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UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-204057

AUG 25 1981

The Honorable Stuart E. Schiffer, *not make available to press*  
Acting Assistant Attorney General  
Civil Division  
Department of Justice

Dear Mr. Schiffer:

Subject: Patsy Sims Fisher v. United States  
Court of Claims No. 400-81C

The plaintiff alleges that she and her former husband, Joyce Ray Fisher, entered into a contract on May 12, 1975, whereby the plaintiff would receive the monthly retired pay inuring to Joyce Ray Fisher from his service with the United States Air Force. The plaintiff further alleges that the United States Air Force has failed to honor the contract, and she seeks to have the Air Force or her former husband pay her for several months of arrearages. Additionally, she seeks specific performance on the contract against both the Air Force and her husband.

We first note that apparently the plaintiff's counsel misconstrues the nature of the action he filed. He cites to 28 U.S.C. § 1346(a)(2), as the jurisdictional basis for this suit in the Court of Claims. The code reference is a basis for jurisdiction in the District Courts of the United States. This confusion on counsel's part may explain why he is seeking a judgment against both the United States and Mr. Fisher who is an inappropriate party to this action before the Court of Claims.

Furthermore, there would appear to be no basis for this action against the United States in the Court of Claims. The underlying basis for this action is a contract or property settlement agreement between Ms. and Mr. Fisher which was incident to their divorce. While the plaintiff alleges that the United States is a party to this contract, such allegation is untenable. This is self-evident from the pleadings and property settlement agreement which is attached thereto.

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Even if the plaintiff could set forth some legal theory ostensibly making the United States liable for specific performance of the property settlement agreement, such theory must fail in light of the recent decision in McCarty v. McCarty, \_\_\_\_\_ U.S. \_\_\_\_\_, 101 S. Ct. 2728 (1981). As the Supreme Court indicates, retired pay is a personal entitlement and it cannot be attached to satisfy settlement pursuant to a divorce. 101 S. Ct. at 2738 and 2739. Furthermore, if Mr. Fisher retired in an enlisted grade, it would appear that he could not assign his retired pay to the plaintiff although the situation may be different were he retired as an officer. See 101 S. Ct. at 2739 (footnote 22). Accordingly, in the absence of positive legislation, such as has been done in regard to civil service retirement benefits, there is no basis to compel the United States Air Force to honor the property settlement agreement as it relates to the member's retired pay. See 101 S. Ct. at 2740-2741.

The plaintiff has not submitted a claim to our Office regarding the subject matter of the suit, and we have no factual information other than that set forth in the petition. We have no record of any counterclaim, setoff, or other demand which would furnish the basis of a cross action against the plaintiff.

If I may be of further assistance in this matter, please contact me at 275-6404.

Sincerely yours,



Jeffrey S. Forman  
Attorney-Adviser