

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DOE(P),)	
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)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:04CV02122 (GK)
)	
Gen. MICHAEL V. HAYDEN, USAF)	
Director, Central Intelligence Agency,)	
and)	
)	
CENTRAL INTELLIGENCE AGENCY)	
)	
Defendants.)	
)	

**GOVERNMENT DEFENDANTS’ OPPOSITION TO PLAINTIFF’S MOTION TO
RECONSIDER**

Plaintiff’s motion for reconsideration is wholly unjustified and unsupported. There is no “new evidence” at issue, nor does Plaintiff meet any of the other standards for a motion for reconsideration. Defendants’¹ motion to dismiss referred to Plaintiff as a contract employee of the Central Intelligence Agency (“CIA”), much like the Answer. The Court has already determined in its January 12, 2007 order that the Civil Service Reform Act (“CSRA”) applies

¹ Individual defendants James Pavitt, John Doe 1, and John Doe 2 have not yet been served with the Second Amended Complaint, and thus are not presently represented by Government Defendants’ counsel, nor are any claims pertaining to them implicated by the instant motion. The terms “Defendants” or “Government Defendants” in this brief refer only to the CIA and General Hayden.

and precludes Plaintiff's contract, Administrative Procedure Act ("APA"), and Federal Tort Claims Act ("FTCA") claims.² There is no basis to reconsider that decision.

DISCUSSION

As Plaintiff acknowledges, the standard for a motion for reconsideration is a stringent one, as motions for reconsideration are disfavored.³ See Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). A motion for reconsideration should not be granted "unless the district court finds that there is an intervening change in controlling law, the availability of new evidence or the need to correct a clear error or prevent manifest injustice." Id. Plaintiff "must show 'new facts or clear errors of law which compel the court to change its prior position.'" Broudy v. Mather, 335 F. Supp. 2d 1, 5 (D.D.C. 2004) (quoting Nat'l Ctr. for Mfg. Sciences v. Dep't of Def., 199 F.3d 507, 511 (D.C. Cir. 2000) (internal citation omitted)). Plaintiff bases the instant motion for reconsideration on a claim of "new evidence not previously available." Plaintiff's Motion to Reconsider and Vacate the Court's Dismissal of Counts I, III, and V on the Grounds that Plaintiff's Claims Are Precluded by the Civil Service Reform Act ("Mot. to Reconsider") at 2.

² Plaintiff refers to the FTCA claim as Count V. Mot. to Reconsider at 1. However, Count V is the Bivens claim, which was not before the Court in the motion to dismiss briefing because the individual defendants were not served at the time, and, indeed, they have still not been served. The FTCA claim is Count VI. See Second Amended Complaint ("2AC") at ¶¶ 60-63.

³ Plaintiff's motion to reconsider appears to fall under Federal Rule of Civil Procedure 60(b), as motions pursuant to Rule 59 must be filed within 10 days of judgment, and Plaintiff's motion was filed almost two months after the Court's January 12, 2007 Order and Opinion issued. The standard under Rule 60 is even more stringent than the one used to evaluate motions pursuant to Rule 59. See Lemmons v. Georgetown Univ. Hosp., --- F. Supp. 2d ---, 2007 WL 619508 *8 (D.D.C. March 1, 2007) (describing the Rule 60(b) standard as "more demanding" than that of Rule 59(e)).

According to Plaintiff, the “new evidence” is that Defendants’ Answer denies that Plaintiff was an employee and instead contends that Plaintiff was a contract employee.⁴ Id. However, Defendants referred to Plaintiff as a contract employee throughout their motion to dismiss and reply brief. See Memorandum in Support of Defendants’ Motion to Dismiss the Second Amended Complaint (“MTD”) at 3, 15, 27, 28, 31-33; Reply in Support of Defendants’ Motion to Dismiss the Second Amended Complaint (“MTD reply”) at 2, 3, 13, 17-18. Any argument that Plaintiff wanted to raise regarding the status of contract employees under the CSRA should have been raised in the process of briefing the motion to dismiss. A “motion to reconsider is not simply an opportunity to reargue facts and theories upon which a court has already ruled, nor is it a vehicle for presenting theories and arguments that could have been advanced earlier.” Fresh Kist Produce, LLC v. Choi Corp., 251 F. Supp. 2d 138, 140 (D.D.C. 2003). There is nothing new in the answer to justify the reexamination of the Court’s determination that the CSRA precludes Plaintiff’s claims.

Particularly egregious is Plaintiff’s attempt to justify making this argument in a motion to reconsider when the CSRA preclusion argument was wholly conceded in Plaintiff’s opposition to the motion to dismiss. See January 12, 2007 Opinion at 14-15 (noting that Plaintiff did not dispute the CSRA argument with regard to the APA claim), 26 n.17 (same for FTCA claim);

⁴ Plaintiff also appears to rely upon the fact that Defendants do not deny Plaintiff’s averments in Paragraph 31 of the Second Amended Complaint regarding his status as a contractor. Mot. to Reconsider at 2. However, the reason that Defendants did not address those averments is that they relate to claims that had already been dismissed at the time that Defendants filed their answer, and thus there was no reason to respond. See Answer at ¶ 31; Charles Alan Wright and Arthur R Miller, 5 Federal Practice & Procedures § 1279 at 477.

MTD Reply at 17, 18 (noting that Plaintiff did not dispute CSRA argument with regard to contract and FTCA claims).

Defendants specifically argued in their motion to dismiss that the fact that “Plaintiff, as a former contractor for the CIA, is not actually able to pursue a claim under the CSRA for the failure to convert his employment from contract employee to staff employee” does not prevent the CSRA from precluding the claim. MTD at 31. The Court agreed with Defendants. The January 12, 2007 Opinion traces the history and purpose of the CSRA and explains that its preclusive effect can still come into play, even for those who cannot take advantage of CSRA remedies. See January 12, 2007 Opinion at 8-13. Thus, the issue raised in Plaintiff’s motion for reconsideration was before the Court and ruled upon. Plaintiff provides no basis for re-examination, nor does he offer any legal analysis that should alter the Court’s decision.

Plaintiff does not deny that, even though CIA employees cannot avail themselves of the CSRA, the CSRA still acts to preempt employment claims such as those in Counts I, III, and VI. Rather, Plaintiff contends that the CSRA does not apply to contractors. Mot. to Reconsider at 3. Plaintiff does not cite a single case holding that contract employees are not subject to CSRA preclusion. Moreover, Plaintiff is confusing the role of an independent contractor, who is self-employed, hired for a specific temporary purpose, and receives no benefits from the contracting agency, see generally, Black’s Law Dictionary (8th ed. 2004); 30 C.J.S. Employer—Employee § 13, with that of a contract employee, who receives the benefits of being a federal employee, as Plaintiff did. Answer ¶¶ 1, 16; Mot. to Reconsider at 2 (describing the Answer). As a CIA contract employee, Plaintiff is patently subject to CSRA preclusion, as this Court has already held in its January 12, 2007 Opinion. Cf. Afshari v. Leavitt, No. 1:05-CV-127, 2006 WL

3030323 *4-7 (N.D.W. Va. Oct. 23, 2006) (finding that claims of service fellows, who contended that their appointments were contractual in nature and therefore excepted from the CSRA, were subject to CSRA preclusion because they were appointed employees of a federal agency).

Furthermore, each of the dismissed claims fails for reasons beyond CSRA preclusion. The Court did not need to resolve the other arguments made by Defendants because the claims were properly dismissed on jurisdictional grounds. Should the Court elect to entertain the motion to reconsider, it would then logically look to the other arguments advanced by Defendants, which would still justify the dismissal of each of these claims. To briefly review, the contract claim fails because Plaintiff has no right to have his contract renewed. MTD at 32-33; MTD Reply at 17-18. Plaintiff's FTCA claim fails because there is no analogous tort claim in D.C. law and, to the extent it is interpreted as a misrepresentation, interference with contract, or negligent administration of records claim, such claims are unavailable under the FTCA in this district. MTD at 28-30; MTD Reply at 15-17. Plaintiff's APA claim fails because it is not adequately pleaded, Plaintiff lacks standing to challenge the regulations at issue, and there is no available relief for Plaintiff's claim. MTD at 18-28; MTD Reply at 10-15. Thus, Plaintiff's claims should be dismissed, in any event.

CONCLUSION

Because there is no "new evidence" upon which to predicate a motion to reconsider, Defendants respectfully request that this motion be denied.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JEFFREY A. TAYLOR
U.S. Attorney for the District of Columbia

/s/

ELIZABETH J. SHAPIRO
MARCIA N. TIERSKY, Ill. Bar 6270736
Trial Attorney
Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Ave., N.W. Room 7206
Washington, D.C. 20530
(202) 514-1359
Fax (202) 318-0486
marcia.tiersky@usdoj.gov

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[PROPOSED] ORDER

Upon consideration of Plaintiff’s Motion to Reconsider and Vacate the Court’s Dismissal of Counts I, III, and V on the Grounds that Plaintiff’s Claims Are Precluded by the Civil Service Reform Act, and the entire record in this case, it is hereby

ORDERED that Plaintiff’s motion is denied.

SO ORDERED.

Dated: _____

Gladys Kessler
United States District Judge