

In the United States Court of Federal Claims

No. 10-509C

(Filed May 17, 2011)

NOT FOR PUBLICATION

TOMMY LEE STEVENS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

Before the Court is defendant’s Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim upon which Relief Can be Granted (“Motion to Dismiss”) filed October 1, 2010. After careful review of the briefs, for the reasons that follow, defendant’s Motion to Dismiss is **GRANTED**.

Plaintiff filed his Complaint *pro se* on August 3, 2010. In this complaint, Mr. Stevens alleged that he was “utiliz[ing] one of the three waivers of the money mandating statutes.” Compl. at 1. Specifically, Mr. Stevens alleged he did not need a money-mandating statute because he was owed money from the United States Treasury. *Id.* The apparent basis for being owed money was that in November 1994 plaintiff was allegedly implanted with a transceiver, which he claims belonged “solely to the U.S. Government.” *Id.* Plaintiff further stated that his complaint was “against the Department of Health and Human Services in Washington D.C. for violation of 45 CFR 46.101(b)(2)(i) [and] (ii).” *Id.* Mister Stevens then requested that the remainder of his complaint be presented orally “because the defendant is locked on to this computer and is controlling it.” *Id.* at 2.

The government filed its Motion to Dismiss, arguing that the Court lacks jurisdiction over Mr. Stevens’s claim because it was barred by the statute of limitations and because the regulation Mr. Stevens cited as the basis of his claim was not a money-mandating regulation. Mot. to Dismiss at 1. Pursuant to 28 U.S.C. § 2501, any claims against the government brought in the Court of Federal Claims must be initiated within six years of the claim accruing. *Id.* at 3. The government also argues that Mr. Stevens has not alleged any facts demonstrating how and

when the United States violated 45 C.F.R. § 46.101(b)(2).¹ *Id.* at 4. Assuming the alleged implantation is the basis for the claim, then the six year period for filing would have expired by December 2000. *Id.* The government next argues that the Court does not have jurisdiction because Mr. Stevens has not alleged a violation of a money-mandating source of law and instead has claimed a non-existent waiver of the money-mandating requirement. *Id.* at 5. Even if Mr. Stevens were trying to claim that 45 C.F.R. § 46.101(b)(2) was money-mandating, the government argues that the case would not be within our jurisdiction because the regulation cannot be fairly read as such. *Id.* at 5-6. This section and the rest of this title of the regulations, defendant maintains, are not intended to create rights in individuals, but rather to direct the actions of researchers. *Id.* at 6. In the alternative, the government argues that even if the Court has jurisdiction, Mr. Stevens has not alleged any facts that would support a claim upon which relief can be granted. *Id.* at 7-8. Specifically, Mr. Stevens had not alleged he was a research subject or how the government violated the cited regulation. *Id.* at 8.

Mister Stevens responded that his claim should not be disallowed because of the statute of limitations. Pl.’s Resp. to Mot. to Dismiss (“Pl.’s Resp.”) at 2. Since first discovering the injury in 1999, within the six year statute of limitations, Mr. Stevens states he has diligently prosecuted his case in various courts. *Id.* Plaintiff maintains that equitable tolling should apply. First, Mr. Stevens argues that because he was incarcerated this “should have stopped the statute of limitation [sic].” *Id.* Second, he argues defendant used fraud and deceit to lead him to believe that someone else was responsible for his injuries. *Id.* at 3. This misconduct, Mr. Stevens claims, places the current litigation squarely within Federal Circuit precedent allowing equitable tolling. *Id.* And last, Mr. Stevens argued that since there was no mention of a statute of limitations problem in his prior filing in the Court of Federal Claims, there must not be an issue. *Id.* at 4.

Plaintiff next addressed the government’s contentions that 45 C.F.R. § 46.101(b)(2) is not money-mandating. Mister Stevens alleges that the violation of the regulation has caused continuing financial, legal and employment burdens. *Id.* He argues that the government should have known that these consequences would follow its actions and he therefore has a right to recover damages. *Id.* Plaintiff also argues against dismissal on the basis of what he calls “three money waivers of the money mandating statute,” namely -- (1) claims alleging a contract between the plaintiff and the government, (2) claims founded upon return of payment to the government, and (3) claims where money has not been paid, but the plaintiff is entitled to a payment from the Treasury. *Id.* at 5-6. It is the last waiver that Mr. Stevens alleges applies here.

The Court need not decide the statute of limitations issue because Mr. Stevens has not alleged a violation of a money-mandating source of law. While *pro se* plaintiffs’ filings are to be liberally construed, *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007), this lenient standard cannot prevent a case outside our jurisdiction from being dismissed. *See, e.g., Wilson v. United States*,

¹ Section 46.101(b)(2) contains only sub-subparts (i) and (ii). Therefore, for convenience, the Court will simply refer to § 46.101(b)(2) as the basis for Mr. Stevens’s claims.

404 F. App'x 499, 500 (Fed. Cir. 2010). Because the Tucker Act, 28 U.S.C. § 1491, does not create any substantive rights, a plaintiff must identify a separate source of law that creates a right to money damages for his claim to be within our jurisdiction. *Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1306 (Fed. Cir. 2008) (quoting *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part)). The test for determining whether a statute or regulation can support jurisdiction in our court is whether it can be fairly interpreted as mandating compensation. See, e.g., *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003); *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983); *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005); *Contreras v. United States*, 64 Fed. Cl. 583, 588-92 (2005).

Mr. Stevens alleges that a violation of 45 C.F.R. § 46.101(b)(2) is the basis for his claim against the United States.² Section 46.101(b)(2) provides:

Unless otherwise required by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from this policy:

...

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless:

(i) Information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and (ii) any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation.

45 C.F.R. § 46.101(b)(2). Nothing in this provision can be fairly interpreted as requiring the United States to pay money damages. Nor is there anything in the remainder of § 46.101 or the other provisions in this subpart of the Code of Federal Regulations that can be fairly interpreted as requiring the United States to pay money damages. See 45 C.F.R. §§ 46.101-.124.³

² It appears to the Court that Mr. Stevens chose this regulation as the basis for his claim because of a letter he received from the Department of Health and Human Services ("DHHS") in response to a Freedom of Information Act request. *Stevens v. United States*, No. 09-338C, 2009 WL 3650874, at *3 (Fed. Cl. Oct. 28, 2009). The letter stated that the DHHS was not aware of having any records on Mr. Stevens, but construed his request as suggesting that he may have been involved in DHHS sponsored research. *Id.* The letter requested additional information from Mr. Stevens to determine whether he had been part of any such research. *Id.*

³ The penalty for violating these provisions of the Code of Federal Regulations is having the research suspended or terminated. 45 C.F.R. §§ 46.113, 46.123.

Plaintiff asserts that he is entitled to a waiver of the requirement that the regulation mandate money damages. Pl.'s Resp. 5-6. Mister Stevens's belief appears to be rooted in a misreading of *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004), from which he pulled language from its context. What Mr. Stevens misses from this language is that the waivers referred to were not waivers of the money-mandating requirement, but were waivers of the sovereign immunity of the United States. The quoted portion of *Ontario Power* simply describes three waivers of the sovereign immunity of the United States: (1) when there exists a contract between the plaintiff and the United States, (2) when there has been an illegal exaction, and (3) when there is a source of law that mandates monetary damages. *Ontario Power*, 369 F.3d at 1301. Plaintiff does not allege any contract rights or the payment of illegally-exacted funds. His claim must thus rest on a money-mandating source, and he has identified none.

Because Mr. Stevens has not alleged the violation of a money-mandating source of law, the Court does not have jurisdiction under the Tucker Act to hear Mr. Stevens's claim. The Court hereby **DISMISSES** this action without prejudice. Given the dismissal of plaintiff's case, any other pending motions are **DENIED AS MOOT**. The Clerk shall close the case. No costs shall be awarded.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge