In The United States Court of Federal Claims

No. 10-434C

This opinion will not be published in the U.S. Court of Federal Claims Reporter because it does not add significantly to the body of law.

Filed: September 21, 2011

CRAIG J. URBAN, *pro se*,	*
	*
Plaintiff,	*
	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*
	*
	*

OPINION

ALLEGRA, Judge:

In this civil pay case, the issue is whether Craig S. Urban (plaintiff) is entitled to a living quarters allowance (LQA) under relevant Department of State regulations. This issue is before the court on defendant's motion to dismiss under RCFC 12(b)(6). For the reasons that follow, defendant's motion is hereby **DENIED**.

I. BACKGROUND[1]

By letter dated August 13, 2007, Mr. Urban received an offer of employment from CACI Premier Technology, Inc. (CACI) to work at its offices at United States Army Europe (USAREUR) G4, Campbell Barracks, in Heidelberg, Germany. This letter listed Mr. Urban's address as Summerville, South Carolina. This offer of employment stated that "[r]elocation

[1] These facts are drawn from plaintiff's complaint (including the attachments thereto), and, for purposes of this motion, are assumed to be correct. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

expenses shall be granted in accordance with the attached relocation agreement." The referenced agreement provided, in relevant part:

> 1. CACI has offered to Employee and Employee has accepted CACI's offer of relocating from **Vaesrade**, **The Netherlands** area to **Heidelberg**, CACI's work site in Germany . . .
>
> 2. In order to assist Employee in relocating his primary residence from **Vaesrade**, **The Netherlands** area to the **Heidelberg** area, CACI agrees to pay or reimburse Employee for relocation expenses for a total aggregate not-to-exceed Four Thousand Dollars ($4,000).
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> * * * * *
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> 5. In the event Employee's CACI's at-will employment shall end prior to the completion of twelve (12) calendar months at destination on account of Employee's voluntary resignation or involuntary resignation by CACI for cause, Employee shall forthwith repay to CACI an amount equal to the total aggregate payments made by CACI pursuant to this Agreement . . .
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> * * * * *
>
> 9. This Agreement sets forth the complete understanding of the parties with respect to the payment or reimbursement of expenses associated with Employee's relocation of his residence from the **Vaesrade**, **The Netherlands** area to **Heidelberg**, and it replaces and supersedes any and all previous understandings, whether written or oral, regarding such subject matter. This Agreement may be amended only in writing signed by the Employee and all management levels approving the original Agreement.

(Emphasis in original). Mr. Urban and CACI executed the relocation agreement on August 15, 2007. Although the relocation agreement refers to Mr. Urban as living in The Netherlands, plaintiff avers that he, in fact, was living in South Carolina at the time he received this offer. He further avers that the relocation agreements refers to The Netherlands because that was where his wife lived and where he had gone to be with her shortly before the paperwork with CACI was finalized.

On October 12, 2007, Mr. Urban sent an electronic message to Michael Grosskopf, at CACI's headquarters for the USAREUR/7A, G4, in which Mr. Urban stated that "[m]y current relocation agreement does not specify my entitlements back to the United States upon completion of my employment with CACI." On October 16, 2007, Mr. Grosskopf responded, by electronic message, stating that "CACI will honor your relocation rights to your home of record in South Carolina in accordance with the CACI Relocation Agreement after you have completed twelve months of satisfactory service against this contract."

Mr. Urban was employed by CACI for three months, from approximately August through November 2007. Beginning on or about November 11, 2007, Mr. Urban began working as a civilian logistics management specialist with the United States Department of the Army in Eygelshoven, The Netherlands. Shortly after starting that job, Mr. Urban asked the Army about his eligibility for a "living quarters allowance." In a memorandum addressed to Mr. Urban dated November 28, 2007, the Army denied plaintiff's request for a LQA. The Army informed plaintiff that he could appeal this decision by filing a claim with the Office of Personnel Management (OPM).

On January 23, 2008, Mr. Urban appealed the Army's denial of his request for a LQA to OPM. On December 4, 2008, OPM denied Mr. Urban's appeal, citing the applicable United States Department of State Standardized Regulations (DSSR) that establish requirements for quarters allowances for United States Government personnel employed overseas. OPM determined that plaintiff was not eligible for LQA because his CACI relocation agreement did not provide for his return transportation to the United States. OPM also rejected the notion that Mr. Urban could be viewed as having been recruited for overseas duty while in the United States.

On July 6, 2010, Mr. Urban filed a complaint in this court challenging the OPM denial of his LQA request. On November 8, 2010, defendant filed a motion to dismiss plaintiff's complaint for failure to state a claim under RCFC 12(b)(6). Briefing on that motion is now completed. The court deems oral argument on this matter unnecessary.

II. DISCUSSION

Deciding a motion to dismiss "starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997); *see also Bell Atl. Corp.*, 550 U.S. at 555. To survive a motion to dismiss for failure to state a claim under RCFC 12(b)(6), the complaint must have sufficient "facial plausibility" to "allow [ ] the court to draw the reasonable inference that the defendant is liable." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *see also Klamath Tribes Claims Comm. v. United States*, 97 Fed. Cl. 203, 208 (2011). The plaintiff's factual allegations must "raise a right to relief above the speculative level" and cross "the line from conceivable to plausible." *Bell Atl. Corp.*, 550 U.S. at 570; s*ee also Dobyns v. United States*, 91 Fed. Cl. 412, 422–28 (2010) (examining this pleading standard). Nevertheless, the Federal Circuit has recently reiterated that "[i]n ruling on a 12(b)(6) motion to dismiss, the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009); *see also Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009), *cert. denied*, 130 S.Ct. 3468 (2010); *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 58 (2009).

Section 5923 of Title 5 of the U.S. Code permits a housing allowance for certain United States employees stationed in a foreign area. 5 U.S.C. § 5923; *see also Aurich v. United States*, 786 F.2d 1126, 1128 (Fed. Cir. 1986). The regulations implementing this provision are found in the DSSR, which establish specific eligibility requirements for quarters allowances for Federal

employees working overseas, including those employed by the Department of Defense. *See Zervas v. United States*, 43 Fed. Cl. 757, 759 (1999). This court and its predecessor have repeatedly held that an employee may bring an action under the Tucker Act, 28 U.S.C. § 1491(a), based upon these DSSR regulations. *See, e.g.*, *Tyler v. United States*, 600 F.2d 786, 788-89 (Ct. Cl. 1979), *Brown v. United States*, 217 Ct. Cl. 710, 713 (1978); *Trifunovich v. United States*, 196 Ct. Cl. 301, 304, 311 (1971); *Zervas v. United States*, 28 Fed. Cl. 66, 68 (1993); *Adde v. United States*, 81 Fed. Cl. 415, 419 (2008). Accordingly, there is no question regarding this court's jurisdiction over the case *sub judice*.

At issue instead is the viability of plaintiff's claim under the DSSR. The relevant regulations provide, as follows:

> 0.31.12 Employees Recruited Outside the United States
>
> Quarters allowances . . . may be granted to employees recruited outside the United States, provided that:
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> a. the employee's actual place of residence in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his/her employment by the United States Government; and
>
> b. prior to appointment, the employee was recruited in the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the former Canal zone, or a possession of the United States by:
>
> (1) the United States Government, including its Armed Forces;
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> (2) a United States firm, organization, or interest;
>
> (3) an international organization in which the United States Government participates; or
>
> (4) a foreign government
>
> and had been in substantially continuous employment by such employer under conditions which provided for his/her return transportation to the United States, the commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the former Canal Zone, or a possession of the United States.

DSSR § 031.12.

Plaintiff's complaint concedes that this regulation governs his eligibility for LQA. Defendant, however, asserts that plaintiff's situation with CACI did not satisfy the requirements of the regulation for two reasons.

Defendant first contends that plaintiff was not recruited by CACI while in the United States or in any of the other places identified in § 0.31.12b., but rather was recruited while working in the Netherlands. Plaintiff's complaint, however, avers otherwise. It explains that plaintiff was living in South Carolina at the time the offer of employment was made – a contention that is supported by the offer itself (attached to the complaint), which is addressed to plaintiff's address in Summerville, South Carolina. Moreover, the complaint further avers that the relocation agreement refers to The Netherlands only because plaintiff had joined his wife there while awaiting finalization of his agreement with CACI. If these facts are true – and, for purposes of this motion, the court must presume them so – then defendant is wrong in contending that plaintiff has not satisfied the first prong of the DSSR regulation.

Defendant next contends that plaintiff's original relocation agreement with CACI did not provide for his return transportation to the United States, but rather authorized only "payment or reimbursement of expenses associated with [his] relocation of his residence from the Vaesrade, The Netherlands area to Heidelberg, Germany." Defendant notes that in an electronic message attached to his complaint, Mr. Urban conceded this point, indicating to a CACI official that "[m]y current relocation agreement does not specify my entitlements back to the United States upon my completion of my employment with CACI." Plaintiff, however, cites a subsequent electronic message received from a CACI official, in which the latter stated that "CACI will honor your relocation rights to your home of record in South Carolina in accordance with the CACI Relocation Agreement after you have completed twelve months of satisfactory service against the contract." Defendant claims that this message did not amend the original relocation agreement because that agreement stated that amendments thereto had to be in writing and signed by Mr. Urban and all management levels approving the original agreement. But, in his complaint, plaintiff avers that the electronic message from the CACI official did not amend the relocation agreement, which dealt only with his travel at the outset of his job with CACI, but rather evidenced a new agreement that focused on an entirely different subject – reimbursement for his return transportation to South Carolina at the conclusion of his job. Defendant would construe this agreement otherwise, but again bases its arguments on factual assertions that are inconsistent with the factual assertions made in plaintiff's complaint.[2] And the court cannot give defendant's contrary assertions credit. *American Satellite Co. v. United States*, 20 Cl. Ct. 710, 713 (1990) (quoting *Wolman v. Tose*, 467 F.2d 29, 34 (4th Cir. 1972)) ("The construction of a contract is a question of fact which, if disputed, is not susceptible of resolution under a motion to dismiss for failure to state a claim."); *see also Novoneuron Inc. v. Addiction Research Institute, Inc.*, 2009 WL 1132344, at *507-08 (11th Cir. April 28, 2009); *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 663 (2d Cir. 1996).

[2] For example, defendant asserts that the electronic message from the CACI official references the CACI relocation agreement and thus must be viewed as relating to the same subject matter. But, plaintiff avers that this reference merely was intended to incorporate the provisions of the relocation agreement that dealt with the categories and amounts of relocation expenses that were recoverable. At the least, the contract in question is ambiguous in this regard, thereby preventing the court from deciding this issue in defendant's favor as a matter of law.

Based on the foregoing, the court concludes that plaintiff's complaint states a claim under the relevant regulation. Accordingly, the court hereby **DENIES** defendant's motion to dismiss under RCFC 12(b)(6). On or before October 21, 2011, defendant shall file an answer to plaintiff's complaint.

IT IS SO ORDERED.

s/ Francis M. Allegra
Francis M. Allegra
Judge