

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

STEPHEN GILL and )  
MICHELLE GILL, )  
Plaintiffs, )  
 )  
v. ) C.A. No. 05-10309-MLW  
 )  
 )  
UNITED STATES OF AMERICA )  
Defendant. )

MEMORANDUM AND ORDER

WOLF, D.J.

September 25, 2009

I. SUMMARY

This case arises from Stephen and Michelle Gill's ("the Gills'") claims against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§1346(b); 2401(b)-2402; 2671-2680, et seq. Stephen Gill alleges claims of negligent and intentional infliction of emotional distress and seeks \$750,000 as damages. Michelle Gill seeks \$375,000 for loss of consortium, service, and marital society.

The government has moved to dismiss or stay the action on the grounds that the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 et seq., deprives the court of subject matter jurisdiction. The government has also moved to strike the Gills' opposition to the motion to dismiss or stay the action because the opposition was filed outside of the 14 day response period allowed by Rule 7.1(B)(2) of the Local Rules of the United States District Court for the District of Massachusetts ("L.R.").

For the reasons set forth below, the motion to strike is being denied, the motion to dismiss or stay is being allowed, and the case is being dismissed without prejudice.

## II. FACTS AND PROCEDURAL BACKGROUND

The Gills allege that Stephen Gill was recruited and hired to work for the Naval Legal Services Command ("NLSC") and/or Naval Legal Service Office Central ("NLSO") in February, 2002. Amended Compl. ¶11. Mr. Gill was to serve as a Claims Attorney-Advisor under a personal services contract for a two-year period. Id. This prompted Mr. Gill to leave his job in Boston, sell his home, and relocate his family to Pensacola, Florida. Id. ¶13. Within forty-five days of the beginning of his employment, Mr. Gill was informed that the position would conclude one month later, on June 30, 2002. Id. ¶15. Thereafter, his employment was continued through a series of unpredictable extensions, first to September 30, 2002, then to October 31, 2002, and finally for a six-month period through April, 2003. Id. ¶¶18-21. This final extension induced Mr. Gill to reject an employment offer from a different employer. Id. ¶21-22. The Gills allege that the final extension was not honored and that Mr. Gill's employment ended on January 11, 2003. Id. ¶23.

Mr. Gill claims damages for emotional distress, including stress and anxiety, fatigue, sleeplessness, feelings of despair, concentration problems, difficulty driving and working, reduced libido, and dysthymia. Id. ¶25.

On January 9, 2006, the court dismissed this case without prejudice to allow the Secretary of Labor to determine whether plaintiffs were entitled to compensation under FECA. See Jan. 9, 2006 Order. The dismissal was affirmed by the First Circuit, Gill v. United States, 471 F.3d 204 (1st Cir. 2006), and the Supreme Court denied certiorari, Gill v. United States, 128 S.Ct. 45 (2007). On July 13, 2007, the Secretary of Labor, through the Office of Workers' Compensation Programs ("OWCP"), issued a decision denying the FECA claim because Stephen Gill was not a civil employee as defined by the FECA, and this decision was affirmed by the Branch of Hearings and Review ("BOHR"). See January 18, 2008 Notice of Decision, Ex. B to Opp'n to Def.'s Mot. to Dismiss or Stay ("Opposition"). On February 29, 2008, plaintiffs' motion to reopen this case was granted. See Feb. 29, 2008 Order.

On November 24, 2008, the OWCP notified Gill that it had received new evidence and was vacating the January 18, 2008 decision of the BOHR and returning his case to an examiner for a de novo decision. See Nov. 24, 2008 Notice of Decision, Ex. A to Mem. of Law in Support of the United States's Mot. to Dismiss or, in the Alternative For a Stay ("Mem. for Mot. to Dismiss or Stay"). According to the government, OWCP learned that, when a NLSO supervisor stated on Mr. Gill's Form CA-2 that "Mr. Gill was not a federal employee nor was employed with [NLSO] during this time," the supervisor intended that the phrase "this time" refer only to June 30, 2004 (the date Mr. Gill listed on the form as the date he

became aware of his disease or illness) and not to any time in 2002 or 2003 (the time Mr. Gill alleges he worked at NLSO). See Mem. for Mot. to Dismiss or Stay at 4-6. The government states that OWCP then realized that OWCP's exclusive reliance on the Form CA-2 to evaluate Mr. Gill's employment status during 2002 and 2003 was misplaced. See id. The government asserts that OWCP has since made a more complete review of Gill's employment record. See id. at 6. OWCP has notified Gill that on the basis of the new evidence, "the preponderance of evidence now supports that you were a 'civil employee' at the time of the claimed injury." Nov. 24, 2008 Notice of Decision, Ex. A to Mem. for Mot. to Dismiss or Stay, at 3.

The government filed its Motion to Dismiss or Stay pursuant to Fed. R. Civ. P. 12(b)(1). It argues that this court lacks subject matter jurisdiction because OWCP's decision to vacate its earlier decision and initiate de novo review raises a substantial question of compensability under FECA. See Mem. for Mot. to Dismiss or Stay at 11.

The Gills filed an Opposition, which the government moves to strike. Defendant's Motion to Strike Plaintiffs' Opposition to Defendant's Motion to Dismiss or Stay (Docket No. 47) ("Motion to Strike"). The government argues that the Gills filed the Opposition 17 days after the Motion to Dismiss or Stay and, therefore, exceeded the 14 day response period allowed by Local Rule 7.1(B)(2).

### III. DISCUSSION

#### A. Motion to Strike

The Gills did file the Opposition 17 days after the Filing of the Motion to Dismiss or Stay. They argue that the period should actually be calculated to provide them 17 days to make a filing. They assert that Federal Rule of Civil Procedure 6(d) instructs that three additional days should be added when service is made using the court's transmission facilities, such as CM/ECF, under Federal Rule of Civil Procedure 5(b)(3). They also ask that, if the court does decide that their Opposition was filed three days late, it excuse the mistake.

The government is correct that the time in which to file an opposition to a motion is 14 days. See L.R. 7.1(b)(2) ("The fourteen day period is intended to include the period specified by the civil rules for mailing time and provide for a uniform period regarding the use of the mails."). In this case, however, the Gills misunderstood the calculation of the period. The court has discretion not to strike an opposition to a dispositive motion because the filing was three days late due to a good faith misunderstanding. See Perry v. Wolaver, 506 F.3d 48, 56 n.10 (1st Cir. 2007) (stating, in regard to the question of whether to accept an opposition to a motion for summary judgment filed seven days late, "we generally defer to the district court's broad discretion in assessing such case management decisions"); Bennett v. City of Holyoke, 362 F.3d 1, 4 (1<sup>st</sup> Cir. 2004) ("[C]ourts are permitted, when

appropriate to accept late filings caused by inadvertence or mistake.").

In Perry, the First Circuit noted several factors contributing to the decision to accept the late filing. See 506 F.3d at 56 n.10. It noted "(1) the [filing party] had not missed any previous deadlines; (2) the [filing party] had responded promptly upon learning of their error; (3) there was no hint of bad faith or intent to delay, and (4) there was no prejudice to [opposing party]." Id. In this case, all of these factors are present. The court, therefore, will not strike the Gills' Opposition.

#### B. Motion to Dismiss or Stay

Federal Rule of Civil Procedure 12(b)(1) allows a party to raise a defense of "lack of subject-matter jurisdiction" by motion to dismiss. The burden of proof in a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. See Aversa v. United States, 99 F.3d 1200, 1209 (1st Cir. 1996). Where a court decides a Rule 12(b)(1) motion on the pleadings, it must "construe the Complaint liberally and treat all well-pleaded facts as true, according the plaintiff the benefit of all reasonable inferences." Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995). However, a plaintiff "may not rest merely on unsupported conclusions or interpretations of law." Id. (citation and internal quotation marks omitted).

The court is not required to decide a motion to dismiss on the pleadings alone and may "direct limited discovery and . . . make

such factual findings as are necessary to determine its subject matter jurisdiction." Rivera-Flores v. Puerto Rico Telephone Co., 64 F.3d 742, 748 (1st Cir. 1995).

The relevant facts are not in dispute. The Gills argue that the OWCP's decision to reconsider its FECA determination is unlawful. They do not dispute the fact that OWCP has decided to rehear the claim. The situation before the court now is substantially similar to that addressed in the January 9, 2006 Order dismissing the case without prejudice. While the question of FECA applicability remains open, the court lacks subject matter jurisdiction over the Gills FTCA claim.

As the First Circuit explained in the Gills' previous appeal, "[l]iability under FECA is exclusive and instead of all other liability of the United States . . . . The Act specifically excludes liability under a Federal tort liability statute." Gill, 471 F.3d at 206 (citation and internal quotation marks omitted); see also Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193-94 (1983) (stating that employees covered under FECA "lose the right to sue the government"); Bruni v. United States, 964 F.2d 76, 78 (1st Cir. 1992) ("The [FECA] provides the exclusive avenue of redress for a federal employee's injury sustained while in the performance of his[/her] duty. The liability imposed by FECA supplants all other liability (including tort liability under the FTCA or other statutes) on the part of the United States to an injured federal employee." (citing 5 U.S.C. §8102)(internal

quotation marks omitted)).

Thus, "[a]n injured employee may not bring an action against the United States under the FTCA when there is a substantial question as to whether or not the injury occurred in the performance of the employee's duty." Bruni, 964 F.2d at 78 (internal quotations omitted). "[A] federal employee who brings tort claims against the United States must first seek and be denied relief under the FECA unless his/her injuries do not present a substantial question of compensability under [FECA]." Gill, 471 F.3d at 206 (quoting Bruni, 964 F.2d at 79). "Resolution of the [FECA] coverage question has been entrusted to the Secretary of Labor." Bruni, 964 F.2d at 79. "A substantial question exists unless it is certain that the Secretary would not find coverage." Id.; see also Gill, 471 F.3d at 207.

In designating the Secretary of Labor to determine the scope of FECA coverage, the statute states:

The action of the Secretary or his designee in allowing or denying a payment under this subchapter is -

- (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
- (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. §8128(b). Accordingly, this court cannot question or look behind the OWCP's decision to vacate its prior determination and to reconsider the question of FECA coverage. See Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 90 (1991) ("FECA contains an

unambiguous and comprehensive provision barring any judicial review of the Secretary of Labor's determination of FECA coverage."); Gill, 471 F.3d at 207-08 ("Every circuit addressing the issue has held that federal courts lack jurisdiction to decide uncertain questions of FECA coverage."). Indeed, the First Circuit has recognized "only one exception to FECA's clear mandate prohibiting judicial review: where the plaintiff makes a specific and substantive claim of the deprivation of his constitutional rights." Cooper v. Chao, 71 Fed. App'x 76, 77 (1st Cir. 2003) (per curiam) (citing Paluca v. Secretary of Labor, 813 F.2d 524, 527 (1st Cir. 1987)).

In this case, the Secretary of Labor, through the OWCP, has vacated its prior decision and is reconsidering whether Gill was a civil employee at the time of the alleged injury and, thus, whether the FECA is applicable. See November 24, 2008 Notice of Decision, Ex. A to Mem. for Mot. to Dismiss or Stay. As a matter of law, it cannot be said that it is "certain that the Secretary would not find coverage." Bruni, 964 F.2d at 79. The decision has yet to be made, and, in fact, the OWCP has stated that "the preponderance of evidence now supports that you were a 'civil employee' at the time of the claimed injury." Nov. 24, 2008 Notice of Decision, Ex. A to Mem. for Mot. to Dismiss or Stay at 3. The Gills raise no "specific and substantive" constitutional objection to OWCP's

decision to vacate its prior decision.<sup>1</sup> Accordingly, this court lacks subject matter jurisdiction over the Gills' claims. See Gill, 471 F.3d at 206; Bruni, 964 F.2d at 79. Although Gill has sought relief under FECA, the OWCP's pending reconsideration of his claim means that he has not yet been denied relief.

#### IV. ORDER

Accordingly, it is hereby ORDERED that:

1. Defendant's Motion to Strike Plaintiffs' Opposition to Defendant's Motion to Dismiss or Stay (Docket No. 47) is DENIED.

2. Defendant's Motion to Dismiss or in the Alternative for a Stay (Docket No. 44) is ALLOWED.

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<sup>1</sup> The Gills make one reference to the government "tramp[ing] Mr. Gill's due process rights" in the "Procedural History" section of their opposition brief. See Opposition at 8. This passing reference is inadequate to raise a constitutional objection because, as the First Circuit has repeatedly held, "arguments raised only in a footnote or in a perfunctory manner are waived." See Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 61 n.17 (1st Cir. 1999) (collecting cases), aff'd sub nom., Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); see also Coopersmith v. Lehman Bros., Inc., 344 F.Supp.2d 783, 790 n.5 (D. Mass. 2004).

As the court has determined that it lacks subject matter jurisdiction, the court must dismiss this case rather than stay the proceeding pending the Secretary of Labor's determination of FECA coverage. See Fed. R. Civ. P. 12(h)(3). However, if the Secretary of Labor does not decide in a timely manner whether Mr. Gill is covered by FECA, the Gills may move for reconsideration of this Order. See Fed. R. Civ. P. 60(b). In doing so, the Gills may raise and brief any argument that the Secretary of Labor's decision to vacate the earlier determination has deprived Mr. Gill of his constitutional right to due process.

3. This case is DISMISSED without prejudice to refiling if the Secretary of Labor decides that the FECA does not cover the plaintiffs' claims.

          /s/ Mark L. Wolf            
UNITED STATES DISTRICT JUDGE