In the United States Court of Federal Claims

Case No. 03-1562C
(Filed: June 16, 2006)
NOT TO BE PUBLISHED

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ROBERT D. KIM, *
Plaintiff, *
*
v. *
*
THE UNITED STATES OF AMERICA, *
Defendant. *

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William C. Halsey, Oceanside, California, attorney of record for Plaintiff.

Claudia Burke, Commercial Litigation Branch, Department of Justice, Washington, D.C., attorney of record for Defendant. With her on the briefs were ***Carolyn J. Craig***, Commercial Litigation Branch, ***Peter D. Keisler***, Assistant Attorney General, ***David M. Cohen***, Director, and ***Franklin E. White, Jr.***, Assistant Director. ***Lieutenant Colonel Rita A. Russell***, U.S. Air Force General Litigation, of counsel.

Sarah Leigh Martin, law clerk.

ORDER / OPINION

Plaintiff, a retired Air Force officer, brings this cause of action for backpay challenging the Secretary's decision to lower his pay grade upon retirement. Defendant filed a Motion to Dismiss, asserting that Mr. Kim's retirement from the military was voluntary and that the Court consequently lacked subject matter jurisdiction. Despite numerous opportunities, the Plaintiff has failed to allege facts that, if true, would establish the involuntary nature of his retirement and thus provide this Court with jurisdiction. **We therefore dismiss his Complaint for lack of subject matter jurisdiction.**

Background:

On September 9, 1996, Plaintiff Robert Kim, a U.S. Air Force colonel at grade O-6, applied to be transferred to the Retired Reserves. Whether this retirement decision was a voluntary one is the threshold matter the Court must decide in order to properly assert jurisdiction in this case.

On July 30, 1997, the Secretary of the Air Force determined that Mr. Kim should be retired as a major (grade O-4) instead of colonel. His decision was based on findings that Mr. Kim committed various offenses in violation of the Uniform Code of Military Justice ("UCMJ"), and therefore did not serve satisfactorily at the grade of colonel (O-6) or lieutenant colonel (O-5). Mr. Kim had accepted non-judicial punishment for those offenses pursuant to Article 15 of the UCMJ. Mr. Kim later challenged the non-judicial punishment and requested that the findings be set aside. In the instant case, Plaintiff challenges both the Secretary's grade determination and the punishment Mr. Kim received.

Mr. Kim originally filed this case in the Southern District of California, and it was transferred to this Court on June 26, 2003. Mr. Kim filed his Amended Complaint on October 27, 2003. At that time, he was acting *pro se*. On January 13, 2005, the Defendant filed a Motion to Dismiss, or in the alternative, for Judgment on the Administrative Record. Mr. Kim then retained counsel on April 1, 2005. Thus represented by counsel, Mr. Kim filed his Opposition to the Defendant's motions, and the issues were fully briefed. The parties submitted a Joint Statement of Facts to accompany the briefs.

In its Motion to Dismiss, the Defendant challenges this Court's subject matter jurisdiction over Mr. Kim's claims, asserting that Mr. Kim has not made allegations which, if true, could support this Court's jurisdiction. After examining the filed documents, the Court determined that more factual development was needed to fully ascertain the circumstances surrounding Mr. Kim's decision to retire from the Air Force. Thus, on November 18, 2005, we ordered Mr. Kim to show cause why his case should not be dismissed, specifically requesting that he articulate non-frivolous allegations of the involuntary nature of his retirement in order to support this Court's jurisdiction. Mr. Kim responded on February 14, 2006, filing his "Points and Authorities in Support of Plaintiff's Order to Show Cause Re: Jurisdiction."

Still not satisfied, we held a status conference on March 24, 2006, for the purpose of further exploring whether Mr. Kim had succeeded in making non-frivolous allegations of involuntariness. At that status conference, Mr. Kim discussed on the record the circumstances of his retirement decision. Following the conference, the Court ordered Mr. Kim to file a sworn declaration setting forth the relevant facts, and ordered both parties to file supplemental briefs on the issue of subject matter jurisdiction. Beginning with his Complaint, Mr. Kim thus has had at least seven opportunities to make satisfactory allegations.

Discussion:

Mr. Kim bears the burden to establish this Court's jurisdiction, *see Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998), keeping in mind that allegations made in a *pro se* complaint are held to "less stringent standards than formal pleadings drafted by lawyers," *Forshey v. Principi*, 284 F.3d 1335, 1357-58 (Fed. Cir. 2002) (*en banc*) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). This special

consideration works in Mr. Kim's favor at least through the submission of the Joint Preliminary Status Report, filed by the parties on February 25, 2004. Subsequently, Mr. Kim was represented by counsel in all proceedings.

Pursuant to the Tucker Act, the United States Court of Federal Claims has jurisdiction over claims for money damages against the federal Government that are based upon a statute, regulation, or Constitutional provision, and do not sound in tort. 28 U.S.C. § 1491(a)(1). Standing alone, the Tucker Act does not create a substantive right of recovery for money damages, so a plaintiff must also demonstrate a separate, substantive right pursuant to a money-mandating provision. *See, e.g.*, *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 398 (1976).

The Military Pay Act, 37 U.S.C. § 204, is a money-mandating provision because it entitles military personnel on active duty to the wages they earn until the time they are properly separated from the service. *Tippett v. United States*, 185 F.3d 1250, 1255 (Fed. Cir. 1999); *see also Palmer v. United States*, 168 F.3d 1310, 1313-1315 (Fed. Cir. 1999) (discussing the difference between claims of active and inactive military personnel). The Military Pay Act also supports Tucker Act jurisdiction over claims by former military personnel who were improperly discharged from the military. *Tippett*, 185 F.3d at 1255.

Jurisdiction over Resignations

In cases of retirement from the military, this Court only has jurisdiction if the member's retirement was involuntary. *Id.* However, resignations from the military are presumed to be voluntary. *Brown v. United States*, 30 Fed. Cl. 227, 230 (1993) (citing *Christie v. United States*, 207 Ct. Cl. 333, 338 (1975)). Thus, at the outset, a plaintiff alleging jurisdiction based upon involuntary retirement from the military must overcome this presumption.

A plaintiff must first make non-frivolous allegations that his retirement from the service was involuntary. *See Tippett*, 185 F.3d at 1255. That is, the plaintiff must assert specific facts which, if proven, would make out a prima facie case of involuntariness. *Id.*; *Dumas v. MSPB*, 789 F.2d 892, 893-94 (Fed. Cir. 1986). Generalities and conclusory assertions are not sufficient. Once that threshold is met, the plaintiff is entitled to an evidentiary hearing on the voluntariness issue. *Tippett*, 185 F.3d at 1255, 58; *Dumas*, 789 F.2d at 894.

A plaintiff may overcome the presumption of voluntariness by proving any of the following: 1) the Government used duress or coercion, 2) the Government misrepresented information, 3) the plaintiff attempted to withdraw the resignation before the effective date, 4) the plaintiff resigned under time pressure, or 5) the plaintiff was not mentally competent. *Scharf v. Dep't of Air Force*, 710 F.2d 1572, 1574 (Fed. Cir. 1983); *Nickerson v. United States*, 35 Fed. Cl. 581, 586 (1996). In the instant case, Mr. Kim has not claimed that he ever attempted to withdraw his resignation, or that he was not mentally competent. At various instances in his filings, he appears to invoke each of the other three exceptions – duress, misrepresentation, and time pressure.

Rebutting Voluntariness

To fall under the duress or coercion exception, a plaintiff must allege and prove facts showing: 1) an involuntary acceptance of terms, 2) circumstances that permit no alternative, and 3) that the circumstances were the result of the Government's coercive acts. *Brown*, 30 Fed. Cl. at 230 (citing *Fruhauf Sw. Garment Co. v. United States*, 126 Ct. Cl. 51, 62 (1953)). Facing a choice between two unpleasant circumstances does not render a decision involuntary under this exception. *Nickerson*, 35 Fed. Cl. at 586-87. For instance, having to choose between facing disciplinary action or retiring from the service, absent other coercive conditions, does not render a retirement decision involuntary because the member always has the choice to face the charges being brought against him. *Id.*

A plaintiff can also overcome the presumption of voluntariness by alleging and proving that the Government misrepresented information, and the plaintiff detrimentally relied upon that information. *Covington v. Dep't of HHS*, 750 F.2d 937, 942 (Fed. Cir. 1984); *Bergman v. United States*, 28 Fed. Cl. 580, 585 (1993). Under this theory, a plaintiff must prove that he in fact relied upon the misrepresented facts, and that a reasonable person also would have done so. *Covington*, 750 F.2d at 942; *Bergman*, 28 Fed. Cl. at 588. Under this exception, it is not necessary for a plaintiff to prove that the Government acted intentionally. *Covington*, 750 F.2d at 942. If the person whose advice is relied upon is the member's own counsel, then the plaintiff likely must prove that he had ineffective assistance of counsel. *See Metz v. United States*, 61 Fed. Cl. 154, 164 & n.23, 166 (2004).

Under the time pressure exception, a plaintiff must show that his decision to retire was involuntary because he had an insufficient amount of time to consider his options and rights. *See Perlman v. United States*, 203 Ct. Cl. 397, 407-08 (1974). Various factors are relevant to this inquiry, including whether the plaintiff had sufficient time to discuss the matter with family, friends, and advisors, and whether a person induced the plaintiff to retire by offering him benefits with only a short or immediate window of acceptance. *Id.*; *Gallucci v. United States*, 41 Fed. Cl. 631, 642 (1998).

Regardless of which exception a plaintiff invokes, the nature of the inquiry is the same. Once non-frivolous allegations have been made, the reviewing court must conduct an evidentiary hearing to examine all of the circumstances surrounding the retirement decision and decide whether the retiree in fact exercised his own free will in making the decision. *See Tippett*, 185 F.3d at 1255, 1258; *Gallucci*, 41 Fed. Cl. at 638-39. "[L]egal precedent requires an objective determination of whether [the plaintiff's] resignation was voluntary, not by examining his subjective perception of the situation, but rather, by examining the totality of circumstances with specific reference to whether plaintiff retained freedom of choice over his actions." *Gallucci*, 41 Fed. Cl. at 639 (citations omitted). In Mr. Kim's case, of course, we are at the initial step – Mr. Kim must make allegations that support a finding of involuntariness.

Mr. Kim's Allegations

Despite the numerous opportunities the Court has provided him, Mr. Kim has failed to assert sufficient facts which, if true, support the conclusion that his resignation from the Air Force was involuntary. We examine in detail five of his iterations.

First, in his Amended Complaint, the only allegation relevant to involuntariness of his retirement is as follows:

> Plaintiff was coerced into retiring from the [Air Force Reserves] on or around September 13, 1996 and was ordered off the McClellan Air Force Base. Plaintiff was told at that time that he would retire at the military grade of Colonel if he retired. Plaintiff was later retired at the rank of major (04), rather than at his earned rank of colonel (06).

Amend. Comp. at ¶ 6. This statement is general and conclusory; it does not support this Court's jurisdiction.

Second, in his Opposition to Defendant's Motion to Dismiss, Plaintiff, now through counsel, set forth no new facts or allegations to back up the assertion in his Complaint. The most he stated in the brief was to reiterate that he made the above-quoted statement in his Amended Complaint, and to argue that he is entitled to an evidentiary hearing on the matter. Pl. Br. at 14. (Of course, legal briefs only constitute argument by counsel, not Mr. Kim's sworn statements.) The Joint Statement of Facts filed by the parties on September 23, 2005, constituting admissions and stipulations, failed to raise any additional, specific facts related to the issue of involuntariness.

Third, in his response to the Court's show cause order, Mr. Kim, through counsel, made several assertions that are relevant to his claim of involuntariness. He stated that he was "reluctant" to sign the application for resignation, despite the fact that his defense counsel, Captain Jacobson, "advised him [Plaintiff] [that] he [Capt. Jacobson] had been advised that Plaintiff would be retiring in the grade of Colonel . . ." Show Cause Resp. at 3. Also, Mr. Kim in this paper stated:

> Major Pavlick, Government Counsel then told Plaintiff that he had to sign that day September 13, 1996. Plaintiff did sign his resignation under pressure and relying on the legal advice of his counsel that he would be retiring in the grade of Colonel.

Id. at 3-4. Plaintiff also quoted at length from a memorandum written by his former defense counsel, Captain Scott Winne, in opposition to Plaintiff's being retired at a reduced grade. (Captain Winne was apparently of the opinion that Mr. Kim was treated unfairly while in the service.) Finally, the Plaintiff made more general assertions that his retirement decision was involuntary due to time pressure, duress and coercion, and reliance upon incorrect advice from his defense counsel.

The Court must examine *all* of the circumstances surrounding a retirement decision to determine whether it was involuntary. *Gallucci*, 41 Fed. Cl. at 639. Mr. Kim's vague assertions fall far short of the standard, and were not reiterated either on the record at the status conference or in Mr. Kim's formal declaration. If true, they would not support a finding that Mr. Kim's retirement decision was involuntary. Among other things, it is not clear from these general statements precisely what Mr. Kim's defense counsel advised him about his retirement, let alone whether Captain Jacobson's conduct rises to the level of ineffective assistance of counsel. Even when the Court considers the unsworn statements of counsel in Plaintiff's show cause response, we conclude that he has not made allegations to support involuntariness.

Fourth, at the status conference and in his declaration, Mr. Kim focused on the fact that he was not released from active duty while his Article 15 proceedings were pending. Declaration at 2. This prolonged duty arguably jeopardized his civilian employment, although we have no details to support such a conclusion.

Mr. Kim described facts that, at best, establish that he was subject to unfair or uncomfortable working conditions while charges were pending against him. He was made to work in a very small space, and was later not given an office or a desk from which to work. *Id.* at 7. This description of his work environment hardly supports a conclusion of involuntariness. *See Nickerson*, 35 Fed. Cl. at 586-87 (being forced to choose between unpleasant outcomes does not alone render a decision involuntary). Mr. Kim's declaration does not contain any additional support for his claim of involuntariness.

Finally, in his supplemental brief, filed on May 8, the Plaintiff argued that the Government misled him by failing to inform him that they would seek a reduction in his grade upon retirement, or that retirement constituted a waiver of his right to appeal his non-judicial punishment. Supp. Br. at 4-5. However, it is clear that the Secretary has the authority to make such retirement determinations based upon whether a member's service was satisfactory at a given grade. *See* 10 U.S.C. §§ 1370(d); 12771. In making these arguments, the Plaintiff does not point to any incorrect information provided to him by the Government upon which he relied in making his decision. Unsupported by sworn testimony, his counsel merely asserts that the Government failed to inform Mr. Kim that it could and would seek a grade reduction based on his allegedly unsatisfactory performance at the grades of colonel and lieutenant colonel. If true, this alone does not constitute reasonable reliance upon misrepresented facts, given the Secretary's generally known authority to make such retirement determinations, and the fact that Mr. Kim had his own counsel.

Conclusion:

This Court does not have jurisdiction over Mr. Kim's claims if he voluntarily retired from the military. *See Sammt v. United States*, 780 F.2d 31, 33 (Fed. Cir. 1985). Mr. Kim has not alleged a specific set of facts which, if true, support the conclusion that his retirement was involuntary.

Accordingly, the Defendant's Motion to Dismiss is GRANTED, and the case is DISMISSED for lack of subject matter jurisdiction. The Clerk of the Court is directed to enter judgment in favor of the Defendant. Each party is to bear its own costs.

IT IS SO ORDERED.

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LAWRENCE M. BASKIR
Judge