does not (and cannot) make factual findings. Iriarte v. Individual Assurance Co., 18 FSM R. 406, 408 (App. 2012); In re Sanction of George, 17 FSM R. 613, 616 (App. 2011). It must rely on either adjudicated, stipulated, or undisputed facts.

Since the petitioners have an adequate, or even superior, legal remedy available, no writ will issue. If we were going to issue a writ, that writ would have ordered that Justice Walliby refer the issue of his disqualification to the Chief Justice for the Chief Justice to assign the disqualification issue to another justice for hearing and decision, as required by the Chuuk Judiciary Act, Chk. S.L. No. 190-08, § 22(5). Justice Walliby has already taken that step.

V. CONCLUSION

Accordingly, since the petitioners have an adequate legal remedy available, this petition is dismissed without prejudice.

* * * *

FSM SUPREME COURT TRIAL DIVISION

MARY BERMAN, Plaintiff, vs. POHNPEI STATE GOVERNMENT, HENRY SUSAIA, as EPA Director, and POHNPEI ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	CIVIL ACTION NO. 2009-023

ORDER DENYING SUMMARY JUDGMENT

Larry Wentworth
Associate Justice

Decided: September 1, 2020

APPEARANCES:

For the Plaintiff: Mary Berman, Esq.
P.O. Box 163
Kolonia, Pohnpei FM 96941

For the Defendants: Monaliza Abello-Pangelinan, Esq.
Assistant Attorney General
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* * * *

HEADNOTES

Civil Procedure – Motions – Unopposed

Failure to oppose a motion is generally deemed a consent to the motion, but even if there is no opposition, the court still needs good grounds before it can grant the motion. Berman v. Pohnpei, 23 FSM R. 17, 19 (Pon. 2020).

Civil Procedure – Motions – For Reconsideration; Judgments – Relief from Judgment

When there is no final judgment in the matter but only an interlocutory order granting partial summary judgment, a party's motion for relief from, or reconsideration of, the interlocutory order is properly characterized, not as one for relief from judgment under Rule 60(b), but as one to reconsider the interlocutory order under Rule 54(b). Berman v. Pohnpei, 23 FSM R. 17, 19 (Pon. 2020).

Civil Procedure – Motions – For Reconsideration; Judgments – Relief from Judgment

When, to the extent that a motion is one to reconsider matters already decided earlier in the case, it is a Rule 54(b) motion to reconsider, and the court must treat it as such. Berman v. Pohnpei, 23 FSM R. 17, 19 (Pon. 2020).

Public Officers and Employees – Pohnpei

The highest management official must make the appointment from the list of eligibles submitted to him unless he finds no person available and acceptable to him on the list, in which case he will ask the Director of Finance and Administration to certify a new list, stating in writing his reasons for rejecting each of the eligibles on the previously submitted list. If the Director finds such reasons adequate, he must then submit a new list from which the management official will make the appointment, but if the Director does not find the reason adequate, he must resubmit the list and the appointment shall be made therefrom. Berman v. Pohnpei, 23 FSM R. 17, 20 (Pon. 2020).

Civil Procedure – Admissions

When a request to admit is not one to admit factual matter but seeks to get the defendants to admit to a legal conclusion, it cannot be deemed admitted. A request for admission that calls for a legal conclusion is beyond Rule 36's scope because requests for admissions are not to be used to answer questions of law or to have the responding party ratify the legal conclusions the requesting party attaches to the case's operative facts. Berman v. Pohnpei, 23 FSM R. 17, 20-21 n.1 (Pon. 2020).

Public Officers and Employees – Pohnpei

Whether a legally adequate reason for Pohnpei not to hire someone is that the applicant had previously sued state government agencies and that her contracts had not been renewed depends on the particular case's circumstances. Berman v. Pohnpei, 23 FSM R. 17, 20-21 (Pon. 2020).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

The court cannot grant summary judgment based on a statute when it seems that the statute, by its terms, may not apply. Berman v. Pohnpei, 23 FSM R. 17, 21 (Pon. 2020).

Public Officers and Employees – Pohnpei

A Pohnpei statute requires notice and an opportunity to be heard for someone, who once was able to perform the position's necessary duties satisfactorily, but who has since become unable to do so anymore before that person may be removed from the eligible list or not certified, may not apply in other situations. Berman v. Pohnpei, 23 FSM R. 17, 21-22 (Pon. 2020).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This comes before the court on the plaintiff's Motion to Reconsider, filed May 27, 2020. The defendants did not file a response. Failure to oppose a motion is generally deemed a consent to the motion, FSM Civ. R. 6(d), but even if there is no opposition, the court still needs good grounds before it can grant the motion. Senda v. Mid-Pacific Constr. Co., 6 FSM R. 440, 442 (App. 1994). The motion is denied.

I. TYPE OF MOTION

The plaintiff, Mary Berman, asks the court to reconsider its October 31, 2019 Order Denying Plaintiff's Summary Judgment Motion, Berman v. Pohnpei, 22 FSM R. 377, 382-83 (Pon. 2019), in which the court denied Berman summary judgment on her libel and defamation claims and granted the non-moving defendants summary judgment on her defamation per se, attorney's fees, and punitive damages claims. She now moves to reconsider under Civil Procedure Rule 60(b)(6).

When there is no final judgment in the matter but only an interlocutory order granting partial summary judgment, a party's motion for relief from, or reconsideration of, the interlocutory order is properly characterized, not as one for relief from judgment under Rule 60(b), but as one to reconsider the interlocutory order under Rule 54(b). Hartmann v. Department of Justice, 21 FSM R. 468, 474 (Chk. 2018); People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM R. 307, 312 (Yap 2012); Richmond Wholesale Meat Co. v. George, 11 FSM R. 86, 88 (Kos. 2002). Thus, to the extent that Berman's motion is one to reconsider matters already decided in Berman v. Pohnpei, 22 FSM R. 377 (Pon. 2019), it is a Rule 54(b) motion to reconsider, and the court must treat it as such. But, as will soon be apparent, Berman's motion seeks summary judgment mostly for claims and theories she did not rely upon in her earlier summary judgment motion. Thus, it may more properly be viewed as a new summary judgment motion.

II. BACKGROUND

In April 2007, the Pohnpei Environmental Protection Agency ("EPA") advertised an opening for a permanent attorney position. The plaintiff, Mary Berman, applied. She was the only person on the June 7, 2007 eligible list, but was not hired. Instead, Acting EPA Director Etiny Hadley asked that the position be readvertised. When the Director of the Pohnpei Department of Finance and Administration informed Hadley that his reasons for rejecting the eligible list must be put in writing, Hadley wrote that Berman was an unsuitable hire because she "had sued the Pohnpei EPA in the past, as well as other state and national government agencies[, and w]hile she has worked for Pohnpei executive agencies and the Pohnpei Legislature previously, her contracts have never been renewed." Letter from Etiny Hadley to Andrew Joseph, Acting Dir. Treasury & Admin. (July 30, 2007).

The position was then readvertised, and Berman reapplied. The September 6, 2007 eligible list consisted of two FSM citizens. Berman was not on it. For various reasons, the EPA did not hire either person on the eligible list. The position was readvertised in July, 2008. Berman again applied, and again was not hired. Berman also applied for other permanent state government attorney positions as they were advertised. She was not hired for any of those either.

Berman filed this lawsuit on June 18, 2009. She alleges that then Acting Director Hadley's (and thus the EPA's) refusal to hire her violated her fundamental liberty interest in an employment opportunity; her right to equal treatment under the law; her right to free speech; and her right to petition the government for

redress. She further alleges that Hadley's statement was false and libelous and that it defamed her and caused damages by the state not hiring her.

In their answer, the Pohnpei state government, Acting EPA Director Etiny Hadley, and the Pohnpei Environmental Protection Agency (collectively "Pohnpei"), conceded that Berman had never sued the EPA before and raised the affirmative defenses of failure to state a claim upon which relief could be granted; the statute of limitations; qualified immunity; and the failure to mitigate damages.

In July, 2009, the EPA again advertised an attorney position, and Berman was again the only applicant. Berman was hired on two successive three-month contracts. Her duties consisted of drafting regulations. In 2010, Berman had another three-month employment contract with the Pohnpei Department of Land and Natural Resources. Once she reached the "official" Pohnpei retirement age of 60, Berman received no further offers of state employment.

III. ANALYSIS

A. *April 2007 Employment Application*

Berman contends that she is entitled to a judgment as a matter of law that the Pohnpei EPA was required to hire her when she applied for the EPA attorney position in April 2007. She asserts that because she was the only qualified applicant on that eligible list, Pohnpei had no choice but to appoint her. Berman argues that Acting EPA Director Hadley's reason for asking that the position be readvertised – that Berman was unsuitable because she had sued the Pohnpei EPA in the past, as well as other state and national government agencies, and her past contracts with Pohnpei agencies and the Legislature had never been renewed – is not a legally adequate reason to refuse to hire her and therefore the state labor law and her constitutional rights to due process were violated.

The applicable statute provides in pertinent part that:

> The highest management official of the department, or of the office or agency if not within a department, shall make the appointment from the list of eligibles submitted to him unless he finds no person available and acceptable to him on the list, in which case he will ask the Director [of Finance and Administration] to certify a new list, stating in writing his reasons for rejecting each of the eligibles on the list previously submitted to him. If the Director finds such reasons adequate, he shall then submit a new list . . . from which said management official will make the appointment. If the Director does not find the reason adequate, he shall resubmit the list and the appointment shall be made therefrom.

9 Pon. C. § 2-113. EPA Acting Director Hadley found Berman unacceptable, and the Finance and Administration Director found the reasons Hadley gave were adequate because he then readvertised the EPA attorney position.

Berman contends that the grounds stated were not, as a matter of law, a "legally adequate reason" to not hire Berman and to therefore seek other qualified candidates. The court cannot make that conclusion.[1]

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[1] In Berman's Requests for Admission, which are generally deemed admitted because the defendants did not respond to them, FSM Civ. R. 36(a), Berman asked the defendants to admit "that the reason Etiny Hadley gave for not hiring Berman was not adequate because Berman was only doing her job when she sued the Pohnpei State and FSM National government." Requests to Admit para. 47 (Jan. 27, 2020). But since that request is not one to admit factual matter but seeks to get the defendants to admit to a legal conclusion, it cannot be deemed admitted.

The crux of the matter is whether the truthful (disregarding the false part that she had sued the EPA before) parts of these grounds – that she had previously sued state government agencies and that her contracts had not been renewed – is an adequate reason for Pohnpei not to hire someone.

Whether it is depends on the particular case's circumstances. Under some circumstances, it may be more than an adequate reason not to hire an applicant. For example, there may be legitimate fears or concerns that the applicant might use the position to gain some advantage in the applicant's pending (or future) lawsuits. In other circumstances, there may be no such concerns about the applicant's prior lawsuits because they were totally unrelated to the position's responsibilities or against some wholly unrelated government department and have been satisfactorily resolved long before the application. It remains to be shown whether, in this case, Berman's prior litigation was, or was not, an adequate reason.

B. *Readvertisement and Pohnpei Code Title 9, Section 2-112(2)*

Berman also contends that, as a matter of law, her due process rights were violated because, contrary to Pohnpei law, she was not notified of the reasons she was removed from the June 7, 2007 eligible list and not given a hearing. For this proposition she relies on the Pohnpei statute which provides that:

> The Director [of Finance and Administration] may remove the name of a person from any eligible list or refuse to certify his name on any list of eligible persons if he finds, after giving him notice and an opportunity to be heard, that the person is no longer able to perform the necessary duties satisfactorily.

9 Pon. C. § 2-112(2).

The court cannot grant summary judgment on this point because it seems this statute, by its terms, may not apply. The court assumes that, for the basis of Berman's argument, her absence from the September 6, 2007 eligible list was because the Finance Director refused to certify her name. But the statute appears to require notice and an opportunity to be heard only for someone, who once was able to perform the position's necessary duties satisfactorily, but who has since become unable to do so anymore, not to someone found unsuitable for the position for other reasons.

Thus, the question may be: Was Berman rejected because she could not perform the necessary duties satisfactorily or was it because she frequently sued state agencies and because her contracts were not renewed? This becomes a question of material fact that needs resolution, one way or the other, before a judgment can issue. Another unanswered question is whether the Pohnpei state courts have interpreted the statute in that manner or have given it a different gloss.

C. *Subsequent Employment Applications*

Berman further contends that she should have been on the eligible list every time the EPA attorney job was readvertised because she had qualified for the April 2007 eligible list. She contends that, because those lists had only FSM citizens on them, she was being discriminated against and Pohnpei law was violated since, under Pohnpei statute, Pohnpei legal residents are to be given first preference for permanent public service positions and she, although a U.S. citizen, was a Pohnpei legal resident and had been one

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A request for admission that calls for a legal conclusion is beyond Rule 36's scope because requests for admissions are not to be used to answer questions of law or to have the responding party ratify the legal conclusions the requesting party attaches to the case's operative facts. Stephen v. Chuuk, 13 FSM R. 529, 531 (Chk. 2005); Mailo v. Chuuk, 13 FSM R. 462, 470-71 (Chk. 2005).

for a long time. Berman also argues that she was denied equal protection of the laws because non-FSM citizens were excluded from the EPA attorney eligible lists.

Berman does not point to any evidence that other qualified non-FSM citizens were excluded from the eligible lists, only that she was excluded. The court therefore cannot conclude that she was discriminated against on the basis of her citizenship as opposed to because of her prior litigation and employment history, although Berman may be able to prove that later.

D. *Result*

Accordingly, the court cannot grant Berman summary judgment for two main reasons. First, whether Berman's prior litigation history was an adequate reason to not hire her requires a legal conclusion based on facts not yet in evidence – whether the truthful grounds that she had previously sued state government agencies and that her contracts had not been renewed was an adequate reason for Pohnpei not to hire someone depends on the particular case's circumstances. Second, Pohnpei Code Title 9, § 2-112(2) seems not to require notice in Berman's situation, however, the court is reluctant to rule that way without learning if the Pohnpei state courts have interpreted that statute differently, and, if that statute does not apply, then whether there is some other basis for requiring the defendants to inform Berman why she was not hired.

IV. CONCLUSION

Accordingly, Mary Berman's May 28, 2020 summary judgment motion is denied. The parties shall file and serve, no later than September 22, 2020, their proposals for further proceedings in this matter.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

SASAKI L. GEORGE, Appellant, vs. CANNEY PALSIS, individually and in his capacity as Directing Attorney for Kosrae MLSC, LEE PLISCOU, in his capacity as the Executive Director of MLSC, and MICRONESIAN LEGAL SERVICES CORPORATION; Appellees.	)	APPEAL CASE NO. K8-2015 (Consolidated with K10-2015) (Civil Action No. 2013-2004)

ORDER DENYING PETITION FOR REHEARING

Decided: September 7, 2020