

In the United States Court of Federal Claims

Nos. 11-386C & 11-392C

(Filed: October 13, 2011)

(NOT TO BE PUBLISHED)

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SAMUEL McNEIL,)
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Plaintiff,)
)
v.)
)
UNITED STATES,)
)
Defendant.)
)

Samuel McNeil, *pro se*, Azusa, CA.

Gregg Paris Yates and Devin A. Wolak, Trial Attorneys, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With them on the briefs were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Claudia Burke, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

LETTOW, Judge.

Samuel McNeil seeks damages from the United States (“the government”) for his alleged wrongful discharge from the United States Air Force (“Air Force”) in 1996 and for alleged contractual breaches and tortious conduct associated with his employment with the United States Postal Service, terminated in 1989. The government has moved to dismiss the complaints on the grounds that Mr. McNeil’s claims do not fall within the subject matter jurisdiction of this court and are barred by the applicable statute of limitations.

BACKGROUND

Mr. McNeil filed complaints in this court on June 14 and 15, 2011, alleging that he was wrongfully discharged from his employment in the Air Force, Compl. in No. 11-386C at 2, and that the United States Postal Service similarly barred him from work, Compl. in No. 11-392C at

2. The complaints posit various theories of recovery, including breach of contract, “execution of illegal orders,” constitutional violations, and intentional infliction of emotional distress. Compl. in No. 11-386C at 1 (capitalization removed);¹ Compl. in 11-392C at 2. In No. 11-386C, Mr. McNeil states that he served on active duty in the Air Force from January 26, 1961 to January 26, 1965, and on reserve duty from October 15, 1986 to December 12, 1996. *See* Def.’s Mot. to Dismiss in No. 11-386C at 2 n.1 & Ex. 1A. Mr. McNeil avers that his discharge on or about December 12, 1996 was the result of an “execution of illegal orders,” Compl. in No. 11-386C at 1, and occurred without a requested court-martial proceeding or legal assistance, all in contravention of his due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, Pl.’s Aff. in No. 11-386C at Ex. 3. In No. 11-392C, Mr. McNeil alleges that he is a retired Postal Service employee who was prevented from returning to work by illegal orders. Compl. in No. 11-392C at 1-2.

As a result of these allegedly wrongful actions, Mr. McNeil asserts that he has lost wages, benefits, and opportunities for education and promotion. In No. 11-386C, Mr. McNeil further asserts that, but for the discharge, he would have retired from the Air Force on February 17, 2003, with a military pension after having served twenty years. *See* Def.’s Mot. to Dismiss in No. 11-386C at Ex. A; *see also* Compl. in No. 11-386C at 4. Mr. McNeil’s complaint in No. 11-386C also claims personal injury damages of \$100 million and “hedonic damages” of \$5 million. Compl. in No. 11-386C at 4. In No. 11-392C, Mr. McNeil contends that the government has breached his contract of employment, intentionally caused him to suffer emotional distress, and barred him from pursuing “life’s pleasurable activities.” Compl. in No. 11-392C at 1, 3. He claims he is due backpay, promotions, and a full retirement, and seeks an award of \$85.8 million plus continuing retirement pay. Compl. in No. 11-392C at 3.²

The government has moved to dismiss Mr. McNeil’s complaints under Rule 12(b)(1) of the Rules of the Court of Federal Claims. The government argues that the court has no jurisdiction over Mr. McNeil’s tort-related claims under the Tucker Act, 28 U.S.C. § 1491(a)(1), that Mr. McNeil’s constitutional claims seek to invoke provisions that are not money-mandating and thus not encompassed by the Tucker Act, and that in all events, Mr. McNeil’s claims are barred by this court’s six-year statute of limitations, 28 U.S.C. § 2501. *See* Def.’s Mot. to Dismiss in No. 11-386C at 4-5; Def.’s Mot. to Dismiss in No. 11-392C at 4-5.

JURISDICTION

Subject matter jurisdiction must be established before this court can proceed to the merits of a controversy. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998). The party seeking relief bears the burden of establishing subject matter jurisdiction by a

¹Mr. McNeil used capital letters uniformly throughout his filings. Subsequent quotations from Mr. McNeil’s submissions will omit capitalization.

²Mr. McNeil previously filed other somewhat similar cases in this court, namely, *McNeil v. United States*, No. 98-926 (Fed. Cl. filed Dec. 18, 1998); *McNeil v. United States*, No. 99-2 (Fed. Cl. filed Jan. 4, 1999); and *McNeil v. United States*, No. 99-26 (Fed. Cl. filed Jan. 14, 1999).

preponderance of the evidence. *See Barrett v. Nicholson*, 466 F.3d 1038, 1041 (Fed. Cir. 2006) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-89 (1936)). “When considering a motion to dismiss for lack of subject matter jurisdiction . . . , the [c]ourt accepts as true the undisputed allegations in the complaint and draws all reasonable inferences in favor of the plaintiff.” *United Keetoowah Band of Cherokee Indians in Okla. v. United States*, 86 Fed. Cl. 183, 186 (2009) (citing *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989)). Pleadings submitted by *pro se* litigants are “held to ‘less stringent standards than formal pleadings drafted by lawyers,’” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1971)), but nonetheless must “affirmatively and distinctly” demonstrate that the court has jurisdiction over the underlying claim, *Zhao v. United States*, 91 Fed. Cl. 95, 98 (2010) (quoting *Norton v. Larney*, 266 U.S. 511, 515 (1925)).

The Tucker Act grants this court “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). However, such a claim must be filed within six years. *See* 28 U.S.C. § 2501 (“Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008) (adherence to this statute of limitations is jurisdictional).

TORT CLAIMS

Mr. McNeil’s personal injury claims rest upon alleged torts. *See Restatement (Second) of Torts* §§ 905, 924 (1979); *see also United States v. Burke*, 504 U.S. 229, 235 (1992) (citing Dan B. Dobbs, *Law of Remedies* 136 (1973)). So do his claims for “hedonic damages,” *see, e.g., Loth v. Truck-A-Way Corp.*, 70 Cal. Rptr. 2d 571, 573 & n.1 (Cal. Ct. App. 1998),³ and for damages for intentional infliction of emotional distress, *see Restatement (Second) of Torts* § 46 (1965). The Tucker Act specifically bars this court from exercising jurisdiction over claims “sounding in tort.” 28 U.S.C. § 1491(a)(1). Thus, this court has no jurisdiction over Mr. McNeil’s claims for personal injuries, hedonic damages, and intentional infliction of emotional distress, and their related theories of recovery.

CONSTITUTIONAL CLAIMS

Additionally, Mr. McNeil contends that his discharge from the Air Force failed to comport with the due process requirements of the Fifth and Fourteenth Amendments. *See* Pl.’s Aff. in No. 11-386C at Ex. 3. These constitutional provisions, however, are not money-mandating and consequently cannot provide a basis for jurisdiction in this court. *See LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that violation of the Fifth or the Fourteenth Amendment does not require the government to pay money); *McCauley v. United*

³“Hedonic damages derives its name from the Greek word ‘hedonikos’ meaning pleasure or pleasureable . . . and means either a loss of enjoyment of life or loss of life’s pleasures.” *Loth*, 70 Cal. Rptr. 2d at 573 n.1 (quotation marks omitted) (citation omitted).

States, 38 Fed. Cl. 250, 266 (1997) (holding that violation of the Fifth or the Fourteenth Amendment does not create a cause of action for money damages); *see also Del Rio v. United States*, 87 Fed. Cl. 536, 539-40 (2009) (same).

STATUTE OF LIMITATIONS

Mr. McNeil's remaining claims center on breach of contract. These claims are within the jurisdiction of the court, but only if they are timely. "A cause of action cognizable in a Tucker Act suit accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.*, when 'all events have occurred to fix the [g]overnment's alleged liability, entitling the claimant to demand payment and sue here for his money.'" *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (quoting *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966)).

The focus of Mr. McNeil's suit in No. 11-386C is his alleged wrongful discharge from the Air Force on approximately December 12, 1996. *See* Compl. in No. 11-386 at 2 ("USAF negligently breached my enlistment contract and executed illegal orders unlawfully ending my military career. . . . My military contract was breached by defendant on or about December 12, 1996."); Def.'s Mot. to Dismiss in No. 11-386C at Ex. 1A (seeking "lost wages from 12 Dec[. 19]96"); *id.* (claiming that plaintiff was in "reserve duty [with the] Air Force Reserves . . . [from] 15[]Oct[. 19]86 to 12[]Dec[. 19]96"); Pl.'s Opp'n in No. 11-386C at 8 ("Defendant conspired to end my military career; the overt act needed to prove conspiracy was an illegal order on or about December 12, 1996 to cease military duty."). Mr. McNeil also states at one point that his "[d]ischarge was dated August 1998." Pl.'s Opp'n in No. 11-386C at 9. "In a military discharge case, [the Federal Circuit has] long held that the plaintiff's cause of action for back pay accrues at the time of the plaintiff's discharge." *Martinez*, 333 F.3d at 1303 (collecting cases). Regardless of whether 1996 or 1998 is used as the accrual date, the result is the same. Mr. McNeil's claims accrued at the time of discharge and expired either on December 12, 2002, or sometime in August 2004. Because Mr. McNeil did not file his complaint until June 14, 2011, 28 U.S.C. § 2501 bars his wrongful discharge claims.

Mr. McNeil's allegations that the Postal Service breached his employment contract are similarly unavailing because the alleged breach apparently occurred 22 years ago. *See* Def.'s Mot. to Dismiss in No. 11-392C at 3 (citing *McNeil v. United States Postal Serv.*, No. CV 09-5730 GHK (C.D. Cal. 2009), indicating that Mr. McNeil was employed by the Postal Service until he was removed in 1989 after having been suspended three times).

Mr. McNeil's invocation of equitable tolling is unavailing, as this court's statute of limitations is not susceptible to equitable tolling. *See John R. Sand*, 552 U.S. at 136-38; *Dubsky v. United States*, 98 Fed. Cl. 703, 709 (2011).

CONCLUSION

This court does not have subject matter jurisdiction over Mr. McNeil's claims because they reflect tortious averments, allege constitutional violations not remediable by money damages, and are barred by the statute of limitations. Consequently, the government's motion to

dismiss for lack of subject matter jurisdiction is GRANTED. The clerk shall enter judgment accordingly.

No costs.

It is so ORDERED.

Charles F. Lettow
Judge