In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 03-2654
(Filed July 28, 2005)

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ERLINDA ANDRES, *
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Plaintiff, *
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v. *
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THE UNITED STATES, *
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Defendant. *
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MEMORANDUM OPINION AND ORDER

On November 12, 2003, the plaintiff, a former employee of the United States Postal Service, filed a complaint in this Court, *pro se*, seeking approximately $55,000 that she claims was either illegally exacted from her or that she is entitled to for the defendant's breach of contract. The defendant has filed a motion to dismiss the plaintiff's illegal exaction claims under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC") for failure to state a claim upon which relief can be granted and to dismiss the plaintiff's breach of contract claim under RCFC 12(b)(1) for want of subject matter jurisdiction. For the following reasons the defendant's motion to dismiss for failure to state a claim and for want of subject matter jurisdiction is **GRANTED**.

I. BACKGROUND

The plaintiff worked as a Part-time Flexible clerk ("PTF") for the United States Postal Service until her retirement on January 31, 2001. Compl. ¶ 3. On May 22, 1999, the plaintiff and seven other PTFs, acting through the American Postal Workers Union ("APWU") pursuant to the applicable collective bargaining agreement, filed a grievance complaining that the Postal Service should have converted their status from PTF to Full-time Regular ("FTR"). *Id*. at ¶ 6. The APWU certified the matter for arbitration, and Arbitrator John R. Fletcher held a hearing on January 5, 2001. *Id*. at ¶ 7. On February 8, 2001, eight days after the plaintiff retired, the arbitrator issued an opinion and award sustaining the grievance, which the plaintiff attached to the Complaint as Exhibit 1. *Id*. at ¶ 8. In the arbitrator's opinion he stated that

> In conclusion we find that APWU has made a convincing case that seven FTR jobs be crafted from PTF hours. Accordingly, we will order that this be promptly accomplished. . . . The grievance is sustained. Seven PTF's shall be converted to FTR and made whole for wage and benefit losses experienced because they were in a PTF status rather than a FTR status.

Pl.'s Ex. 1 at 16 (footnote omitted). The opinion also contained a footnote that stated that "[t]he eighth FTR job requested, the one working different times on different days, is considered too speculative to warrant conversion on this record." *Id*. at 16 n.4.

According to the plaintiff this award was personal to her, and entitled her to an award of "wages and benefits losses" calculated on the number of hours she worked. Compl. ¶ 12. However, the Postal Service did not compensate the plaintiff for wage and benefit losses; rather, the Postal service compensated the first seven PTF's on the seniority list who were employed at the Kenosha, Wisconsin facility on February 8, 2001, the date of the arbitrator's decision. *Id*. at ¶ 16. The plaintiff had, of course, retired on January 31, 2001. *Id*. at ¶ 3.

Thus, the plaintiff brought suit in this Court seeking to be made "whole for wages and benefit losses experienced because she was in a PTF status rather than a FTR status." Compl. at ¶ 18 (internal quotations omitted). It is the plaintiff's contention that the award to the eighth person on the list directly contradicts the arbitrator's statement in footnote four that an award to the eighth person on the list would be "too speculative." *Id*. at ¶ 20. The Postal Service on or about February of 2001 paid the eighth person on the list approximately $16,000. *Id*. at ¶ 21. According to the plaintiff that money should have gone to her along with an additional $39,000 for the additional hours the plaintiff worked. *Id*. at ¶ 22. By failing to pay the approximately $55,000 the plaintiff asserts she was awarded by the arbitrator, the plaintiff claims the Postal Service illegally exacted money from her and that the Postal Service breached the APWU's collective bargaining agreement. *Id*. at ¶¶ 23–43.

II. DISCUSSION

A. Standard of Review

In ruling on a motion to dismiss under RCFC 12(b)(1) or RCFC 12(b)(6), the Court is generally "obligated to assume all factual allegations to be true and to draw all reasonable inferences in the plaintiff's favor." *Hecke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974)). Under RCFC 10(c) "any written instrument which is an exhibit to a pleading is a part thereof for all purposes."[1] RCFC 10(c); *see also Morris v. United States*, 33 Fed. Cl. 733, 746 n.11 (1995) ("[d]ocuments accompanying a

[1] Accordingly, the Court may consider the copy of the arbitrator's decision that was attached to the Complaint.

complaint are considered part of the complaint and, thus, may be considered under a motion to dismiss"); *Kinnucan v. United States*, 25 Cl. Ct. 355, 356-57, n.1 (1992) (same). A motion to dismiss under RCFC 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, on a motion to dismiss under RCFC 12(b)(1) the "[p]laintiff bears that burden of showing jurisdiction by a preponderance of the evidence." *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002); *see also Thomson v. Gaskill*, 315 U.S. 442, 446 (1942).

B. Plaintiff's Illegal Exaction Claims

The plaintiff has asserted four separate counts styled as illegal exactions: 1) an illegal exaction contrary to statute, 2) an illegal exaction contrary to regulations, 3) an illegal exaction contrary to arbitration award, and 4) an illegal exaction contrary to the collective bargaining agreement. *See* Compl. at ¶¶ 23–39. An illegal exaction occurs where a "plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 605 (1967), *cited in Aerolineas Argentinas v. United* States, 77 F.3d 1564, 1572–73 (Fed. Cir. 1996). Thus, an illegal exaction claim has two elements: 1) that money was taken by the Government; and 2) that the exaction violated a provision of the Constitution, a statute, or a regulation.

Even if the plaintiff were able to demonstrate that the Postal Service had violated a provision of the Constitution, a statute, or a regulation, the plaintiff would fail to state a claim for an illegal exaction as the plaintiff has not "paid money over to the Government, directly or in effect." *Eastport*, 178 Ct. Cl. at 605. The plaintiff does not claim that she paid money over to the Government *directly*; rather, she claims that she has *in effect* paid money to the Government. Pl.'s Resp. at 6. The plaintiff is basing her claim on an misreading of the "directly or in effect" language in *Eastport*. The plaintiff asserts that the Postal Service, by not paying her the money she claims she was awarded by the arbitrator's decision, has "in effect" required her to pay money over to the Government. However, the "in effect" language of *Eastport* does not apply to the plaintiff's claims.

The Court of Claims' statement in *Eastport* that the exaction may be "in effect" has generally been held to apply to two situations. The first situation occurred in *Aerolineas*, where the Government required an airline to pay to money to a third non-governmental party. *Aerolineas*, 77 F.3d at 1569–70. The plaintiffs in *Aerolineas* were required to pay the cost of hotel rooms, meals, twenty-four hour security guards, and medical and other expenses, while passengers and stowaways on their airlines awaited asylum rulings. *Id*. The Federal Circuit ruled that if the airlines "made payments that by law the [INS] was obligated to make, the government has 'in its pocket' money corresponding to the payments that were the government's statutory obligation [and a case] can be maintained . . . for recovery of the money illegally

required to be paid on behalf of the Government." *Id.* at 1573–74. The second situation in which the "in effect" language has been applied is where the Government took property from the plaintiff and then sold the property, receiving money in return. *Bowman v. United States*, 35 Fed. Cl. 397, 401 (1996) (stating that "cases such as the instant one -- where the Government exacts property which it later sells and for which it receives money -- must necessarily qualify for consideration under the established illegal exaction jurisdiction"). Thus, the "in effect" language has generally only applied where the Government has required a plaintiff to pay money to a third party in contravention of the Constitution, a statute or a regulation, or where the Government has taken a plaintiff's property and converted that property into money, preventing the return of the illegally-taken property.

Neither of those situations are present in the case at bar; rather, the plaintiff seeks back pay she claims the Postal Service was required to pay her as the result of an arbitrator's decision. The plaintiff is not seeking the return of money that she paid over to the government, which the government is obligated to return. Were the plaintiff's theory of illegal exaction correct, an illegal exaction would lie in almost every case that comes before this Court.[2] For example, every successful back pay claim this Court hears could also be characterized as an illegal exaction were the plaintiff's theory correct, as the Government, by not paying the claimant the back pay they were owed, held the claimant's money in its pocket. The same could be said of a breach of contract claim, as the Government would be holding the money it allegedly owed the government contractor in its pocket. However, what distinguishes an illegal exaction from a back pay or breach of contract claim, is that in an illegal exaction case the claimant has paid money over to the Government that he once had in his pocket, and in a back pay or breach of contract claim the claimant is seeking payment of money the claimant has never received. In short, the plaintiff's theory of illegal exaction is incorrect. Accordingly, as the plaintiff never paid the Government any money, directly or in effect, she does not have an illegal exaction claim. Therefore, the defendant's motion to dismiss for failure to state a claim is GRANTED.

C. Plaintiff's Breach of Contract Claim

In addition to the plaintiff's claims for an illegal exaction, the plaintiff also alleges that the Postal Service's failure to pay her as directed in the arbitrator's opinion and award constitutes a breach of contract, namely the collective bargaining agreement between the union and the Postal Service. Compl. at ¶¶ 40–43.[3] The defendant has moved to dismiss this claim for lack of

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[2] Tax refund suits, of course, "fit snugly within the category of so-called 'illegal exaction cases,' defined by the Court of Claims in its seminal decision in *Eastport*." *Usibelli Coal Mine v. United States*, 54 Fed. Cl. 373, 376 (2002).

[3] However, the plaintiff seemingly ignores or changes this claim in its opposition brief to the defendant's motion to dismiss. *See* Pl.'s Resp. at 10. The plaintiff claims in its opposition brief that counts four and five of the Complaint are for an illegal exaction contrary to the collective bargaining agreement. *Id.* In the Complaint, though, count five is clearly a count for

jurisdiction over the subject matter. The defendant asserts that cases based on an allegation that the Postal Service failed to abide with an arbitrator's decision made pursuant to a collective bargaining agreement must be brought in a district court, in accordance with 39 U.S.C. § 1208(a). Def.'s Mot. at 5–6; Def.'s Reply at 1. Moreover, the defendant argues that before any court could consider the plaintiff's allegations, the plaintiff would need to establish that her union, the APWU, had failed in its duty of fair representation. *Id*. The Court agrees with the defendant's argument; accordingly, the defendant's motion to dismiss count five of the Complaint for want of jurisdiction is GRANTED.

Section 1208 of title 39, United States Code, provides that "[s]uits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any *district court* of the United States having jurisdiction of the parties, without respect to the amount in controversy." 39 U.S.C. § 1208(b) (emphasis added). Furthermore, section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, which is the private sector equivalent of 39 U.S.C. § 1208, states that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting interstate commerce . . . may be brought in any *district court* of the United States having jurisdiction of the parties without respect to the amount in controversy." 29 U.S.C. § 185(a) (emphasis added). Because the language of 39 U.S.C. § 1208(b) is identical to that of section 301 of LMRA in all relevant respects, cases interpreting section 301 have continually been held to apply to cases covered by 39 U.S.C. § 1208(b). *See, e.g.*, *Miller v. United States Postal Serv*., 985 F.2d 9, 10 n.1 (1st Cir. 1993); *McNair v. United States Postal Serv.*, 768 F.2d 730, 735 (5th Cir. 1985); *National Assoc. of Letter Carriers v. United States Postal Serv*., 590 F.2d 1171, 1176 (D.C. Cir. 1978); *see also Bowen v. United States Postal Serv*., 459 U.S. 212, 232 n.2 (1983) (White, J., dissenting).

The plain language of both 39 U.S.C. § 1208 and section 301 requires that suits for violations of collective bargaining agreements be brought in a district court. Moreover, the courts have held that a suit brought to enforce a favorable arbitration award is a section 301 claim. *See, e.g.*, *Livingstone v. Schnuck Market, Inc*., 950 F.2d 579, 582 (8th Cir. 1991); *Evans v. Einhorn*, 855 F.2d 1245, 1254 (7th Cir. 1988); *Samples v. Ryder Truck Lines, Inc*., 755 F.2d 881, 884 (11th Cir. 1985). Accordingly, as section 39 U.S.C. § 1208 is the Postal Service equivalent of section 301, suits brought by a postal employee to enforce a favorable arbitration award must be brought in a district court. Count five of the plaintiff's Complaint seeks to enforce an allegedly favorable arbitration award, and jurisdiction therefore rests with the district courts; this Court is without jurisdiction to hear the plaintiff's breach of contract claim.

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breach of contract, namely the collective bargaining agreement. *See* Compl. at ¶¶ 40–43. Accordingly, the Court will address count five separately from counts one through four based on the allegation of the Complaint that the defendant breached the collective bargaining agreement. Were the Court to read count five as an illegal exaction, it would be dismissed for failure to state a claim upon which relief can be granted for the same reasons counts one through four were dismissed.

Although the Court has the authority to transfer a case that is not within its jurisdiction to a district court, under 28 U.S.C. § 1631, when the transfer would be in the interest of justice, the Court finds that it would not be in the interests of justice to transfer the plaintiff's case. It appears that even were this case transferred to the district court, the statute of limitations would have run on the plaintiff's breach of contract claim. Under 28 U.S.C. § 1631 a case is considered filed in the court to which it is transferred on the date upon which it was filed in the court from which it is transferred; the plaintiff filed her Complaint in this Court on November 12, 2003. A claim such as the plaintiff's is subject to a six-month statute of limitations, which begins to run when the claimant discovers the acts constituting the alleged violation. *Podobnik v. United States Postal Serv*., 409 F.3d 584, 593 (3d Cir. 2005). Although the Court need not definitively determine this date as the question is not before the Court, the Complaint does state that "on or about February, 2001" the Postal Service paid the eighth PTF on the seniority list rather than the plaintiff. Compl. ¶ 21. Accordingly, it appears highly likely the statute of limitations would bar the plaintiff's case were this Court to transfer the case.

III. CONCLUSION

For the foregoing reasons, the plaintiff's claims for an illegal exaction are **DISMISSED** for failure to state a claim upon which relief can be granted. Furthermore, the plaintiff's claim for breach of contract is **DISMISSED** for want of subject matter jurisdiction. The Clerk is directed to enter judgement in favor of the United States.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge