ORIGINAL

In the United States Court of Federal Claims

No. 11-639 C
(Filed: May 30, 2012)
NOT FOR PUBLICATION

FILED

MAY 30 2012

U.S. COURT OF FEDERAL CLAIMS

MALLOY, ARTHUR BRENNAN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Arthur Brennan Malloy, Springville, Ala., plaintiff, *pro se*.

Luke A. E. Pazicky, Trial Attorney, Harold D. Lester, Jr., Assistant Director, Jeanne E. Davidson, Director, Commercial Litigation Branch, Tony West, Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C., for defendant.

OPINION AND ORDER

GEORGE W. MILLER, Judge

Plaintiff, Arthur Brennan Malloy, appearing *pro se*,[1] filed a complaint in this court on October 3, 2011 alleging that he was wrongfully discharged from the United States Navy; that such wrongful discharge was a result of racial prejudice and bad motives; and that he is owed back pay, retirement pay and benefits, and damages. Compl. 2–3 (docket entry 1). On the same

[1] On April 24, 2012, plaintiff filed a request for appointment of counsel. Plaintiff states he is "unlearned in law, [and] lacks the ability to represent himself," and claims that, if he were appointed counsel, the court would benefit from the "orderly processing of this cause of action and a prompt resolution of matters and issues." Req. for Appointment of Counsel 1–2 (docket entry 12). Defendant opposes this request, arguing that plaintiff's case does not present the extreme circumstances that would warrant appointment of counsel. Def.'s Resp. to Pl.'s Req. for Appointment of Counsel 1–2 (docket entry 13, May 11, 2012). Although this court has the ability to appoint counsel in civil cases, it should do so only in "extreme circumstances." *Washington v. United States*, 93 Fed. Cl. 706, 708 (2010). Such circumstances include situations in which "quasi-criminal penalties or severe civil remedies are at stake" or when the case presents an extreme hardship to the party requesting counsel. *Id.* at 708–09. Plaintiff's case does not present such extreme circumstances. Accordingly, plaintiff's request for appointment of counsel is **DENIED**.

day, plaintiff filed a "Declaration in Support of Request to Proceed In Forma Pauperis" (docket entry 2). Defendant, the United States, moved to dismiss plaintiff's action on November 28, 2011 for lack of jurisdiction pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"), claiming that the court does not have jurisdiction over plaintiff's action because it was filed outside the six-year statute of limitations set forth in 28 U.S.C. § 2501 or, in the alternative, because this court does not have jurisdiction over tort claims (docket entry 4). Plaintiff responded to defendant's motion to dismiss on February 13, 2012 (docket entry 8).[2] Defendant replied in support of its motion to dismiss on February 22, 2012 (docket entry 9). On March 5, 2012, plaintiff filed, by leave of the Court, a supplemental response to defendant's motion to dismiss (docket entry 10), and he filed an amended supplemental response on May 23, 2012 (docket entry 14).

I. Background

Plaintiff was a member of the United States Navy sometime prior to 1965.[3] *See* Compl. 3–4. On November 26, 1965, a "Field Review Board" of the United States Navy convened to determine whether plaintiff should be discharged from service, specifically engaging in a "review of misconduct" pursuant to Article C-10312 of the Bureau of Naval Personnel Manual.[4] *Id.* at 3. As a result of this review, the Field Review Board concluded that plaintiff should receive an "other than honorable" discharge. *Id.* at 4.

Plaintiff alleges that, in connection with this review, the Navy acted "in bad-faith and with discriminatory intent designed to injure the plaintiff, [and] overreached its authority of 'authorized' punishment(s)." *Id.* The only factual support plaintiff offers for this contention is that "[a]ll members of the Field Board were 'White' (Caucasians) and plaintiff is 'Black' (Afro-American)." *Id.*

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[2] After receiving notification that defendant's motion to dismiss had not been served upon plaintiff, the Court ensured its proper delivery. *See* Order to Show Cause 1 (docket entry 6, Feb. 2, 2012). Thereafter, the Court issued an Order to Show Cause as to why plaintiff had not yet filed a response to defendant's motion to dismiss. *Id.* Plaintiff responded on February 13, 2012 explaining that he had received and previously responded to defendant's motion to dismiss and stating that he was again mailing his response to the court (docket entry 7).

[3] Plaintiff is currently incarcerated in Alabama serving a life sentence without possibility of parole as a result of an Alabama state conviction for first degree robbery. *Malloy v. Alabama*, No. 2:86-cv-1160-TMH, 2011 U.S. Dist. LEXIS 25121, at *1 (M.D. Ala. Feb. 1, 2011), *adopted by* No. 2:86-cv-1160-TMH, 2011 U.S. Dist. LEXIS 25653 (M.D. Ala. Mar. 11, 2011); *see* Def.'s Mot. to Dismiss 2 n.3.

[4] Article C-10312 of the Bureau of Naval Personnel Manual is entitled "Discharge of Enlisted Personnel by Reason of Misconduct." Def.'s Mot. to Dismiss app. at 9. When in force, it provided the procedures the Navy was to follow when discharging a member for misconduct, which could be triggered by a number of events, including conviction by civil authorities, procurement of a fraudulent enlistment, or prolonged unauthorized absence. *Id.*

Plaintiff also alleges that the Navy, "while recognizing the plaintiff's 'abnormal' behavior and presumption of psychosis, knowingly and in bad faith, failed to order medical treatment and/or psychological testing prior to termination of service." *Id.* at 3. Plaintiff does not provide any additional information regarding this allegation other than stating that he "had no criminal-history or aggressive-behavior pattern prior to military service." *Id.* at 4. He claims that the military's failure to pursue treatment or testing resulted in "undue injury . . . and a miscarriage of justice prejudicial to plaintiff." *Id.*

As relief for his claims, plaintiff seeks full retirement status; compensatory damages in the amount of $20 million for "emotional distress, suffering and deprivation of his privileges and entitlements as a Veteran"; punitive damages amounting to at least $5 million; actual damages to include $200,000 in back pay and $750,000 in retirement back pay; and "exemplary damages as the Court of Claims determines to be just as fair." *Id.* at 5–6.

II. Discussion

According to the Tucker Act, the United States Court of Federal Claims' subject matter jurisdiction extends to "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). Pursuant to 28 U.S.C. § 2501, "[e]very 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." 28 U.S.C. § 2501.

When deciding a case based on a defendant's motion to dismiss for a lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), the court must determine whether it has authority to address a plaintiff's legal and factual issues. *Brach v. United States*, 443 F. App'x 543, 547 (Fed. Cir. 2011). In so doing, the court must assume that all of the plaintiff's undisputed factual allegations are true and draw all reasonable inferences in the plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

A court will "liberally" construe a *pro se* plaintiff's pleadings when assessing that plaintiff's case. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" (citation omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))); *see Humphrey v. United States*, 52 Fed. Cl. 593, 595 (2002) ("[T]he Court will generously construe a *pro se* complaint . . . ."), *aff'd*, 60 F. App'x 292 (Fed. Cir. 2003). However, a *pro se* plaintiff "still must establish the requisite elements of his claim," including the court's subject matter jurisdiction. *Humphrey*, 52 Fed. Cl. at 595. In the Court of Federal Claims, this includes establishing by a preponderance of the evidence that the plaintiff's case was timely filed. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134–36 (2008) (explaining that the statute of limitations stated in 28 U.S.C. § 2501 is jurisdictional in nature); *Banks v. United States*, 102 Fed. Cl. 115, 127 (2011) ("Because the statute of limitations in this court is jurisdictional, plaintiffs have the burden of showing by a preponderance of the evidence that their claims were timely filed." (citation omitted)).

Here, defendant argues that plaintiff's claim should be dismissed for lack of jurisdiction because it was filed more than six years after the claim accrued. Def.'s Mot. to Dismiss 3–4.

A. Plaintiff Has Not Alleged Facts Sufficient to Demonstrate that His Claim Was Timely Filed

"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 . . . ." *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc). A claim alleging wrongful military discharge accrues on the date of the plaintiff's discharge from the military. *Levy v. United States*, 83 Fed. Cl. 67, 74 (2008) (citing *Young v. United States*, 529 F.3d 1380, 1383 (Fed. Cir. 2008)). Additionally, as has been frequently held, a plaintiff's claim for military back pay following a wrongful discharge accrues at the time of his or her discharge. *Martinez*, 333 F.3d at 1303 ("In a military discharge case, this court and the Court of Claims have long held that the plaintiff's cause of action for back pay accrues at the time of the plaintiff's discharge."). And, finally, an action for retirement pay also accrues on the date of discharge.[5] *Levy*, 83 Fed. Cl. at 74 (explaining that, in "a military pay case seeking retirement pay, the applicable start date for accrual of the statute of limitations . . . is the date of [a plainiff's] actual discharge"). Taken together, these rules are referred to as the "date-of-discharge rule." *Id.*

It is unclear in this case precisely when plaintiff was discharged from the Navy. He explains that the Field Review Board met on November 26, 1965 and, on that date, decided that he should receive a discharge "other than honorable." Compl. 3. Assuming the truth of all facts alleged in the complaint, it appears that November 26, 1965 is the date of the *decision* to discharge plaintiff, not the actual date of discharge, an interpretation with which defendant impliedly agrees. *See* Def.'s Mot. to Dismiss 4 ("[Plaintiff's] complaint does not specify the actual date of his discharge . . . ."). Plaintiff never states his precise date of discharge, which could have been some time after the decision to discharge was rendered. *See, e.g.*, *Chapman v. United States*, 92 Fed. Cl. 570, 587 (2010) (discussing an event that occurred after a Coast Guard member's "discharge orders had been issued and only a few weeks before the . . . date on which his discharge was effective"), *aff'd*, 427 F. App'x 897 (Fed. Cir. 2011).

In his response to defendant's motion to dismiss, plaintiff states, "The injury to the plaintiff accru[ed] on February 7, 1966." Pl.'s Resp. to Def.'s Mot. to Dismiss para. 3. He then requests "'full-back [sic] pay' from February 7, 1966 to the present day," *id.* para. 4, implying that February 7, 1966 is the date on which he was discharged from the Navy. *See Martinez*, 333 F.3d at 1303 (explaining that an action for back pay following a wrongful discharge accrues on the date of discharge). However, the record does not permit the Court to find that plaintiff's action accrued on February 7, 1966. The Court must draw all reasonable inferences in plaintiff's favor, *see Scheuer*, 416 U.S. at 236, and plaintiff does not definitively state as a fact that

[5] Accrual of a claim for *disability* retirement pay occurs at the time the relevant military board denies or declines to consider such an action. *Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005); *see Smalls v. United States*, 298 F. App'x 994, 996 (Fed. Cir. 2008). Nothing in plaintiff's filings suggests that he has presented a disability retirement claim to an appropriate military board.

February 7, 1966, which is beyond the six-year statute of limitations, was the date of his discharge.

In an effort to determine the date plaintiff's claim accrued, defendant notes that plaintiff "has been serving a life sentence without parole in an Alabama correctional facility *since 1981*," which is beyond the six-year statute of limitations. Def.'s Mot. to Dismiss 4 (emphasis added) (citing *Malloy v. Alabama*, No. 2:86-cv-1160-TMH, 2011 U.S. Dist. LEXIS 25121, at *1 (M.D. Ala. Feb. 1, 2011), *adopted by* No. 2:86-cv-1160-TMH, 2011 U.S. Dist. LEXIS 25653 (M.D. Ala. Mar. 11, 2011)). However, this fact does not necessarily suggest that plaintiff was immediately discharged from the Navy upon his incarceration. *See Stone v. United States*, 4 Cl. Ct. 250, 253–56 (1984) (assessing the disability retirement claims of a member of the Army who was imprisoned in 1971 and discharged from the military four years later in 1975); *see also Lowe v. United States*, 79 Fed. Cl. 218, 225–26 (2007) (discussing the effect of military confinement on a service member's active duty status), *appeal dismissed*, 333 F. App'x 523 (Fed. Cir. 2009).

Defendant also highlights plaintiff's request for retirement back pay at a rate of $30,000 per year for 25 years—"the number of years that plaintiff would have been properly retired as Veteran." Def.'s Mot. to Dismiss 4 n.4 (quoting Compl. 6) (internal quotation marks omitted). Defendant argues that plaintiff's claim for retirement back pay supports the conclusion that plaintiff was discharged, or otherwise separated from the naval service, at least 25 years prior to filing suit, i.e., sometime in 1986. *Id.*

Plaintiff also claims back pay in the amount of $10,000 per year for twenty years—"the required time-period to reach military retirement." Compl. 6. Therefore, even assuming plaintiff was never discharged from the Navy and was properly retired in 1986 as defendant suggests, and assuming plaintiff would have had to serve twenty more years from his date of discharge before being eligible to retire, it follows that plaintiff's discharge would have occurred in 1966, twenty years prior to his presumed retirement in 1986. This analysis is consistent with the date on which plaintiff represents his claim accrued, February 7, 1966.

Although the Court can only speculatively establish from plaintiff's filings when plaintiff was discharged from the Navy, none of the dates discussed above would cause plaintiff's complaint to be timely. November 26, 1965, February 7, 1966, and the years 1981 and 1986 are all beyond the six-year statute of limitations. Furthermore, plaintiff does not present any evidence nor does he allege any facts that would support a finding that his discharge occurred during the six-year period prior to the filing of his complaint, which would be sometime between October 3, 2005 and October 3, 2011. As a result, plaintiff has failed to meet his burden to establish subject matter jurisdiction as he has not alleged facts that, taken as true, would demonstrate that his claim was timely filed.

B. The Accrual of Plaintiff's Claim Is Not Suspended

In an amended supplemental response to defendant's motion to dismiss, plaintiff argues that his action is timely based on accrual suspension, Amendment to Pl.'s Supplemental Resp. to Def.'s Mot. to Dismiss ("Pl.'s Am. Suppl. Resp.") 1, which is the principle that "the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed." *Martinez*, 333 F.3d at 1319. Specifically, plaintiff contends that his action did not accrue until December 2009,[6] when he received military records from the Bureau of Naval Records. Pl.'s Am. Suppl. Resp. Ex. A. It was at this time, he states, that he realized that he had been wrongfully discharged. *Id.*

In order to succeed on an accrual suspension theory, the plaintiff "must either show that [the] defendant has concealed its acts with the result that [the] plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date." *Martinez*, 333 F.3d at 1319 (quoting *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985)) (internal quotation marks omitted). Here, plaintiff does not allege and nothing indicates that defendant concealed plaintiff's discharge or its actions related to his discharge. Additionally, "at all times [plaintiff] possessed the factual information required to bring his claim in this [c]ourt, even if he lacked the awareness of his legal right to do so." *Dubsky v. United States*, 98 Fed. Cl. 703, 709, *appeal dismissed*, No. 2011-5123, 2011 WL 7461090 (Fed. Cir. 2011); *see Young*, 529 F.3d at 1385; *Martinez*, 333 F.3d at 1319. Plaintiff certainly knew he had been discharged from the Navy, which is the injury for which he now seeks redress, and nothing suggests that his discharge was "inherently unknowable." Accordingly, plaintiff's argument that his claim is timely because the accrual of his action should be suspended fails.

C. Plaintiff's Claim Is Not a Legal Nullity

Additionally, to refute defendant's statute of limitations argument, plaintiff argues that "[a] military discharge issued in violation of a regulation of the executive department involved is a nullity and the character and fact of the discharge are voided by the failure of the service department to accord the man his material rights or to follow the required procedures." Pl.'s Resp. to Def.'s Mot. to Dismiss para. 4. Plaintiff argues that because his discharge was wrongful, it effectively did not occur, rendering him "factually and legally still a serviceman in the U.S. Navy" who is entitled to back pay. *Id.*

In response to this contention, defendant points to *Parker v. United States*, 2 Cl. Ct. 399 (1983). Def.'s Reply in Supp. of Mot. to Dismiss 1. In *Parker*, the plaintiff was discharged from the United States Navy in December 1974. *Parker*, 2 Cl. Ct. at 400. After filing a request for a correction of records with the Board for Correction of Naval Records, which was denied, and a request for reconsideration of that denial, which was also denied, the plaintiff filed a complaint in the Court of Claims in August 1982. *Id.* at 401. The defendant, the United States, then filed a motion to dismiss alleging that the plaintiff's claim was filed after the six-year statute of limitations had run and was, therefore, untimely. *Id.*

[6] This is a direct contradiction of plaintiff's previous claim that his action accrued on February 7, 1966. Pl.'s Resp. to Def.'s Mot. to Dismiss paras. 3–4; *see supra* Part II.A.

Like plaintiff in this case, the plaintiff in *Parker* argued that "defendant had no legal right to effect his discharge" and, therefore, "because the discharge [was] illegal, the limitations period [could not] be held to commence on a legal nullity." *Id.* at 402. In response, the court reasoned: "The defect in this approach is that, if adopted, limitations would bar only lawful actions. In effect, the bar would evaporate. The court would try all claims on their merits to ascertain the legality of the challenged government action before declaring a suit filed out of time." *Id.* Defendant adopts the rationale of the *Parker* court and explains that, if plaintiff's reasoning were followed, "the limitations period applicable to the Court of Federal Claims would apply only to lawful discharges, a result that makes no sense." Def.'s Reply in Supp. of Mot. to Dismiss 2 (citing *Parker*, 2 Cl. Ct. at 402).

The Court agrees with the conclusion of the *Parker* court and holds that, even if plaintiff's discharge were illegal or otherwise wrongful, that would not operate to delay the start of the limitations period.

CONCLUSION

In view of the foregoing, the Court **GRANTS** plaintiff's motion for leave to proceed *in forma pauperis* to the extent necessary to permit him to litigate defendant's pending motion. The Court **GRANTS** defendant's motion to dismiss for lack of jurisdiction and finds that plaintiff's claim is barred by the applicable statute of limitations, 28 U.S.C. § 2501. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

George W. Miller

GEORGE W. MILLER
Judge