

In the United States Court of Federal Claims

No. 07-837 C

(Filed July 15, 2009)

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

ORDER

This order addresses the Motion for Summary Judgment filed by defendant in this litigation on March 23, 2009, together with plaintiff's "Answer and Objection," filed June 10, 2009, and Defendant's Reply, filed June 22, 2009.

Plaintiff, while serving in Phoenix, Arizona as a District Adjudication Officer for the Department of Homeland Security ("DHS") applied for and was awarded a DHS position in Vancouver, British Columbia, Canada, as an Immigration Inspector. Plaintiff's relocation in October, 2002 from Phoenix to Vancouver resulted in a disagreement concerning housing arrangements in Vancouver and claims by plaintiff of a hostile work environment.

In December 2002 plaintiff requested a transfer from Vancouver back to her previous position in Phoenix due to "extreme family circumstances and hardship situations encountered in Vancouver, B.C., Canada, after my move." (App. to Def.'s Mot. for Summ. J. 62.) On December 23, 2002, plaintiff requested leave without pay to begin on January 8, 2003. (*Id.* at 65-66.) Plaintiff did not report to work after December 2002. (*Id.* at 67.)

Plaintiff 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, and claims based on the Americans with Disabilities Act, and the Federal Whistleblower Protection Act. The Amended and the Second Amended Complaints also asserted two counts (IV and V) of breach of plaintiff's employment agreement with the Immigration and Naturalization Service, now DHS. On July 10, 2007, these contract claims (counts IV and V) in the Arizona

District Court were, pursuant to 28 U.S.C. § 1631, transferred to the United States 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.).

On December 6, 2007, the three remaining 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 United States District Court, Western District of Washington at Seattle, case No. C08-0210-JCC. By an order, dated April 28, 2009, the Seattle District Court granted a motion to dismiss these transferred counts. 2009 WL 1173938 (W.D. Wash.). In dismissing plaintiff's Rehabilitation Act claim, the district court noted that plaintiff had been removed from her employment with DHS, had unsuccessfully appealed the removal to the Merit Systems Protection Board ("MSPB") and had not timely filed an appeal of the adverse MSPB decision. 2009 WL 1173938, at *6; 2006 WL 3490033 (MSPB 2006).

The instant case commenced with the two counts transferred to the Court of Federal Claims by the Arizona District Court. Defendant moved to dismiss these counts and an order, filed December 31, 2008, directed that the "[c]ontractual claims transferred from the Arizona District Court shall be DISMISSED, pursuant to RCFC 12(b)(6), for failure to state a claim." Plaintiff was, however, provided an opportunity to file a second amended complaint asserting any intended monetary claim(s) supported by a regulation.

On February 2, 2009, plaintiff filed a Second Amended Complaint seeking compensation, during the period she was in Vancouver, B.C., Canada, for a temporary subsistence allowance, living quarters allowance, and a post allowance as authorized by 5 U.S.C. §§ 5923-24.^{1/}

^{1/} Plaintiff's complaint also can be construed to state matters over which the Court of Federal Claims lacks jurisdiction, such as tort claims and civil rights claims. *Keene Corp. v. United States*, 508 U.S. 200, 214 (1993); *Alves v. United States*, 133 F.3d 1454, 1459 (Fed. Cir. 1998); *Anderson v. United States*, 22 Cl. Ct. 178, 179 (1990), *aff'd*, 937 F.2d 623 (Fed. Cir. 1991); *Blassingame v. United States*, 33 Fed. Cl. 504, 505 (1995), *aff'd*, 73 F.3d 379 (Fed. Cir. 1995). These matters were addressed by the Arizona and Washington District Courts to the extent there pleaded by plaintiff.

Defendant moves for summary judgment asserting that the undisputed facts establish that plaintiff did receive a temporary subsistence allowance pursuant to 5 U.S.C. § 5923(a)(1), for the period she was in Vancouver, B.C., Canada and that plaintiff's departure from Canada by early January 2003, removed any entitlement to further benefits.

The documents included in the appendix to Defendant's Motion for Summary Judgment at pp. 13-61 establish that plaintiff did recover the temporary subsistence allowance authorized by section 5923(a)(1). Plaintiff did not qualify for a living quarter allowance authorized by 5 U.S.C. § 5923(a)(2) as she departed Vancouver before the expiration of her temporary subsistence allowance period so that she never incurred living quarters expenses defined by section 5923(a)(2) as rent, heat, light, fuel, gas, electricity, and water. . . ." Plaintiff could not receive a post allowance as 5 U.S.C. § 5924(1) provides that "employees receiving the temporary subsistence allowance under section 5923(1) are ineligible for a post allowance under this paragraph."

In these circumstances, plaintiff has not set forth any statute or regulation which would mandate the payment of more money than she received for the events pleaded concerning her DHS employment in Vancouver, B.C., Canada.

Accordingly, it is **ORDERED** that Defendant's Motion for Summary Judgment, filed March 23, 2009, is **GRANTED** and plaintiff's Second Amended Complaint is **DISMISSED**, with no costs to be assessed.

James F. Merow
Senior Judge