UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

DOE (P),[1]	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 04 CV 2122 (GK)
	)	
Hon. MICHAEL HAYDEN, *et al.*	)	
	)	
Defendants	)	

PLAINTIFF S REPLY IN SUPPORT OF HIS MOTION TO RECONSIDER

Defendants have filed an opposition (Def.Opp.) to Plaintiff s Motion to Reconsider (Plaintiff s Motion) based upon their contentions that Plaintiff has not presented sufficient new evidence to warrant reconsideration, that Plaintiff has wholly conceded the preclusive effect of the Civil Service Reform Act (CSRA), and that the CSRA applies to contractors as well as employees. Defendants arguments misconstrue applicable law and facts.

First, Defendants insist that the averment in their Answer that Plaintiff was at all times a contract employee does not constitute the requisite new evidence necessary for a motion to reconsider because he was so characterized throughout their Motion to Dismiss. (Def.Opp. at 2-3). Defendants ignore that a motion to dismiss under Rule 12(6), Fed.R.Civ.Proc., does not constitute a pleading under Rule 7(a), Fed.R.Civ.Proc. A motion to dismiss in response to a complaint is not a pleading. *Mellon Bank, N.A. v. Ternisky,* 999 F.2d 791 (4th Cir.1993); *see, also, United States v, Plant,* 56 F.R.D. 613 (D.C.Ark. 1972)*; Bigelow v. RKO Radio Pictures,* 16 F.R.D. 15 (N.D.Ill.1954). Therefore, because a motion to dismiss must assume all factual

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[1] The notation (P) indicates that the preceding name is a litigation pseudonym for a covert employee of the Central Intelligence Agency.

averments in the Complaint as true, it cannot make its own counter-factual averments. By contrast, an Answer does constitute a pleading under Rule 7(a), and its averments or failures to deny allegations in a complaint are considered admissions. Hence, despite the argument of Defendants, Plaintiff, who believed and was told that he was a staff employee, had no evidence that he was a contractor until service of Defendants Answer. Plaintiff s Motion is therefore properly brought on the grounds of new evidence presented in Defendants Answer.[2]

Second, Defendants contend that Plaintiff conceded that CSRA preclusion was conceded during his opposition to Defendants Motion to Dismiss, citing to this Court s January 12, 2007 Opinion (Opinion) at 14-15. (Def.Opp. at 3-4).

This is a far cry from what Plaintiff conceded and what the Court ruled. The Court noted that even though Plaintiff did not address Defendants CSRA preclusion claim, it would nonetheless address the claim on the merits (Opinion at 15) and dismissed the claim only on the grounds that Plaintiff did not allege a Constitutional violation of the Administrative Procedure Act (APA), merely violations of Defendants own regulations. (Opinion at 17). Quite simply, Plaintiff s Opposition to Defendants Motion to Dismiss was filed in the absence of Defendants judicial admission that Plaintiff was a contractor, not an employee, and would have raised different counter arguments had Plaintiff been aware of this fact.

Finally, Defendants argue that CIA contractors are encompassed by the CSRA and that Plaintiff confuses an independent contractor with a contract employee. (Def.Opp. at 4-5). As

[2] Defendants convoluted contention that Plaintiff s Motion is not timely brought under Rules 59 & 60(b), Fed.R.Civ.Proc., is irrelevant. (Def.Opp. at 2 n.3). Defendants Answer was filed on February 28, 2007 [Doc. 63]. Plaintiff s Motion was filed on March 6, 2007 within eight days thereafter, timely by any standard.

an initial matter, one cannot be both a contractor, in the strict sense of the term, and an employee for the same master or principal, for the same task at the same time. A person is either a contractor or an employee. Circumstances may indicate that a person is an employee for one purpose and a contractor for another. 30 C.J.S. Employer-Employee § 6. Their status may be determined by the terms of the contract, if any, the conduct of the parties and all surrounding circumstances. *Eldridge v. McGeorge,* 99 F.2d 835, 840 (8th Cir.1938).

What Defendants confuse are contracts for employment under which certain terms may be bargained for by the parties, often including a provision prohibiting immediate termination without cause, rights a typical employee would not possess. 30 C.J.S. Employer-Employee § 21. Under the terms of such contract one party may be otherwise treated as an employee. An example would be collective bargaining agreements negotiated by unions. In the instant action, however, Defendants have merely avered that Plaintiff was a contractor/employee without any supporting specifics as to the existence of any contract, its terms, duration, etc. One is therefore compelled to the conclusion that Plaintiff was simply a contractor to the CIA and not an employee.[3]

Respectfully submitted,

_________/s/_____________

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[3] Defendants also point to *Afshari v. Leavitt,* No. 1:05CV127, 2006 WL 3030323 *4-7 (N.D.W. Va. Ocxtober 23, 2006) as evidence that contractors are encompassed with the CSRA. However, the facts of *Afshari* indicate otherwise, as the plaintiffs therein were both specifically appointed as Civil Service Fellows, *id.,* clearly within the CSRA which Plaintiff herein was not.

CERTIFICATE OF FILING

I, Roy W. Krieger, do hereby certify that a true and correct copy of the foregoing was electronically filed this 5th day of April, 2007.

_______________/s/___________
Roy W. Krieger