2 U.S.C. 118 to be represented by the United States. She does not make such assertion or evidentiary proof in her present application to the court. Such a statement requires only two sentences by Ms. Utiger, i.e., "All appellees have requested representation by the Department of Justice under 2 U.S.C. 118. I have been assigned by the Attorney General of the United States to represent them here in this court per that statute."

Why not make such a statement either in her sworn declarations when the matter was raised in appellate opposition or at any other time of her choosing since first entering the suit and be done with the matter? Perhaps the omission is yet another example of a typographic error by Ms. Utiger where she meant to make such

a declaration, but instead called the entire matter “patiently frivolous” and expected the court to divine she actually was invoking 2 U.S.C. 118, the waivers of summons or 28 U.S.C. 2679 as a basis of representation as required by statute instead of ridiculing the entire due process of law.

As she has not taken the occasion of two sworn declarations to make such a simple and direct resolution of the issue raised by appellant, there is only one possible conclusion: the required requests allowing the United States to become a party to this suit were never made by the appellees. Obviously Ms. Utiger is hoping the court will allow the United States to become a party to this suit without it having to satisfy the statutory language incumbent upon the United States permitting it to do so.

As Ms. Utiger has not stated the appellees had requested representation by the United States under 2 U.SC. 118 providing necessary statutory empowerment permitting her appearance, it is clear there is no such request by the appellees. Therefore Ms. Utiger cannot invoke 2 U.S.C. 118 as a basis of appearance before this court. It is obvious that whatever reasons known only to the appellees decided not to make individual appearances either at district or appellate court level. It is also obvious that for whatever reasons only known to them they did not all request the United States to represent them in this suit.

As to other issues raised by Ms. Utiger in their motion. Ms. Utiger suggests, "…we are unaware of any rule that would prohibit counsel from appearing for a party on appeal on account of its 'non-appearance' in the court below." Appellant has provided several statutory laws and therefore "rules" that prohibit counsel from appearing if the required due process of those laws is not followed. The due process of these law clearly have not been followed by Ms. Utiger. It would appear the court, by its order of February 11, 2005, believes there is a rule or law that would prohibit such appearance. Otherwise the court would not have bothered to have issued its order. Instead Ms. Utiger now presumes to instruct the court about its rules of procedure which she has termed "patiently frivolous" and state that no such rules exist and therefore the court presumably didn't know what it was doing when it issued its order.

In a footnote on pages 4-5, Ms. Utiger urges that the suit be dismissed for insufficiency of process. Ignoring that appellant attempted in district court to ensure proper service had been accomplished by a special motion of his own even after having satisfied service and that the district court refused this motion yet did not assert service had not been done correctly, thus making it clear the district court was convinced proper service had been done by appellant, we are left with an interesting question. If appellant had not properly served the individual members of Congress, all of whom by statute must individually request representation in order

for Ms. Utiger to represent them, then how is it the government can make appearance as no appellee would know of the suit and therefore could not request representation? The court is reminded Ms. Utiger has never explained how she was "notified" of this suit as stated in her opening letter to this court.

For the record, waivers of summons were sent individually to each member of Congress listed in the complaint. They were *not* sent en masse to the U.S. Attorney nor to the Attorney General. These officials received separate and individual copies of the complaint as specified by the court rules. Further, a letter was included asking both if they required copies of the Waivers of Summons for their records. No reply was ever sent to appellant and therefore no Waivers of Summons were ever sent to the U.S. Attorney or the Attorney General. Federal Rules of Civil Procedure, Rule 4, makes it clear it is the duty of the *appellees* to return waivers to appellant. They did not do so within the time prescribed under FRCP Rule 12 and Rule 4 nor have they since. Further, no waiver of summons has been returned by the post office marked "undelivered" or otherwise indicating the appellees did not receive the waivers. Failure of appellees to obey the rules of service does not mean the appellant is in default for improper service as implied by Ms. Utiger. It means her clients have failed to obey the rules of service.

The government cannot have it both ways. Either the appellees received the Waivers of Summons and requested under statute the government represent them

and the government has simply forgotten to mention this fact as a typographical error in their motion for appearance, or the appellees did not receive the waivers, made no such requests and therefore the government cannot represent them as it was never asked by the appellees as they never knew they were being sued. As the government is asserting representation of all appellees, for their position to be valid, it must be assumed appellant properly served all appellees in order for them to decide to request representation by the government. Presumably, appellees then gave the waivers to the government as instructed in the waivers when the appellees requested representation. Then, the government simply forgot to follow court procedure and return them to appellant as specified in the waiver of summons. This explains why Ms. Utiger rather than simply return the Waivers of Summons to appellant and establish her right to appear instead chooses to fight the issue rather than win it. It explains why she has not made a declaration in her motion for appearance that she has the waivers in her possession. She simply forgot she has them; another typographical error in which the court is again called upon to divine that the government actually has the waivers but simply doesn't want the court to know it.

Proper service by appellant does not relieve the government of its responsibility to assert under at least one of the above cited statutes evidentiary proof of such requests by appellees and since such waivers must be in the hands of the gov-

ernment, it is clear the government is attempting to have this suit dismissed by withholding evidence of service from the court. Obviously if Ms. Utiger says she does not have the waivers, then it is clear the appellees could not have requested representation as she asserts. Again the question must be asked, why not simply assert one of three statutory procedures presented by the appellant and be done with it? Nowhere does the government in its argument to appear before this court simply end the matter doing so with a simple single sentence. The only conclusion that can drawn from this is the government cannot make such assertion. Therefore the government cannot appear, as it has not shown it is authorized by statute to do so.

As to the government's assertion that it was proper for it to wait until it filed its answer and that it was under no obligation to do so once the court dismissed the suit, Rule 12 of the Federal Rules of Civil Procedure refutes this assertion. The rule clearly states individuals sued and the U.S. Attorney must file an answer within 60 days of service; it does not provide for the government not to answer as a result of dismissal. Therefore the government violated the rule and therefore was improper in its action in that it failed to appear and file an answer as required by rule.

In sum, Ms. Utiger has presented no evidentiary proof she has been hired by any appellee as a private attorney to represent them in this suit. She has presented no evidence required by statute permitting her to represent appellees in their offi-

cial capacity. She has presented no evidentiary proof the actions of appellees are within the scope of their office as official duties. Without these evidentiary proofs, clearly Ms. Utiger cannot make appearance before this court. Appellant therefore requests the court deny the appearance of Ms. Utiger on the grounds she has failed to prove she has been requested by appellees to represent them as individuals or that the United States, through the office of the United States Attorney General has certified the actions of the appellees are duties of office thus permitting representation by the Department of Justice or has invoked any other applicable statute permitting appearance by Ms. Utiger before this court.

Dated: March 28, 2005

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Bill Walker, appellant, pro-se
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CERTIFICATE OF SERVICE

Case Name: Walker v. Members of Congress, et al.

Case No: 05-35023

I hereby certify that the person show below per her written request was served a copy of Appellant's Opposition to Motion for Appearance by Ms. Karen Utiger Of Department of Justice To Represent Appellees in this Suit.

Dated: March 28, 2005

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