In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 00-475C
(Filed September 26, 2006)

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TECOM, INC., *
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Plaintiff, *
*
v. *
*
THE UNITED STATES, *
*
Defendant. *
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* *

ORDER

Pursuant to RCFC 59(a)(1),[1] the defendant moved for reconsideration of the Court's sanction Order of May 4, 2006. The decision to grant a motion for reconsideration lies largely within the discretion of the Court. *See Yuba Natural Resources, Inc. v. United States,* 904 F.2d 1577. 1583, (Fed. Cir. 1990). The burden on the moving party is high and a motion for reconsideration is not intended merely to give an unhappy litigant an additional opportunity to persuade the Court to accept its arguments. *See Citizens Federal Bank, FSB v. United States,* 53 Fed. Cl. 793, 794 (2002). "The movant must show either that: an intervening change in the controlling law has occurred, evidence not previously available has become available, or that the motion is necessary to prevent manifest injustice." *Bishop v. United States,* 26 Cl. Ct. 281, 286 (1992).

The defendant has not demonstrated any reason for the Court to reconsider the prior ruling, other than the defendant's disappointment with the outcome. The government repeats its argument, previously rejected by the Court, *see* Tr. (Oct. 24, 2005) at 634-37, that a retired member of the Air Force may be considered an "officer or employee" of the United States for

[1] "A new trial or rehearing or reconsideration may be granted to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." RCFC 59(a)(1).

purposes of FRE 615(2). Although the government cites six opinions concerning the status of retired servicemen or officers that are "new" in the sense that they were not previously cited by defendant, *compare* Def.'s Mot. to Recon. at 7 *with* Def.'s Resp. to Ct.'s Req. for Brfg. re FRE 615 ("Def.'s FRE 615 Br.") at 7, all of these opinions pre-date the prior briefing by more than seventeen years. Moreover, the treatment of retired pay as "reduced pay for reduced current services," *Cornetta v. United States*, 851 F.2d 1372, 1382 (Fed. Cir. 1988), has no bearing on Mr. McCowen's eligibility as an FRE 615(2) "officer of employee" of the United States. His participation in the trial was not part of the service he provides as a retired member of the Air Force -- specifically, being "subject to call to active duty," *Lemly v. United States*, 109 Ct. Cl. 760, 763 (1948) -- but instead, as defendant conceded, was "under a contractual relationship with the United States to provide consulting services to the Government." Def.'s FRE 615 Br. at 7; *see also* Tr. (Oct. 17, 2005) at 140 (government counsel stating that McCowen "is under a contract now with the Air Force to perform the services that he's in fact serving"); *id.* at 145 (government counsel admitting McCowen "has not been recalled directly for this purpose").

The government cites a Sixth Circuit case, which pre-dated its earlier briefing by over two years, in which a corporation was allowed to use a former employee as its FRE 615 representative when the corporation had "no current employees and is no longer operating." Def.'s Mot. to Recon. at 5 (quoting *Roberts v. Galen of Virginia, Inc.*, 325 F.3d 776, 785 (6th Cir. 2003)). This circumstance, of course, can hardly be said to describe the state of the Air Force or the United States government. Nor does the Court find persuasive the other authorities cited by defendant, *see id.*, which were also neither controlling nor subsequent to the prior briefing.

One additional aspect of the government's motion to reconsider warrants mention. The defendant contends that its failure to accurately represent Mr. McCowen's status as retired was "harmless error," *id.* at 2, and that rather than imposing monetary sanctions under RCFC 11, the Court should be content with "the trial sanctions already imposed." *Id.* at 1. The exclusion of Mr. McCowen, however, was not a "sanction," but rather the normal operation of FRE 615. And the government seems incapable of understanding that the misrepresentation concerning Mr. McCowen prevented the matter of his eligibility to serve as party representative under FRE 615(2) -- or, for that matter, under FRE 615(3), if that ground had been timely raised -- to be considered pre-trial. This error was not harmless, but caused a disruption of the trial, imposing costs on the plaintiff. The motion for reconsideration is hereby **DENIED**.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge