In the United States Court of Federal Claims

No. 07-837 C

(Filed December 31, 2008)

GABRIELA RODRIGUEZ,	)
Plaintiff,	)
v.	)
	)
THE UNITED STATES,	)
Defendant.	)

ORDER ON MOTION TO DISMISS

Plaintiff, Gabriela Rodriguez, was employed as a District Adjudications Officer for the Department of Homeland Security in Phoenix, Arizona when she applied for and was awarded a position as an Immigration Inspector in Vancouver, British Columbia. She asserts that the job posting for this position stated that housing would be provided. As a result, she sold her home, her husband resigned from his job and her family, including two minor children, moved to British Columbia where she commenced her new position as Immigration Inspector at the Vancouver International Airport.

In Vancouver, plaintiff alleges she was not provided housing as promised, forcing the family to live in a motel room and to place their belongings in storage. Their two children, ages nine and five, were not allowed to enroll in school because they lacked a permanent address, all of which caused her emotional, physical and monetary distress.

Plaintiff also complains she was not adequately trained for her new job, she was stalked by her supervisor, relentlessly criticized and hounded when she used the restroom and in other ways mistreated, all in breach of express and implied conditions of her job offer which resulted in stress-related physical symptoms.

Plaintiff was referred by her employer for medical evaluation. Doctors recommended a short-term medical leave, prescribed an anti-depressant, and recommended she return to Phoenix. Her request for a transfer to a later shift was denied. She requested a transfer or a leave without pay, but before she got a response (and she alleges she never did) she moved back to Phoenix where she learned later that her job status was classified as absent without official leave and she has been

blacklisted for employment. A subsequent Fitness for Duty Examination concluded she was unfit for duty.

Plaintiff's demand for compensatory damages in the instant action includes lost revenue from the sale of her home in Phoenix. But for the sale of her home to move to Vancouver, she could have realized subsequent appreciation in value. She also claims mental and financial hardship because her husband could not work because he had to stay in the motel with the children who could not be enrolled in school.

Her partial list of damages includes attorney fees, replacement value of household goods, storage charges, closing costs and realtor's commission for her home in Phoenix as well as lost appreciation on the same, phone charges, airline tickets, medical bills, lost income, moving costs to return to Phoenix, non-reimbursed payment on a government credit card, and hotel charges in Vancouver from 10/20/02 to 10/21/02 in the amount of $68.

Plaintiff, her husband and minor children, filed suit in the United States District Court for the District of Arizona on October 27, 2004. The eleven-count First Amended Complaint included allegations of tort and civil rights violations under Title VII, the Americans with Disabilities Act and the Federal Whistleblower Protection Act. The Amended and Second Amended Complaints also asserted two counts of breach of plaintiff's employment agreement with the Immigration and Naturalization Service ("INS") now the Department of Homeland Security ("DHS").

An Initial Decision of the Merit Systems Protection Board dated August 17, 2006 affirmed plaintiff's removal from federal service effective August 6, 2005 because of her inability to perform her duties due to her medical condition.[1/] *Rodriguez v. Dep't of Homeland Security*, 2006 WL 3490033 (MSPB 2006).

On July 10, 2007, plaintiff's contract claims (Counts IV and V) in the Arizona District Court were, pursuant to 28 U.S.C. § 1631, transferred to the United States

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[1/] Apparently plaintiff left Vancouver in early January 2004. Six months later the agency proposed to remove her from federal service due to her medical condition. On August 25, 2004, she replied and requested reassignment to accommodate her disability. An undated determination upheld the initial removal effective August 6, 2005.

Court of Federal Claims, and all but three remaining Counts were dismissed on July 10, 2007. *Rodriguez v. United States*, 2007 WL 2022010 (D. Ariz. 2007).

On December 6, 2007, the remaining three Counts, alleging violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., the Rehabilitation Act of 1973, 28 U.S.C. § 791 and the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq*. were transferred by the Arizona District Court to the District of Washington where, according to the publically-available docket sheet, a jury trial is scheduled for June 22, 2009.

In the present action, defendant filed a Motion to Dismiss the transferred contract counts, arguing that it is well-settled that federal employees serve by appointment and have no contract rights except by statute. Accordingly, the motion asserts, the Court of Federal Claims lacks subject matter jurisdiction. Given the contractual allegations, the motion is construed as also encompassing a dismissal pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. *See Todd v. United States*, 386 F.3d 1091 (Fed. Cir. 2004).

Motion to Dismiss Standards

In deciding a motion to dismiss, this court must presume all undisputed factual allegations to be true and construe all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds* by *Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982); *Reynolds v. Army & Air Force Exch. Serv*., 846 F.2d 746, 747 (Fed. Cir. 1988).

Plaintiff had no employment contract

As the Federal Circuit recently reiterated in upholding the dismissal of breach of employment contract claims, federal employees do not have an employment contract with the federal government. Rather, they "derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government." *Doe v. United States*, 513 F.3d 1348, 1355 (Fed. Cir. 2008) (citing *Chu v. United States*, 773 F.2d 1226, 1229 (Fed. Cir. 1985)); *Adams v. United States*, 391 F.3d 1212, 1221 (Fed. Cir. 2004); *Collier v. United States*, 379 F.3d 1330, 1331 (Fed. Cir. 2004); *Schism v. United States*, 316 F.3d 1259, 1274-75 (Fed. Cir. 2002) (*en banc*); *Hamlet v. United States*, 63 F.3d

1097, 1102 (Fed. Cir. 1995); *Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985).

As a federal employee both before and after her move to British Columbia, plaintiff served by appointment. Her employment and compensation package are governed by statute and regulation, not contract. She did not, and could not have, entered into any separate agreement with the government, express or implied, for compensation beyond that to which she was entitled to by statute and regulations. This principle is well-established.

> Though a distinction between appointment and contract may sound dissonant in a regime accustomed to the principle that the employment relationship has its ultimate basis in contract, the distinction nevertheless prevails in government service. Applying these doctrines, courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel. These cases have involved, *inter alia*, promises of appointment to a particular grade or step level, promises of promotion upon satisfaction of certain conditions, promises of extra compensation in exchange for extra services, and promises of other employment benefits.

Adams v. United States, 391 F.3d 1212, 1221 (Fed. Cir. 2004) (citations omitted).

The government is accordingly correct in that absent a contract, plaintiff has failed to state a claim covering most, if not all, of the relief sought in the Complaint, assuming, for the purpose of deciding the pending motion, that the pleaded allegations are true.

However, plaintiff mentions in her "Response to government's new motion to dismiss: oppose govt. (sic) motion," a living quarters allowance ("LQA") that under 5 U.S.C. § 5923 or 5924, United States Department of State ("DOS") Regulation 220, and *Adde v. United States*, 81 Fed. Cl. 415 (2008), may comprise a regulatory monetary claim within this court's jurisdiction to resolve.

Construing plaintiff's Complaint broadly to encompass the foregoing whether by amendment or otherwise, the Back Pay Act, 5 U.S.C. § 5596 (2000), together with

the Tucker Act, 28 U.S.C. § 1491 (2000), grant this court jurisdiction over any claims plaintiff may have for back pay for services rendered **if and to the extent** provided by statute or regulation. *Spagnola v. Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984) (explaining that the Back Pay Act is "derivative," in that it only mandates compensation required by statute or regulation).

Assuming for the purposes of this motion that the statute referenced by plaintiff, 5 U.S.C. § 5923(a), applies, it provides for certain living expenses for a 90-day period (which may under certain circumstances be extended for not more than 60 days):

> (a) When Government owned or rented quarters are not provided without charge for an employee in a foreign area, one or more of the following quarters allowances may be granted when applicable:
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> (1) A temporary subsistence allowance for the reasonable cost of temporary quarters (including meals and laundry expenses) incurred by the employee and his family--
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> (A) for a period not in excess of 90 days after first arrival at a new post of assignment in a foreign area or a period ending with the occupation of residence quarters, whichever is shorter; and
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> (B) for a period of not more than 30 days immediately before final departure from the post after the necessary evacuation of residence quarters.
>
> (2) A living quarters allowance for rent, heat, light, fuel, gas, electricity, and water, without regard to section 3324(a) and (b) of title 31.

Department of State Standardized Regulations ("DOSSR") implement these quarters allowances. DOSSR 110 *et seq*. provides for reimbursement and in certain circumstances advance payment of certain housing and living expenses. The government may be correct that plaintiff did not submit claims for reimbursement of requests for advance payment, which the government asserts, is a required prerequisite for any payment of allowances. The government is also correct that her Complaint does not assert, or suggest, that she was denied a living quarters allowance for which she applied and was entitled. Whether there are mandatory administrative remedies that must have been pursued is also not addressed in the record or by the parties.

It is not determined, at this stage of the litigation, that any cited statute or regulation applies and that Mrs. Rodriguez would qualify for compensation. Construing plaintiff's claim before this court very broadly, it cannot be said on this bare record that the government has established that she does not have a valid cause of action for some limited quarters allowance over which this court would have jurisdiction. If she met the specific requirements of applicable regulations, she would be entitled to rely on them for redress. *Adde*, 81 Fed. Cl. at 419. *See also Boston v. United States*, 43 Fed. Cl. 220, 225-26 (1999) (holding any entitlement to living expenses had to be based on statute or regulation not on contract); *Zeras v. United States*, 28 Fed. Cl. 66, 68 (1993) (analyzing DOSSR concerning living quarters allowances for certain employees recruited outside the United States). However, any allowances under these cited regulations (assuming such were requested, entitlement established and compensation unpaid) would be quite limited and would not extend to most, if not all, of the damages expressly sought in this litigation.[2/] Of course, on the merits, the government may be able to establish that no regulation providing compensation applies, that plaintiff did not request reimbursement or advance payment or that any amounts owed were paid, or that mandatory administrative remedies were not pursued. The parties are urged to discuss and resolve the question of any potential unpaid regulatory compensation. Any further proceedings in this court would require an Amended Complaint expressly pleading the entitlement sought and of course, be based on underlying factual and legal support.

There is another action pending which may further bar the court's consideration

Although not mentioned in the government's Motion to Dismiss, plaintiff's transferred action, pending in United States District Court in the State of Washington, may also and independently preclude jurisdiction in the Court of Federal Claims. As noted in the Arizona District Court's Transfer Order dated December 6, 2007, Rodriguez's Title VII and Rehabilitation Act claims (Counts I and II of her First Amended Complaint filed in Arizona District Court – Exhibit A to Defendant's Reply to Plaintiff's Opposition to the Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed in the instant litigation), were transferred to the District of Washington where trial is scheduled for June 22, 2009. Count III alleging violation of Whistleblowing Act, 5 U.S.C. § 2302(b)(8), also remains. Apparently, these

[2/] The district court to which plaintiff's claims were transferred in the State of Washington would also have jurisdiction of such a claim up to $10,000. 28 U.S.C. § 1346(a)(2).

claims concern her employment in Vancouver which was overseen by DHS's office in Seattle, Washington as were decisions and recommendations regarding her transfer and leave requests.

28 U.S.C. § 1500 prohibits this court from hearing any otherwise appropriate claim if plaintiff has another action involving the same claim(s) pending in another court against the United States or its agents or employees.

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Consequently, if plaintiff is prosecuting a claim in another court when she filed the same claim in the Court of Federal Claims, the Court of Federal Claims may not adjudicate her claim, even though subject matter jurisdiction would otherwise lie. A transfer, pursuant to 28 U.S.C. § 1631, produces a filing in the Court of Federal Claims in which the claims remaining in the district court are considered to be pending for the application of 28 U.S.C. § 1500. *United States v. County of Cook*, 170 F.3d 1084, 1090 (Fed. Cir. 1999). What constitutes "the same claim" for purposes of § 1500 is the subject of interpretation.

Section 1500 was thoroughly and recently analyzed by Judge Block in *Yankton Sioux Tribe v. United States*, 84 Fed. Cl. 225 (2008). Summarizing Supreme Court precedent, § 1500 requires the following analysis:

> (a) If the operative facts are substantially the same and there is some overlap in the relief requested, then § 1500 applies. *Keene*, 508 U.S. at 212, 113 S. Ct. 2035.
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> (b) If the operative facts are the same, but the relief requested is distinctly different, then § 1500 does not apply. *See Loveladies*, 27 F.3d at 1549-51.

84 Fed. Cl. at 231.

The record in this matter is simply not developed sufficiently for the court to determine if Section 1500 is applicable. If quarters allowance or advances were involved in the still-pending district court litigation, operative facts may be the same or at least overlap. On this record, any claim plaintiff may have submitted regarding quarters allowance, and how, if and where decisions in this regard where made and/or related to claims pending in the District Court in the State of Washington simply cannot be determined on this record.

The government in its Motion (Ex. 2), indicates that Rodriguez previously filed a claim with the Merit Systems Protection Board. An initial decision upholding the agency's determination that she was medically unable to perform the duties of her position as Immigration Inspector was dated August 17, 2006. *Rodriguez v. Dep't of Homeland Security*, 2006 WL 3490033 (August 17, 2006). The record in this court does not indicate whether that determination was appealed and/or remains pending. These matters would be relevant in any further proceeding in this litigation.

Accordingly, based on the present record, in the absence of any valid contractual basis for the transferred claims, it is **ORDERED**:

(1) The contractual claims transferred from the Arizona District Court shall be **DISMISSED**, pursuant to RCFC 12(b)(6), for failure to state a claim;

(2) With respect to any remaining regulatory claim(s), if any, within this court's jurisdiction, as discussed above, if plaintiff intended to assert such a claim(s) in this matter, on or before January 30, 2009, plaintiff shall file a second amended complaint expressly setting out the intended monetary claim(s), supported by the regulation, and stating the basis for the relief sought;

(3) If no second amended complaint is timely filed, in accordance with (2), the clerk shall then enter a final judgment entirely **DISMISSING** this suit for failure to state a cause of action.

James F. Merow
Senior Judge