

In the United States Court of Federal Claims

No. 08-852 C
(Filed: February 4, 2010)

DAVID WARD, *
 *
 Plaintiff, *
 *
 v. *
 *
 THE UNITED STATES, *
 *
 Defendant. *

Michael D. J. Eisenberg, Washington, DC, for plaintiff.

Stacey K. Grigsby, United States Department of Justice, Washington, DC, for defendant.

ORDER

On February 2, 2010, plaintiff in the above-captioned case filed a motion to partially redact the court's September 28, 2009 decision, along with his proposed redactions. Unfortunately for plaintiff, his motion is woefully out of time.

Plaintiff filed his complaint in this court on December 1, 2008, seeking incapacitation pay related to injuries that he sustained during his service in Kuwait and Iraq during Operation Enduring Freedom. On April 15, 2009, defendant moved to dismiss plaintiff's complaint, or, in the alternative, for judgment on the administrative record. Along with its combined motion, defendant filed an administrative record, which contained copies of the documents in the possession of the Army Board for Correction of Military Records, including medical records, and copies of relevant personnel records. The administrative record was not, and was not required to be, filed under seal.

The court ruled on defendant's combined motion in its September 28, 2009 decision. Due to the nature of plaintiff's injuries, the court, out of an abundance of caution, issued the decision under seal, even though it was under no obligation to do so. In a footnote on the first page of the decision, the court provided:

The court has filed this opinion under seal due to its detailed description of plaintiff's medical history. If either party believes that this opinion contains protected material that should be redacted prior to the opinion being made

available to the public, that party shall file, **no later than Friday, October 9, 2009**, a motion requesting redaction that specifically describes the material proposed for redaction and the reason for the redaction request.

Neither party filed a motion for redaction. Accordingly, the court reissued the decision for publication on October 16, 2009—seven days after the expiration of the deadline for filing a redaction motion and eighteen days after it issued its original decision under seal.

In the months following the court's reissuance of its decision for publication, plaintiff's counsel twice sought information from the court concerning how to get the decision redacted. In November 2009, counsel telephoned the clerk's office with his inquiry. At the direction of chambers' staff, a clerk's office employee suggested to counsel that plaintiff file a motion for redaction. Counsel then telephoned chambers directly on January 7, 2010, with his inquiry. Chambers' staff again explained to counsel that the court could not redact portions of its decision in the absence of a proper motion.

Almost one month after counsel's second telephone inquiry, plaintiff filed the instant motion. In the three-and-one-half months since the court reissued its decision for publication, the decision has been available to the public in the clerk's office, on the court's website, on PACER, and in online databases such as Lexis and Westlaw. In addition, the decision was published in the December 31, 2009 soft-bound advance sheet of the Federal Claims Reporter. Plaintiff now asks the court to unring the bell. However, plaintiff's undue delay in filing the appropriate motion, as referenced in the court's merits ruling, forecloses the court from granting the instant motion.

First, as a practical matter, it is too late to prevent publication of the court's decision in the hard-bound Federal Claims Reporter. Because plaintiff made no representations in his motion regarding whether it was even possible to retract the court's decision from the hard-bound reporter at such a late date, even though this is a fact that he should have ascertained before filing his motion, the court made the necessary inquiry of West and received a negative response. Moreover, even if such a retraction was possible, the court would be required to wait until defendant responded to plaintiff's motion, given that plaintiff made no representations that (1) he consulted with defendant about the contents of the motion or (2) defendant did not oppose the motion.

Second, the court has provided plaintiff with ample opportunity to seek redaction of the decision. To protect plaintiff's privacy, it took the additional step of filing the decision under seal, prominently placing an invitation to plaintiff to file a redaction motion on the decision's first page (with the deadline in bold type). It then waited one week after the designated deadline before reissuing the decision for publication. And, in response to counsel's telephonic inquiries in the months following the decision's publication, the court not once, but twice suggested that plaintiff file a redaction motion. Thus, there is no question that plaintiff and his attorney were repeatedly advised of the proper procedure for obtaining a redacted decision. Therefore, even if

the decision had not been publicly available for so many months, granting plaintiff's instant motion would only serve to reward plaintiff's attorney's lack of diligence.

Finally, not only has the decision already been widely disseminated, but the administrative record filed by defendant, which contains extensive information concerning plaintiff's medical history, remains publicly available in the clerk's office and on PACER. In the more than nine months since the filing of the administrative record, plaintiff has not sought to place it under seal or requested that any portion of it be redacted. Thus, any redaction of the court's decision would not remove the offending information from the public domain.

For the foregoing reasons, the court **DENIES** plaintiff's motion.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge