

In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 07-208C

(Filed January 25, 2008)

RAYMOND HARRY SWENTEK,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff Raymond Swentek, acting *pro se*, alleges that the government owes him back pay corresponding to pay periods dating back over thirty years ago, based on a retroactive administrative decision made over twenty-five years ago. The government has filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”). For the following reasons, the Court **GRANTS** defendant’s motion to dismiss for lack of subject matter jurisdiction, as the six-year statute of limitations prevents our court from exercising jurisdiction over claims as old as those raised by Mr. Swentek.

I. BACKGROUND

Plaintiff alleges that he is owed back pay totaling \$18,900.45 plus thirty-one years’ worth of interest. Compl. He claims that this back pay is the result of a Merit Systems Protection Board (“MSPB”) decision which retroactively restored him to a government position. *Id.*¹ The dollar figures come from three documents which are cited in and attached to the complaint. Two of these are checks from the United States Treasury, dated April 6, 1977 and September 13, 1978, which have “returned check notice” forms attached to them. *Id.* Atts. 2 & 4. The third is a May 21, 1976 letter from the government to Mr. Swentek’s lawyer at the time, Ms. Wilhelmina

¹ Four days after the complaint in this case was filed, Mr. Swentek submitted a second complaint to the Clerk’s Office. This was filed, assigned to the Honorable Lawrence M. Baskir and given case number 07-214C. The complaints appear to be identical, and Mr. Swentek acknowledges that he only intended to file one case. Tr. (Sept. 5, 2007) (“Tr.”) at 24-25.

Jackson, that details three disbursements allegedly made by the government to Mr. Swentek. *Id.* Att. 3. Mister Swentek appears to have written “not received” next to two of the described disbursements -- \$8,252.49 for lost wages through May 26, 1976 and \$256.67 for “[t]ravel expenses for necessary medical treatment.” *Id.* Also attached to his complaint is a copy of a Notification of Personnel Action form, the date of which is obscured but which contains two date stamps, the earliest signifying receipt on May 10, 1983. *Id.* Att. 1. This form appears to reflect the cancellation of a previous order, effective October 24, 1975, removing him from a civil engineering position with the United States Army Training Center and Fort Dix, New Jersey.²

Mister Swentek further elaborates on his claims in a subsequent submission to the Court. *See* Pl.’s Reply to Def.’s Mot. to Dismiss (“Pl.’s Reply”). In this document, plaintiff explained that his claims arose from events surrounding an injury he received while at work. *Id.* Plaintiff noted that the U.S. Court of Claims, our predecessor court, had considered his claims. *Id.* It appears the Court of Claims had twice considered claims by Mr. Swentek. First, in 1975, the court considered a breach of contract claim alleged by Mr. Swentek against the government. *Swentek v. United States*, 208 Ct. Cl. 981, 982 (1975). Ironically, given the current proceeding, the court found Mr. Swentek’s claims were barred by the statute of limitations. *Id.* at 983.

Second, in 1981, the court examined claims made by Mr. Swentek regarding a removal action taken by the United States Army against plaintiff, and remanded the case to the newly-created Office of Appeals for the MSPB for further consideration. *Swentek v. United States*, 228 Ct.Cl. 468, 476 (1981). The MSPB, on remand, ordered the Army to cancel the personnel removal action against Mr. Swentek and instead impose a ten-day suspension. *Swentek v. Dep’t of Army*, 8 M.S.P.B. 432, 435 (1981). This is the matter which the Notification of Personnel Action form, attached to the complaint, concerns. Despite being dismissed from the Ft. Dix position, plaintiff alleges in his reply that he received top secret clearance and was able to move on to a position with the “Army Security Agency, Arlington Hall Station.” Pl.’s Reply.

Given Mr. Swentek’s *pro se* status, the Court gave him the opportunity to explain his allegations in more detail, in a hearing held by telephone. *See* Tr. At the hearing, Mr. Swentek explained that he discovered the Notification of Personnel Action form and the two returned checks in his personnel file during a visit to the Department of Labor, apparently in March 2003. *See* Tr. at 9-12, 31-32; *see also* Compl. Att. 1 (copy of document containing March 25, 2003 date). Based on these documents, Mr. Swentek surmises that the government was attempting to send him back pay as a consequence of the 1981 MSPB decision, but the checks were, unbeknownst to him, returned to the government as undeliverable. Tr. at 11-12.

² The form contains among its remarks: “Retroactive restoration based on MSPB, Office of Appeals decision concurred [sic] to by US CLAIMS COURT.” Compl. Att. 1.

II. DISCUSSION

A. Legal Standard

Congress, via the Tucker Act, has placed within this Court's jurisdiction "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). A claim for money damages under the Tucker Act must be brought within six years after the date the claim accrues. 28 U.S.C. § 2501; *Soriano v. United States*, 352 U.S. 270, 273 (1957); *Maclean v. United States*, 454 F.3d 1334, 1336 (Fed. Cir. 2006). The statute of limitations requirement is a jurisdictional requirement that may not be waived by the parties. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354-55 (Fed.Cir. 2006), *aff'd*, No. 06-1164 (U.S. Jan. 8, 2008).

Although this Court accords a *pro se* plaintiff leniency in presenting his case, *see Hains v. Kerner*, 404 U.S. 519, 520 (1972); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Young v. United States*, 60 Fed. Cl. 418, 426 (2004), plaintiff's *pro se* status does not immunize him from the requirement that he plead facts upon which a valid claim can rest. *Paalan v. United States*, 57 Fed. Cl. 15, 16 (2003). Nor does it relieve him of his burden of demonstrating -- by a preponderance of the evidence if jurisdictional facts are challenged, *see Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747-48 (Fed.Cir. 1988); *Englewood Terrace Ltd. P'ship v. United States*, 61 Fed. Cl. 583, 584 (2004) -- that this Court possesses jurisdiction over the claim he has submitted.

The government's motion does not challenge any jurisdictional allegations. *See* Motion at 1 n.2. In reviewing such motions to dismiss, the court accepts as true all of the non-movant's factual allegations and draws all reasonable inferences in a light most favorable to that party. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Reynolds*, 846 F.2d at 747; *see also Pixton v. B&B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002) (explaining that court must "view the alleged facts in the complaint as true, and if the facts reveal any reasonable basis upon which the non-movant may prevail, dismissal is inappropriate").

B. Analysis

Mister Swentek's claims accrued many more than six years prior to his filing of the complaint in this case. The claims appear to rest on two sources. First, there is the letter from the government to his then-counsel, dated May 21, 1976. Compl. Att. 3. This letter describes three disbursements which, the government claimed, "have been made" in connection with plaintiff's "compensation case." *Id.* Assuming for the purpose of deciding the government's motion that it is true that Mr. Swentek never received two of these payments, that fact would have been known in May 1976 when the letter was received. Mister Swentek's claim to this money would have accrued at that time, when the government apparently conceded the debt and alleged that it paid him money he never received.

The second source of plaintiff's claim to back pay is the MSPB decision which overturned his removal from the civil engineering post at Ft. Dix. *Swentek*, 8 M.S.P.B. at 435. Concerning this portion of his claim, Mr. Swentek alleges he was aware in the early 1980s that the MSPB had ruled in his favor, but did not suspect that he failed to fully receive all payments due under the decision until he discovered the returned checks in his personnel file. Tr. at 19-20. The two checks, however, on their face contradict his allegation that they relate to the MSPB decision, which was issued on November 25, 1981. See *Swentek*, 8 M.S.P.B. at 432. One check is dated April 6, 1977, and is attached to a notice stating it was returned on April 13, 1977. Compl. Att. 2. The other check is dated September 13, 1978, and is attached to a notice stating that it was returned on October 4, 1978. *Id.* Att. 4. The allegation that these checks resulted from the MSPB decision is, accordingly, not well-pled, and cannot be taken as true. See *Page v. United States*, 51 Fed. Cl. 328, 333 (2001); *Thune v. United States*, 41 Fed. Cl. 49, 51 (1998).

These two checks could not possibly have resulted from the MSPB decision, as they pre-date that decision by several years. Taking as true Mr. Swentek's allegation that these checks represent payments owed to him by the government that were not otherwise received (for example, by replacement checks), the cause of action for these payments would have accrued back in 1977 and 1978. See *Sauer v. United States*, 173 Ct.Cl. 642, 647 (1965). The Court notes that plaintiff acknowledged that he was employed by the Army in a different capacity during that time period. See Tr. at 13; see also Pl.'s Reply. Mister Swentek should have realized that he had not received these payments when they did not timely arrive, and has no basis for contending that he could not have known until 2003 that the checks never came in the mail. See *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir. 1988); *Patton v. United States*, 64 Fed. Cl. 768, 774 (2005). Moreover, the same conclusion is compelled even were the Court to assume that the checks were somehow issued to compensate Mr. Swentek pursuant to an award of back pay resulting from his MSPB proceedings in the early 1980s -- he would have known at that time that the money was owed, and could not wait more than six years to bring legal action to collect it.

As Mr. Swentek's claims arose decades ago, his complaint was filed well outside the statute of limitations period. Accordingly, this Court **GRANTS** the government's motion to dismiss Mr. Swentek's complaint pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction. The Clerk of the Court is directed to close the case. No costs shall be awarded.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge