In the United States Court of Federal Claims

No. 03-1345 C
Filed April 27, 2005

FREDERICK J. SONNENFELD,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

Frederick J. Sonnenfeld, pro se, plaintiff.

Sharon A. Snyder, Trial Attorney, Bryant G. Snee, Assistant Director, David M. Cohen, Director, Commercial Litigation Branch, Peter D. Keisler, Assistant Attorney General, United States Department of Justice, Washington, D.C., for defendant.

OPINION AND ORDER

GEORGE W. MILLER, Judge.

This matter is before the Court on Defendant's Motion to Dismiss, or in the Alternative, For Summary Judgment. For the reasons set forth below, Defendant's Motion to Dismiss, or in the Alternative, For Summary Judgment is GRANTED.

BACKGROUND

I. Facts[1]

Plaintiff enlisted in the United States Army Reserve on November 6, 1993, and signed a re-enlistment agreement purporting to enroll him in the Army's Student Loan Repayment Program ("SLRP") for loan repayment up to $20,000. Complaint ("Compl.") ¶¶ 5-7. At the time

[1] The recitation of facts in this section does not constitute findings by the Court. All of the stated facts are either undisputed or alleged and assumed to be true for the purposes of the pending motion.

of his re-enlistment, the Retention Non Commissioned Officer ("NCO") apparently told Mr. Sonnenfeld that he was eligible for the SLRP. Compl. ¶ 7. The SLRP is part of the Army's Selected Reserve Incentive Program ("SRIP"), which authorizes bonuses and educational funding to facilitate the Army's efforts to meet retention and recruiting goals in critical skills areas. Skill areas are designated by a number and a letter known as a Military Occupational Specialty ("MOS"). At the time Mr. Sonnenfeld signed his re-enlistment contract, his MOS was 71L – administration. Compl. ¶ 7.

Twice a year the U.S. Army Office of the Deputy Chief of Staff for Personnel publishes a list of the MOSs that are eligible for the SLRP. Because Mr. Sonnenfeld signed his re-enlistment contract in November 1993, his eligibility was governed by the 1994 fiscal year SRIP list, dated October 1, 1993. The list appears to indicate that drill sergeants were the only soldiers with a 71L MOS who were eligible for the SLRP. Mr. Sonnenfeld was not a drill sergeant, and therefore, the Government contends, he was ineligible. Plaintiff asserts that the SLRP was offered as a re-enlistment bonus for Prior Service ("PS") soldiers. Plaintiff further contends that Army Regulation 135-7 (eff. July 1, 1990) provided that PS applicants and in-service personnel who contracted for an MOS in which they were qualified or in a critical MOS that had been established by the Department of the Army were eligible for the SLRP increased incentive. Plaintiff asserts that he was a qualified 71L PS soldier on the date of re-enlistment in accordance with the provisions of the July 1, 1990 version of Army Regulation 135-7.

Mr. Sonnenfeld's alleged ineligibility for the SLRP was discovered in March 1998, after he submitted a request for reimbursement of a portion of his student loan and was informed that he was not eligible for the program. The 104th Division Retention Officer submitted a request for exception to policy on Mr. Sonnenfeld's behalf that was supported by his commander. The exception to policy request was denied, and Mr. Sonnenfeld filed suit first in the United States District Court for the District of Colorado, and then in this court seeking $20,000 for breach of contract.

II. Proceedings

In an Opinion and Order dated September 24, 2004, granting in part and denying in part defendant's motion to dismiss pursuant to United States Court of Federal Claims Rule ("RCFC") 12(b)(1), the Court held that: (1) the Court lacked jurisdiction over plaintiff's claim based on the re-enlistment agreement, (2) the Court had jurisdiction over plaintiff's claim based on Army Regulations, (3) the Court lacked jurisdiction over plaintiff's claim based on the Federal Tort Claims Act, and (4) Defendant's motion to dismiss pursuant to RCFC 12(b)(6) was not ripe for resolution. As authorized by the Court's September 24, 2004 Opinion and Order, defendant filed a further Motion to Dismiss, or in the Alternative, For Summary Judgment. In response to the Government's latest motion, plaintiff articulated a claim for entitlement based on Army Regulation 135-7, a claim pursuant to Public Law 99-145, and a claim pursuant to the Fifth Amendment.

DISCUSSION

I. Standard of Review for Motion to Dismiss For Failure to State A Claim

A. Legal Standard

Defendant moved to dismiss plaintiff's complaint pursuant to RCFC 12(b)(6), for failure to state a claim upon which relief can be granted because the regulation upon which be relied does not afford the remedy he seeks. "In passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, unchallenged allegations of the complaint should be construed favorably to the pleader." *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989); *CC Distributors, Inc. v. United States*, 38 Fed. Cl. 771, 774 (1997). In rendering a decision, the court must presume that the undisputed factual allegations included in the complaint are true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *CC Distributors,* 38 Fed. Cl. at 774. The court should not grant a motion to dismiss unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that will entitle it to relief. *CC Distributors,* 38 Fed. Cl. at 774 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "Conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Id.* The court, however, "is mindful that pleadings drafted by pro se plaintiffs are held to 'less stringent standards than formal pleadings drafted by lawyers,'" and accordingly, such pleadings are construed "liberally." *McSheffrey v. United States*, 58 Fed. Cl. 21, 25 (2003) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

RCFC 12(b)(6) specifically instructs, however, that where such a motion is filed and "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by RCFC 56." RCFC 12(b); *see also Singleton v. United States*, 54 Fed. Cl. 689, 691 (2002); *Rotec Indus., Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1250 (Fed. Cir. 2000). In the instant case, both plaintiff and defendant rely on matters outside the pleadings. The Court is not excluding these items and, therefore, will treat defendant's motion to dismiss for failure to state a claim as a motion for summary judgment.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RCFC 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant for summary judgment bears the burden of demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

B. The Provision of Army Regulation 135-7 Upon Which Mr. Sonnenfeld Relies Was Rescinded Prior to His Re-Enlistment

Mr. Sonnenfeld asserts jurisdiction based upon the Tucker Act, 28 U.S.C. § 1491. Compl. at ¶¶ 1-2, 15. The Tucker Act grants "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2000). The Tucker Act, however, is only a jurisdictional statute; it does not create any substantive rights for money damages enforceable against the United States. *Testan v. United States*, 424 U.S. 392, 398 (1992). Therefore, in order to pursue a substantive right, the plaintiff "must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States." *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998).

The parties agree that plaintiff was not in a critical MOS within the meaning of Army Reg. 135-7 at 5.1-3 (eff. July 1, 1990). Mr. Sonnenfeld, relying on the July 1, 1990 version of Army Reg. 135-7, argues that he was eligible for the SLRP incentive because he was a prior service soldier who contracted for and remained in an MOS in which he was already qualified. However, that provision of the regulation was rescinded by the Department of the Army effective January 1, 1992. In the section entitled "Eligibility," Army Regulation 135-7 5.1-3c (eff. Oct. 1, 1994) strikes out "PS applicants and in-service personnel who contract for an MOS in which they are qualified" and adds "[e]xcept under the drill sergeant program (para. 1-21), contracts on or after 1 Jan 92 to serve in an MOS authorized by HQDA for the SLRP incentive (para. 5.1-2e(2)), or in a critical MOS that has been established by HQDA for the SLRP increased incentive (para 5.1-2e(1))." *See* Declaration of Lt. Col. Kenneth D. Curry, Def.'s Mot., Enclosure 3 at 15. Thus, the provision upon which Mr. Sonnenfeld relies was no longer in effect when he signed his re-enlistment contract on November 6, 1993. Therefore, defendant is entitled to summary judgment.

II. Public Law 99-145 Does Not Provide Plaintiff the Relief He Seeks

Mr. Sonnenfeld appears to allege that Public Law 99-145 provides him a remedy in this case. Pl. Br. at ¶¶ 7-8. Public Law 99-145, the Department of Defense Authorization Act for 1986, was the source of 10 U.S.C. § 2171 (2000), Education Loan Repayment Programs. The statute provides that student loans *may* be repaid for members of the reserve component. 10 U.S.C. § 2171(a)(2)(A). Moreover, it specifically provides that the soldier be a member in a military speciality "specified by the Secretary" of Defense. *Id.* This statute in no way mandates the repayment of student loans; it simply confers the authority to establish a program for the repayment of student loans. Such a loan repayment program was established under Army Reg. 135-7; however, Mr. Sonnenfeld at the time of his re-enlistment was not in a military speciality that made him eligible for the program. Accordingly, Public Law 99-145 does not provide the relief he seeks.

III. This Court Is Not the Proper Forum In Which To Seek Equitable Relief

Mr. Sonnenfeld urges that this Court grant him relief, arguing that "the court should consider the merits, and ethical issues involved in this case keeping in mind that what may be lawful, may be unethical." Pl. Br. at ¶ 10. Unfortunately, Mr. Sonnenfeld has chosen the wrong forum for his argument and attaches to his brief a decision by the Army Board for Correction of Military Records ("ABCMR") that supports the Government's position.

The ABCMR decision attached as Exhibit D to Mr. Sonnenfeld's brief is factually and legally similar to Mr. Sonnenfeld's claim. In the ABCMR proceeding, the applicant, like Mr. Sonnenfeld, stated that he was induced to enlist based upon the promise of a $10,000 SLRP. Pl. Br. at Ex. D. However, when the applicant applied for repayment of his $2,500 student loan, he was told that he did not qualify for the SLRP because he had not enlisted in a qualified MOS. *Id.* The AMBCR agreed with the applicant that "it would be an injustice not to give the applicant an enlistment incentive which he reasonably believed would be fulfilled." *Id.* The AMBCR recommended that the applicant's records be corrected to show that, as an exception to policy, his MOS had been approved for the $10,000 SLRP. *Id.*

Unlike this Court, the ABCMR possesses broad equitable powers to change any military record to "correct an error or remove injustice." 10 U.S.C. § 1552(a)(1); *Oleson v. United States*, 172 Ct. Cl. 9, 22 (1965) (legislation creating Boards is remedial in nature and should be liberally construed). Mr. Sonnenfeld has repeatedly been encouraged to seek relief under the ABCMR's equitable powers, yet he has declined to do so. Mr. Sonnenfeld cannot show any legal entitlement to compensation.

IV. The Court Lacks Jurisdiction Over Mr. Sonnenfeld's Fifth Amendment Claim

Mr. Sonnenfeld now asserts that the Fifth Amendment to the United States Constitution provides a basis for his recovery in this case.[2] Pl. Br. at ¶ 9. The Tucker Act does grant this Court jurisdiction to render judgment upon any claim against the United States founded upon the Constitution. 28 U.S.C. § 1491(a)(1). However, not every claim arising under the Constitution satisfies the jurisdictional requirements of the Tucker Act. *Richards v. United States*, 20 Cl. Ct. 753, 755 (1990). The claim must arise from the violation of a provision of the Constitution which mandates the payment of money damages. *Stephenson v. United States*, 58 Fed. Cl. 186, 192 (2003) (citing *United States v. Mitchell*, 463 U.S. 206 (1983)).

Neither the Fifth Amendment due process clause, nor its equal protection component, mandate compensation by the Federal Government for alleged violations. *Stephenson*, 58 Fed.

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[2] Plaintiff is unclear as to what type of claim he is asserting under the Fifth Amendment. Based on the facts of this case, the Court assumes that he is asserting a due process or equal protection claim. The Court sees no basis for an assertion that any property right of plaintiff was taken.

Cl. at 192 (citing *LeBlanc v. United States*, 50 F.3d 1025, 1026 (Fed. Cir. 1995), *Bounds v. United States*, 1 Cl. Ct. 215, 216 (1983), *aff'd*, 723 F.2d 68 (Fed. Cir. 1983)); *see also Carruth v. United States*, 224 Ct. Cl. 422, 445, 627 F.2d 1068, 1081 (1980). Thus, neither the due process clause nor its equal protection component satisfies the jurisdictional requirements of the Tucker Act, and therefore, the Court lacks jurisdiction to entertain any claims by Mr. Sonnenfeld based thereon.

CONCLUSION

For the reasons set forth above, defendant's Motion to Dismiss, or in the Alternative, For Summary Judgment is GRANTED. The clerk shall enter judgment: (1) dismissing pursuant to RCFC 12(b)(1) plaintiff's claims under the re-enlistment contract, Federal Tort Claims Act, and Fifth Amendment and (2) granting summary judgment for defendant pursuant to RCFC 56 regarding plaintiff's claims under Army Regulation 135-7 and Public Law 99-145.

IT IS SO ORDERED.

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GEORGE W. MILLER
Judge