

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

KATHRYN L. KERSHNER,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.: 02-1887 (RMU)
v.	:	
	:	Document No.: 15
GALE A. NORTON, Secretary of the	:	
Department of the Interior,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

DENYING THE PLAINTIFF’S MOTION TO ALTER THE TRANSFER ORDER

I. INTRODUCTION

Plaintiff Kathryn L. Kershner alleges employment discrimination by defendant Gale A. Norton, the Secretary of the Department of Interior, in this Title VII action. This matter comes before the court on the plaintiff’s motion to alter the court’s order transferring this case to the Northern District of West Virginia (“transfer order”). The plaintiff argues that the court erred by basing its transfer order on an affidavit the defendant submitted with her reply and by granting the defendant’s motion to transfer despite a factual dispute regarding proper venue. Because the affidavit supports the reply and no factual conflict exists, justice does not require the court to alter the transfer order and the court denies the plaintiff’s motion.

II. BACKGROUND

In September 2002, the plaintiff filed a complaint alleging employment discrimination by the defendant. Compl. at 1. At the time of the alleged discrimination,

the defendant employed the plaintiff as a social service assistant at the defendant's job corps facility in Harpers Ferry, West Virginia. *Id.* The plaintiff alleges retaliation and discrimination based on a disabling depression made worse by working the midnight shift. *Id.* at 3. In April 2003, the defendant moved the court to transfer the action, arguing that venue is improper here because the defendant maintained and administered the plaintiff's employment records relevant to her claims in Harpers Ferry. Mot. to Transfer at 1. For this reason, and because the location of the relevant employment records was the only element of venue in dispute, the court determined that venue is proper in the Northern District of West Virginia and not in this district. Order dated May 2, 2003 at 2 (citing 42 U.S.C. § 2000e-5(f)(3)). Accordingly, the court granted the defendant's motion to transfer. Order dated May 2, 2003 at 2. On May 6, 2003 the plaintiff filed a motion to alter the court's order, challenging the transfer of the case. Mot. to Alter J. at 1.

III. ANALYSIS

A. Legal Standard for Altering or Amending an Interlocutory Judgment

A district court may revise its own interlocutory decisions "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." FED. R. CIV. P. 54(b); *see also Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000) (citing Federal Rule of Civil Procedure 60(b)'s Advisory Committee Notes). The standard of review for interlocutory decisions differs from the standards applied to final judgments under Federal Rules of Civil Procedure 59(e) and 60(b). *Compare Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 42, 48 n.6 (D.D.C. 2001) and *United Mine Workers v.*

Pittston Co., 793 F. Supp. 339, 345 (D.D.C. 1992) with *LaRouche v. Dep't of Treasury*, 112 F. Supp. 2d 48, 51-52 (D.D.C. 2000) and *Harvey v. District of Columbia*, 949 F. Supp. 878, 879 (D.D.C. 1996). A motion pursuant to Rule 59(e), to alter or amend a judgment after its entry, is not routinely granted. *Harvey*, 949 F. Supp. at 879. The primary reasons for altering or amending a judgment pursuant to Rule 59(e) are an intervening change of controlling law, the availability of new evidence or the need to correct a clear error or prevent manifest injustice. *Id.*; *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam). Motions pursuant to Rule 60(b) may be granted for similar reasons. FED. R. CIV. P. 60(b); *LaRouche*, 112 F. Supp. 2d at 51-52. Reconsideration of an interlocutory decision, however, is available under the standard, "as justice requires." *Childers*, 197 F.R.D. at 190.

B. The Court Did Not Err By Relying on the Defendant's Reply Affidavit

The plaintiff argues that the court erred by relying on information in an affidavit that the defendant submitted with her reply. Mot. to Alter J. at 3. Therefore, the plaintiff contends, the court should alter the transfer order and deny the defendant's motion to transfer. *Id.*

Federal Rule of Civil Procedure 6(d) states: "When a motion is supported by affidavit, the affidavit shall be served with the motion." Although the rule is silent on the proper time to file affidavits that support a reply, courts have held that filing an affidavit with a reply is appropriate when the affidavit addresses matters raised in the opposition. *McGinnis v. Southeast Anesthesia Assocs.*, 161 F.R.D. 41, 42 (W.D.N.C. 1995); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 767 F. Supp. 1220, 1235 (S.D.N.Y. 1991).

Such an approach fulfills the purpose of Rule 6(d), which is to avoid unfair surprise and permit the court to resolve motions on the merits. *McGinnis*, 161 F.R.D. at 42.

To support her motion to transfer, the defendant supplied an affidavit from one of her attorneys, Jacqueline Jackson, stating that the employment records pertinent to this case “are maintained at . . . Harpers Ferry, West Virginia.” Jackson Aff. ¶¶ 1, 5. The plaintiff’s opposing affidavit declares that several of the defendant’s employees told her that her employment records were located in the District of Columbia. Kershner Aff. ¶¶ 2-7. The plaintiff’s affidavit also states that she saw her personnel file at Harpers Ferry, and it only contained two documents. *Id.*

The defendant’s reply included an affidavit by William Jones, an employee of the defendant who was responsible for the maintenance of the plaintiff’s employment records. Def.’s Reply at 3, Jones Aff. ¶ 2. The transfer order relied on the Jones affidavit which demonstrates that the defendant maintained and administered the plaintiff’s employment files in Harpers Ferry. Order dated May 2, 2003. Like the Jackson affidavit that the defendant submitted with her motion to transfer, the Jones affidavit states that the defendant housed the plaintiff’s employment records in Harpers Ferry. Jackson Aff. ¶ 5; Jones Aff. ¶¶ 3-4. The defendant used the Jones affidavit – which is based on personal knowledge – to address the plaintiff’s argument that Ms. Jackson did not demonstrate “personal knowledge to support the facts that she” put forth. Def.’s Reply at 3-4; Pl.’s Opp’n at 3. The Jones affidavit counters this argument by proffering the same evidence from a source with personal knowledge. Def.’s Reply at 3; Jones Aff. ¶¶ 1-2. Because the affidavit does not introduce new issues of fact it complies with Rule 6(d). *McGinnis*, 161 F.R.D. at 42. The Jones affidavit also replies to the plaintiff’s argument that the

defendant “is mistaken as to the location of the personnel files,” by providing a source with personal knowledge that the department maintained and administered the plaintiff’s employment records at Harpers Ferry. *Id.*; Pl.’s Opp’n at 3-4; Def.’s Reply at 3; Jones Aff. ¶¶ 1-3.

In summary, because the affidavit filed with the defendant’s reply supports the defendant’s reply and does not raise new matters, the court did not err in considering it. *McGinnis*, 161 F.R.D. at 42. Accordingly, justice does not require the court to alter the transfer order on this basis. *Childers*, 197 F.R.D. at 190.

C. The Court Did Not Err By Considering Facts in Dispute

The plaintiff argues that the Kershner and Jones affidavits disagree on the location of the plaintiff’s employment records, and therefore the court erred by transferring venue despite a relevant factual dispute. Mot. to Alter J. at 3. This argument is also incorrect. Specifically, the Kershner affidavit states that (1) *others told* the plaintiff that her records were kept in the District of Columbia, (2) based on conversations *with Mr. Jones*, the plaintiff “*came to understand* that relevant records were in Washington D.C.,” and (3) the plaintiff “*actually saw*” her personnel file maintained at Harpers Ferry and it was not complete. Kershner Aff. ¶¶ 2-7 (emphasis added). Not only is the Kershner affidavit based largely on hearsay, but there is no indication that the personnel file the plaintiff saw was complete or exclusive of other files maintained at Harpers Ferry, or that any files in the District of Columbia were her main personnel files. *Id.* Indeed, the affidavit from Mr. Jones demonstrates that the plaintiff drew incorrect conclusions based on her conversations with him.

In contrast to the plaintiff's affidavit, the Jones affidavit states that (1) Mr. Jones had personal knowledge of the maintenance of the plaintiff's employment records, and (2) the department housed the majority of the plaintiff's employment records – including her performance standards, evaluations, training records, time and attendance records, and supervisors' notes – in Harpers Ferry. Jones Aff. ¶¶ 2-4. Therefore, the hearsay or speculative information in the Kershner affidavit does not overcome the sworn and first-hand information in the Jones' affidavit. *Compare* Kershner Aff. ¶¶ 2-7 with Jones Aff. ¶¶ 2-4.

The court recognizes that the Jones affidavit conflicts with the plaintiff's assertion in her complaint that venue exists in this district because the defendant maintained the plaintiff's files here. Compl. ¶ 4. The plaintiff, however, cannot bar any challenges to venue by injecting a conclusory fact into her complaint. *Darby v. U.S. Dep't of Energy*, 231 F. Supp. 2d 274, 277 (D.D.C. 2002). Rather, the court may consider sworn facts that defeat the plaintiff's bare and unsworn assertion of venue in order to reach the merits of the venue issue. *Id.*; 5A FED. PRAC. & PROC. CIVIL 2d § 1352. Accordingly, justice does not require the court to alter the transfer order. *Childers*, 197 F.R.D. at 190.

IV. CONCLUSION

For the foregoing reasons, the court denies the plaintiff's motion to alter the transfer order. An order directing the parties in a manner consistent with this

Memorandum Opinion is separately and contemporaneously issued this 14th day of August, 2003.

Ricardo M. Urbina
United States District Judge

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ORDER

DENYING THE PLAINTIFF’S MOTION TO ALTER THE TRANSFER ORDER

For the reasons stated in this court’s Memorandum Opinion separately and contemporaneously issued this 14th day of August, 2003, it is

ORDERED that the plaintiff’s motion [15] to alter the transfer order is **DENIED**.

SO ORDERED.

Ricardo M. Urbina
United States District Judge