In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 00-475C
(Filed May 4, 2006)

* *

TECOM, INC., *

Plaintiff, *

v. *

THE UNITED STATES, *

Defendant. *

* *

ORDER

The instant controversy arose on the first day of the trial in this case. The defendant misrepresented the employment status of one of its fact witnesses, whom it designated as its party representative and thereby exempted from the sequestration rule that the government itself invoked. *See* Pre-Trial Conf. Tr. at 27. After plaintiff's counsel informed the Court of the misrepresentation, and the parties submitted initial briefing on the matter, the Court ordered the defendant to show cause why the Court should not order it to pay plaintiff's attorneys' fees and costs resulting from the need to address the effects of this misrepresentation. For the reasons explained below, the Court hereby orders the defendant to pay the attorneys' fees and costs that the plaintiff incurred in response to the misrepresentation.

I. THE MISREPRESENTATION

A. John McCowen as a Party Representative

John McCowen, the individual at the center of the controversy, was one of two witnesses that the defendant called in its case-in-chief. The defendant expressed its intention to use Mr. McCowen as a witness in its original witness list ("Def.'s Wit. List"), and reiterated it in a subsequent amended witness list ("Def's Amend. Wit. List"). However, it is the defendant's

characterization of Mr. McCowen's employment status that has led to the current situation. Mister McCowen[1] is identified as:

> John Mc[C]owen
> Quality Assurance Evaluator
> Peterson AFB, CO

Def. Wit. List at 3. This is an unremarkable description until compared with the others. For example, defendant identifies Mr. Schulte as:

> LTC (Ret.) Schulte
> Commander of Transportation
> Peterson AFB, CO

Id. at 4. Note that Mr. Schulte is identified as being retired whereas Mr. McCowen is not, leaving the inference that Mr. McCowen is still employed by the Air Force in some capacity, whether military or civilian. This problem is further highlighted in the descriptions that follow the names identified in the witness list. Mister McCowen is described as follows: "Mr. McCowen, during the relevant time period was an active duty service member who functioned as a Quality Assurance Evaluator ("QAE") for Fleetpro' [sic] maintenance operation." *Id*. at 3. Compare McCowen's description with that of Mr. Schulte: "During the relevant time period, November 1996-June 1997, LTC (Ret.) Schulte was the commander of transportation services at Peterson AFB." *Id*. at 4. The prefatory language is the same, but the reader is reminded that LTC Schulte is retired. Lest one think that the defendant is merely treating Mr. Schulte with a higher degree of reverence because of his status as a commissioned officer, one need only look at another of the individuals identified by the defendant in its witness list. Mister Paul Banis, also a Master Sergeant at the time of the performance of Tecom's contract, *see Tecom v. United States*, 66 Fed. Cl. 736, 744 (2005), is identified as:

> Paul Banis
> Contracting Officer
> Peterson AFB, CO

Id. at 2. His description reads: "During the relevant time period, Mr. Banis was an active duty service member serving as a contracting officer. *Mr. Banis has since retired*." *Id*. (emphasis added). The "[d]uring the relevant time period" language is common throughout the witness list, but the government identifies Messrs. Schulte and Banis as retired, strengthening the inference

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[1]John McCowen is repeatedly referred to as "John McGowen" by defense counsel in documents leading up to trial. *See* Def.'s Wit. List at 3; Def's Amend. Wit. List at 1. At trial Mr. McCowen stated that his name was spelled McCowen, not McGowen. Trial Tr. at 694. Throughout this Order the Court refers to him as McCowen, even when referring to documents that use the incorrect spelling.

that Mr. McCowen was still an employee. This inference was reinforced when defendant filed its supplemental witness list ("Def. Supp. Wit. List"), identifying, *inter alia*, "Maj. (Ret.) Mark Karzon." Def. Supp. Wit. List at 1. Defendant appeared to consistently use the convention of identifying Air Force personnel who had since left the service as retired, but gave no indication in its filings that Mr. McCowen had left the Air Force's employ.[2]

Whether or not a particular fact witness was still employed by the party calling him to testify would normally be of little consequence, and the failure to describe his current employment status on a witness list would be of no significance. The impression created by these prior filings, however, took on importance at the pre-trial conference held on October 3, 2005. At the conference, defense counsel invoked the rule on exclusion of witnesses, Rule 615 of the Federal Rules of Evidence (FRE):

> MR. AUSTIN:[3] We will have the 615 exclusion of witnesses.
>
> THE COURT: Yes. Should we go -- well, I think maybe we should go through the witnesses first and determine who all will be testifying and then we can assess --
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> MR. AUSTIN: Well, Your Honor, I think I have a general rule that understanding that the party representative can appear in court, but all other witnesses, we would ask that they be excluded until after they have testified.
>
> THE COURT: Okay. I understand that the government is within their right to do that.
>
> MR. NELSON:[4] We have no problem with that.
>
> * * *
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> MR. AUSTIN: Your Honor, from the government's standpoint, *we will have a party representative*, Mr. John Mc[C]owen, and I believe, at least part of the trial, the expert that we have retained. And I don't believe --

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[2] Defendant's response to the Court's Order to Show Cause included a letter addressed to plaintiff's counsel, dated February 12, 2002, which discusses six individuals whom plaintiff sought to depose. Although this letter identified Mr. John McCowen as being retired, the Court does not find that it has any bearing on the representations to the Court, as well as to plaintiff's counsel, over three years later, that Mr. McCowen could properly serve as a party representative.

[3] Michael Austin, Esq., counsel for defendant United States of America.

[4] Karl J. Nelson, Esq., counsel for plaintiff Tecom, Inc.

> THE COURT: The experts cannot be excluded; yes. Who would the person be? John Mc[C]owen?
>
> MR. AUSTIN: Mc[C]owen.
>
> THE COURT: Mc[C]owen, okay.
>
> MR. AUSTIN: Yes, Your Honor.

Pre-Trial Conf. Tr. at 26-27 (emphasis added). Rule 615 states:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

By specifically invoking FRE 615, and designating Mr. McCowen as the party representative, the clear implication of defendant was that Mr. McCowen was still employed by the Air Force. If he was not, then the government would have been attempting to avoid the exclusion of one of its fact witnesses merely by designating the witness as the party representative -- and plaintiff would have been within its rights to object. But, as the Court noted at trial, "it would be hard to fault the Plaintiff for not picking up on the fact that [Mr. McCowen is] retired, since he was not designated as retired in the papers." Trial Tr. at 636.

The plain language of FRE 615(2) limits its exception to "an officer or employee of a party . . . ." It is beyond question that counsel for the defendant was referring to FRE 615(2) during the pre-trial conference when he stated, "from the government's standpoint, we will have a party representative, Mr. John Mc[C]owen . . . ." Pre-Trial Conf. Tr. at 27. Government counsel later argued that Mr. McCowen's presence was essential to the presentation of his case, and thus allowed under FRE 615(3). *See* Def.'s Resp. to Ct.'s Req. for Brf. re FRE 615 at 4. Under FRE 615(3), Mr. McCowen's employment status would not have been relevant, but defendant's counsel did not suggest that FRE 615(3) applied until after the Court had already excluded Mr. McCowen and requested briefing from the parties concerning the matter of Mr. McCowen's presence during the trial. Regardless of its application, the issue is not that McCowen might have been allowed to hear other witnesses' testimony under FRE 615(3), but rather that the misleading identification of McCowen as still being employed by the Air Force prevented the matter from being determined at a more appropriate time, *before* the trial.

B. McCowen's Employment Status

Per the discussion at the pre-trial conference, the trial began with Mr. McCowen seated at the defense table. Mister Austin introduced Mr. McCowen to the Court as the agency representative. Trial Tr. at 15. However, during a brief recess on the first day of trial, Mr. Nelson discovered Mr. McCowen's employment status and informed the Court:

> MR. NELSON: Your Honor, before we proceed with the testimony, I have to report what I perceive anyway to be a serious transgression on the role of witnesses the government asked to impose in this case. Remember in the pretrial conference the government had asked for the rule on witnesses to make sure that no one would be allowed in the courtroom who was not either a party representative or an expert which is a general rule on witnesses?
>
> It turns out during the break that the gentleman sitting to Mr. Austin's right who they're calling their party representative is not employed with or affiliated with the United States Air Force at this point in time. Yet, they are calling him their representative, so he is sitting in here.
>
> He's essentially a fact witness like any other fact witness and has been sitting in here all day long, and you cannot simply designate someone to be your representative who has no relationship with the entity he purports to represent.
>
> THE COURT: Mr. Austin?
>
> MR. AUSTIN: Your Honor, first of all Mr. Nelson didn't cite any case law to support that rule. The rule says a party representative, and as far as I can determine at this quick just first blush, that the Agency has a discretion to nominate anyone whom they feel is to represent them in Court subject to whatever representation the individual might have.
>
> The individual who the Agency has designated however is a retired Master Sergeant in the Air Force who was present at Peterson Air Field during the whole time at issue. Secondly, he is under a contract now with the Air Force to perform the services that he's in fact serving, so if Mr. Nelson's objection goes to no current relationship, he is under contract.
>
> If it goes to the lack of knowledge, that is not in fact true because Master Sergeant Mc[C]ow[e]n retired, was in fact present throughout the period that is at issue, so I see no basis in fact or law for his objection.
>
> MR. NELSON: Your Honor, if I might? First of all, if you accept Mr. Austin's version of the story, he could walk out on the street right now, grab the first passerby and say under the rules of Federal Civil Procedure, you are now our

> party witness. The purpose of the rule is to prevent fact witnesses from sitting through the trial and listening to the testimony.
>
> What we've heard is they basically hired him to be a witness in this case and have taken the position that because they've hired him to come here and be a witness, that somehow makes him a consultant.

Id. at 138-40. The Court did not accept defendant's interpretation of FRE 615 and ruled that Mr. McCowen was to be barred from the courtroom until he testified, just as any other fact witness would be when FRE 615 is invoked. Trial Tr. at 143. The Court gave the parties the opportunity to submit briefs on this point. After reviewing the briefs, the Court found no reason to alter its original position and reaffirmed its decision to exclude Mr. McCowen under FRE 615. Trial Tr. at 635 ("it appears that the government did misrepresent Mr. McCowen's employment status to the Court and to the Plaintiff").

Issues such as the eligibility of a former employee to represent the agency under FRE 615(2) -- or whether a particular fact witness's presence was essential to a party, had the defendant sought the FRE 615(3) exception at the proper time -- are precisely the sort of questions that should be resolved at a pre-trial conference to prevent them from causing an interruption at trial, as occurred here. Regrettably, defendant continued its pattern of misrepresentation even when responding to the Court's request for briefing on the issue of McCowen's presence in the courtroom. Defendant claimed that the plaintiff had waived its right to challenge McCowen's testimony under FRE 615 because plaintiff should have raised any objection it had when McCowen was identified as being retired. Defendant argued:

> At the outset of the trial in this case, we designated Msgt (Ret) McCowen (Ret.) McCowen [sic] as our party representative, and plaintiff's counsel was or should have been aware at that time of his active duty status. Specifically, *we identified his status when making our designation*. Nevertheless, when we made our designation, plaintiff's counsel did not object or otherwise signal that he perceived a problem with our designation. Moreover, plaintiff's counsel did not object at the commencement of trial.

Def.'s Resp. to Ct.'s Req. for Brf. re FRE 615 at 5 (emphasis added). The problem with this argument is that defendant *did not* identify Mr. McCowen's status when designating him as the agency representative, *see* Pre-Trial Conf. Tr. at 26-27, nor did it do so when introducing Mr. McCowen at trial. *See* Trial Tr. at 15. This issue is not a complicated matter of law that would have taken defendant a long time to research, but was a factual matter that could have been resolved by merely reviewing a few pages of the relevant transcripts. Yet instead of doing so, defendant's counsel mistakenly asserted that he had identified Mr. McCowen's duty status (presumably retired, since active duty would have raised no red flag), when he in fact made no such statement. To its credit, defendant later withdrew its waiver argument, *see* Def.'s Resp. to Show Cause Order at 5 n.2, but not before further misleading the Court and further diverting plaintiff's counsel's time and resources in the midst of trial.

II. REMEDY

All judicial bodies inherently have the power to sanction parties, or their attorneys, for failure to conform to their rules or to respect their dignity, or for unnecessarily impeding the tribunals' business. This power is reflected in, but not limited by, Rule 11 of the Rules of the United States Court of Federal Claims (RCFC) (requiring a reasonable inquiry into statements alleged in papers filed), RCFC 16(f) (authorizing sanctions for violations of pre-trial orders), RCFC 37 (authorizing sanctions for failure to cooperate during discovery), and 28 U.S.C. § 1927 (allowing the Court to impose costs upon any attorney who "multiplies the proceedings in any case unreasonably and vexatiously."). As defendant acknowledged in its own papers, *see* Def. Resp. to Show Cause Order at 3-4, when sanctions are at issue, a Court should consider factors such as whether an act "was part of a pattern of activity" and "the effect it had on the litigation process in time and expense." *Id*. at 3-4 (quoting Advisory Committee Notes, 1993 Amendments, FED. R. CIV. P. 11).

The McCowen matter interrupted the trial, forcing the plaintiff to divert precious trial preparation time to what should have been resolved through pre-trial motion practice. Although the Court has little trouble believing that defendant's counsel acted negligently rather than intentionally when proffering Mr. McCowen as a party representative, this error was completely within the defendant's control, and the defendant should bear the costs. The defendant is sanctioned accordingly.

Plaintiff shall file a memorandum of costs, itemizing the additional attorneys' fees and costs it incurred in preparing memoranda and otherwise addressing this matter of the misrepresentation of McCowen's status, on or by May 11, 2006. Defendant may file an objection to any of the items listed on or by May 18, 2006.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge