Case:21-50237 Document:00516017725 Filed: 9/16/21

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-50237

Adolfo Sandor Montero,
Plaintiff—Appellant
v.
UNITED STATES OF AMERICA
Defendant—Appellee

Appeal from the United States District Court
For the Western District of Texas, Austin.
USDC No. 1:19-CV-1035

Before SMITH, HIGGINSON, and WILLETT, Circuit Judges.

PER CURIAM:

The panel previously granted Appellee's opposed motion to dismiss this appeal. Appellant has filed a motion for reconsideration, and that motion is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-50237

Adolfo Sandor Montero,
Plaintiff—Appellant
v.
UNITED STATES OF AMERICA
Defendant—Appellee

Appeal from the United States District Court
For the Western District of Texas, Austin.
USDC No. 1:19-CV-1035

Before SMITH, HIGGINSON, and WILLETT, Circuit Judges.

PER CURIAM:

It is ordered that the Appellee's opposed motion to dismiss the appeal is GRANTED.

A-3
Case:21-50237 Document:00515933449 Filed: 7/7/21

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

July 12, 2021

Mr. Adolfo Sandor Montero
1215 Canyon Maple Road
Pflugerville, TX 78660

No. 21-50237 Montero v. USA,
USDC No. 1:19-CV-1035

Dear Mr. Montero,

We received your motion to correct misleading statements in defendant's reply. This filing is considered a sur-reply and isn't allowed without leave of court. Therefore, we are taking no action on this motion.

Sincerely,
Lyle W. Cayce, Clerk

By: s/Mary Frances Yeager/
Mary Frances Yeager, Deputy Clerk
504-310-7686

cc: Mr. Anthony T. Sheehan
Mr. Curtis Cutler Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Adolfo Sandor Montero,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

ORDER

Before the court is Plaintiff Adolfo Sandor Montero's ("Montero") motion for reconsideration of the Court's order granting Defendant United States of America's motion to dismiss and final judgment in the United States' favor. (Mot. Reconsider., Dkt. 27;Order, Dkt. 24;Final J., Dkt 25). Montero is proceeding pro se in this matter. The United States filed a response to Montero's motion, (Dkt. 28), and Montero filed a reply, (Dkt. 29). After considering Montero's arguments, the record, and the relevant law, the Court denies Montero's motion for reconsideration.

"[T]he Federal rules of Civil Procedure do not recognize a general motion for reconsideration." *St. Paul Mercury Ins. Co v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997). "A motion filed after judgment requesting that the court reconsider its decision in light of additional evidence constitutes either a motion to 'alter or amend' under Fed. R. Civ. P. 59(e) or a motion for 'relief from judgment' under Fed. R. Civ. P. 60(b)." *Texas A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394,400 (5th Cir.

2003). The date when the relief-seeking party files the motion determines which rule applies: if the motion is filed within 28 days after the entry of final judgment, it is subject to rule 59(e); otherwise it is subject to Rule 60(b). Id.[1]

Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). It is not the proper vehicle to "raise arguments which could, and should, have been made before the judgment issued." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990). Altering, amending, or reconsidering a judgment under Rule 59(e) is an extraordinary remedy that courts should use sparingly. *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

Initially, because Montero filed his motion within 28 days of the Court's entry of final judgment, it is subject to Rule 59(e). (See Mot. Reconsider., Dkt. 27); *Texas A&M Research Found.*, 338 F.3d at 400.

Next, the Court does not find good cause to vacate its previous judgment. Montero's motion consists primarily if not exclusively of arguments which could have been, and indeed were, made before the judgment issued. *See Simon*, 891 F.2d at 1159. It does not argue that the Court made any manifest errors of law or fact. *See Waltman*, 875 F.3d

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[1] *Texas A&M Research Found.* discussed the 10-day period specified in the version of Rule 59(e) in effect when it was decided in 2003. 338 F.3d at 400. In 2009, Rule 59 was amended to extend the 10-day period to 28 days. Fed. R. Civ. P. 59 advisory committee's note to 2009 amendment. However, the logic of the Texas A&M Research Found. rule still applies to the extended period.

at 473. And it presents no newly discovered evidence. *See id.* Ultimately, Montero's motion restates the same arguments he has previously made throughout this case prior to judgment; it does not present a compelling reason for the "extraordinary remedy" of vacating a judgment. *See Templet*, 367 F.3d at 479.

Accordingly, IT IS ORDERED that Montero's motion for reconsideration, (Dkt. 27), is DENIED.

SIGNED on January 26, 2021.

s/Robert Pitman/
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Adolfo Sandor Montero,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

FINAL JUDGMENT

On July 27, 2020, the Court dismissed Plaintiff's claims against Defendant with prejudice after adopting the report and recommendation from United States Magistrate Judge Mark Lane and granting Defendant's motion to dismiss. (R. & R., Dkt. 12; Mot., Dkt. 4).

As nothing remains to resolve, the Court renders final judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that each party bear its own costs. IT IS FURTHER ORDERED that the case is CLOSED.

SIGNED on July 24, 2020

s/Robert Pitman/
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Adolfo Sandor Montero,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

ORDER

Before the Court is the report and recommendation of United States Magistrate Judge Mark Lane concerning Defendant the United States of America's motion to dismiss, (Dkt. 4). (R. & R., Dkt. 12). Judge Lane recommends that the Court grant the motion. (*Id.* at 6).

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure de novo review by the district court. 28 U.S.C. § 636(b)(1)(C). Plaintiff Adolfo Sandor Montero ("Montero") timely objected to each portion of the report and recommendation, (Objs., Dkt. 19), and the United States responded to his objections, (Resp. Objs., Dkt. 20). Montero also filed a "motion to correct misleading defendant statements to prevent fraud on the Court," (Mot., Dkt. 21), to which the United States responded, (Corr. Resp. Mot., Dkt. 23).[1]

[1] The Court could construe this motion as a reply to the United

Therefore, the Court reviews the report and recommendation de novo. Having done so, the Court overrules Montero's objections and adopts the report and recommendation as its own order.

Having also reviewed Montero's history of asserting these and very similar claims in the Western District of Texas, the Court takes the opportunity to warn Montero of the likely consequences of continuing to file lawsuits in this vein. Montero is proceeding pro se. This case is one of four that he has filed in the Western District of Texas asserting nearly identical claims. In each case, his claims were dismissed.. *See Montero v. United States*, No. 1:08-CV-885-JRN (W.D. Tex.); *Montero v. United States*, No. 1:10-CV-250-JRN (W.D. Tex.); *Montero v. United States*, No. 1:12-CV-660-LY (W.D. Tex.). Twice, the Fifth Circuit has determined that Montero's arguments are frivolous, *Montero v. Comm'r*, 354 F. App'x 173, 175 (5th Cir. 2009); *Montero v. United States*, 409 F. App'x 738, 738 (5th Cir. 2011) ("[Montero's] arguments are patently frivolous and devoid of any merit whatsoever."). Moreover, it has upheld a $20,000 sanction against Montero for advancing frivolous arguments. *Montero*, 354 F. App'x at 176. And the Fifth Circuit has itself imposed an $8,000 sanction against him for filing a frivolous appeal. *Montero*, 409 F. App'x at 738–39.

Montero's choice to proceed in this manner harms both the Court and other litigants:

> Federal courts are proper forums for the resolution of serious and substantial federal claims. They are frequently the last, and

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States' response, and the United States' subsequent response as a surreply. However, because the Court grants United States' motion to dismiss, Montero's motion is moot.

> sometimes the only, resort for those who are oppressed by the denial of the rights given them by the Constitution and laws of the United States. Fulfilling this mission and the other jurisdiction conferred by acts of Congress has imposed on the federal courts a work load that taxes their capacity. Each litigant who improperly seeks federal judicial relief for a petty claim forces other litigants with more serious claims to await a day in court. When litigants improperly invoke the aid of a federal court to redress what is patently a trifling claim, the district court should not attempt to ascertain who was right or who was wrong in provoking the quarrel but should dispatch the matter quickly.

Raymon v. Alvord Indep. Sch. Dist., 639 F.2d 257, 257 (5th Cir. Unit A 1981). If Montero continues to assert these claims in subsequent lawsuits, he will very likely be sanctioned as described below.

Accordingly, IT IS ORDERED that Judge Lane's report and recommendation, (Dkt. 4), is ADOPTED. Montero's objections, (Dkt. 19), are OVERRULED.

IT IS FURTHER ORDERED that the United States' motion to dismiss, (Dkt. 4), is GRANTED. Montero's claims asserted in this case are DISMISSED WITH PREJUDICE.

Montero's subsequent motion, (Dkt. 21), is MOOT. The Court will enter final judgment in a separate order.

IT IS FINALLY ORDERED that Montero is WARNED that filing or pursuing any further frivolous lawsuits may result in (1) the imposition of court costs under 28 U.S.C. § 1915(f); (2) the imposition of significant monetary sanctions under

Fed. R. Civ. P. 11; (3) the imposition of an order barring him from filing any lawsuits in this Court without first obtaining the permission from a District Judge of this Court or a Circuit Judge of the Fifth Circuit; or (4) the imposition of an order levying some combination of these sanctions.

SIGNED on July 27, 2020

s/Robert Pitman/
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

CFR AUTHORITIES[1]

26 CFR § 31.6051-1 Statements for employees.

(a) Requirement if wages are subject to withholding of income tax [...]

A. The name, address, and identification number of the employer.

B. The name and address of the employee, and his social security account number if wages as defined in section 3121(a) have been paid or if the Form W-2 is required to be furnished to the employee for a period commencing after December 31, 1962

C. The total amount of wages as defined in section 3401(a)

D. The total amount deducted and withheld as tax under section 3402,

E. The total amount of wages as defined in section 3121(a),

F. The total amount of employee tax under section 3101 deducted and withheld [...]

(b) Requirement if wages ARE NOT subject to withholding of income tax [...]

i. The name and address of the employer,

ii. The name, address, and social security account number of the employee,

iii. The total amount of wages as defined in section 3121(a), ***[NOTE: no entry listed for 3401(a) "wages", compare with C&D above]***

iv. The total amount of employee tax deducted and withheld from such wages [...]

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[1] Authority quotes taken from Petitioner's original complaint as being the most pertinent in that time period. Any small changes in the latest version of the CFR are not reflected here, they were not relevant at that time.

26 CFR §31.3401(a)-2 Exclusions from wages.
[...]
(a)(4) For provisions relating to **payments** with respect to which a **voluntary withholding agreement is in effect, which are not defined as wages in section 3401(a) but which are nevertheless deemed to be wages**, see **§§31.3401(a)–3 and 31.3402(p)–1.**

26 CFR §31.3401(a)-3 Amounts deemed wages under voluntary withholding agreements.
(a) In general. **Notwithstanding** the exceptions to the **definition of wages specified in section 3401(a)** and the regulations thereunder, **the term "wages"** includes the amounts described in paragraph (b)(1) of this section with respect to which **there is a voluntary withholding agreement in effect under section 3402(p). References in this chapter to the definition of wages contained in section 3401(a) shall be deemed to refer also to this section (§31.3401(a)–3)**.
(b) **Remuneration for services.** (1) Except as provided in subparagraph (2) of this paragraph, the amounts referred to in paragraph (a) of this section **include any remuneration for services** performed by an employee for an employer which, **without regard to this section, does not constitute wages under section 3401(a)**. [...]

26 CFR §31.3402(p)-1 Voluntary withholding agreements.

(a) **In general.** An employee and his employer **may enter into an agreement** under section 3402(b) to provide for the withholding of income tax **upon payments of amounts described in paragraph (b)(1) of §31.3401(a)-3**, made after December 31, 1970.

[...]

(b) **Form and duration of agreement.** (1)(i) Except as provided in subdivision (ii) of this subparagraph, an employee who desires to **enter into an agreement** under section 3402(p) shall furnish his employer with **Form W-4** (withholding exemption certificate) executed in accordance with the provisions of section 3402(f) and the regulations thereunder. **The furnishing of such Form W-4 shall constitute a request for withholding.**

§ 31.3402(n)-1 Employees incurring no income tax liability.

(a) **In general.** Notwithstanding any other provision of this subpart (except to the extent a payment of wages is subject to withholding under § 31.3402(g)-1(a)(2)), an employer **shall not deduct and withhold any tax** under chapter 24 upon a payment of wages made to an employee, if there is in effect with respect to the payment a **withholding exemption certificate** furnished to the employer by the employee which certifies that -

(1) The employee **incurred no liability** for

income tax imposed under subtitle A of the Internal Revenue Code for his **preceding taxable year**; and

(2) The employee anticipates that he **will incur no liability** for income tax imposed under subtitle A for his **current taxable year**.

(b) **Mandatory flat rate withholding.** To the extent wages are subject to income tax withholding under **§31.3402(g)-1(a)(2)**, such wages are subject to such income tax withholding **regardless of whether a withholding allowance certificate** under section 3402(n) and the regulations thereunder has been furnished to the employer.