In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 03-2174C
(Filed August 5, 2005)

* *

MARK REAVES,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* *

MEMORANDUM OPINION AND ORDER OF DISMISSAL

WILLIAMS, Judge.

Plaintiff pro se, Mark Reaves, brings this action seeking pay, allowances, and benefits he lost due to his discharges from both the Active Guard Reserve (AGR) where he served on active duty and the Massachusetts Army National Guard where he served as a reservist. Plaintiff also requests reinstatement into the Army National Guard and a promotion with concomitant training. This matter comes before the Court on Defendant's motion to dismiss for lack of subject matter jurisdiction. Because Plaintiff's complaint regarding his discharge from active duty was filed over six years after the date of discharge, this claim is time-barred.[1] Moreover, this Court lacks jurisdiction over Plaintiff's challenge to his later dismissal from the Massachusetts National Guard where he served as a non-active duty reservist because there is no money-mandating statute authorizing back pay for an improper discharge from the reserves.[2] As such, Defendant's motion to dismiss is granted.

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[1] It is well established that "[c]ompliance with the Claims Court's statute of limitations is jurisdictional." Jones v. United States, 801 F.2d 1334, 1335 (Fed. Cir. 1986).

[2] Reservists are paid only for the drills and training they actually attend, and reinstatement to a reservist position would not carry with it back pay.

Background[3]

On September 30, 1996, Plaintiff, a National Guardsman serving with the Massachusetts Army National Guard, was accepted into the Active Guard Reserve (AGR).[4] On November 6, 1997, Plaintiff was discharged from the AGR, under other-than-honorable conditions, for testing positive for cocaine use. On November 25, 1997, Plaintiff was discharged from service in the Massachusetts Army National Guard.

Plaintiff filed this complaint on November 24, 2003, seeking pay, allowances, and benefits he lost as a result of his discharge from the AGR and the Massachusetts Army National Guard.[5] On January 30, 2004, Defendant filed a motion to dismiss, which Plaintiff failed to timely oppose. On August 13, 2004, the Court entered an Order to Show Cause directing Plaintiff to demonstrate why the Court should not dismiss his complaint for failure to prosecute. On September 21, 2004, Defendant filed correspondence from Plaintiff in which Plaintiff expressed his desire to continue with his action and attributed his delay in prosecuting his claim to his participation in an Army Discharge Review Board (Board) proceeding.[6] On September 29, 2004, Plaintiff responded to the Order to Show Cause by filing a "Request for Stay," and subsequently a "Motion to Proceed," to which Defendant responded on January 28, 2005.

Discussion

Subject matter jurisdiction may be challenged at any time by the parties, by the Court sua sponte, and even on appeal. Booth v. United States, 990 F.2d 617, 620 (Fed. Cir. 1993). In ruling

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[3] This background is derived from the parties' pleadings and attachments thereto.

[4] The AGR contains Army National Guard members and reservists serving in a full-time active duty capacity. See 10 U.S.C. §§ 12301, 12310. Any member of the National Guard called to active duty by the Secretary, must be approved by the State Governor or appropriate authority. See 10 U.S.C. § 12301(d). While on active duty, service members are paid pursuant to 37 U.S.C. § 204(a)(1), while non-AGR members of the of the National Guard and the United States Army are paid pursuant to 37 U.S.C. §§ 206(a)(1), 206(a)(2). See Martinez v. United States, 333 F.3d 1295, 1310 n.3 (Fed. Cir. 2003) ("Service members on active duty are entitled to basic pay pursuant to 37 U.S.C. § 204(a), while reservists are paid only for the drills and training they actually attend . . . .").

[5] Plaintiff filed an amended complaint on December 5, 2003. Plaintiff's amended complaint is, in substance, a reiteration of the initial complaint. Therefore, the Court will be referring to the original complaint throughout this Opinion.

[6] On June 15, 2004, Plaintiff presented his case to the Board, and on July 26, 2004, the Board granted a correction to Plaintiff's military records to show an honorable discharge from the Massachusetts Army National Guard. See Attachment to Plaintiff's Request for Stay (Sept. 29, 2004).

on a motion to dismiss for lack of subject matter jurisdiction, the Court must presume all undisputed factual allegations to be true and construe all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1583 (Fed. Cir. 1993); Holland v. United States, 57 Fed. Cl. 540, 551 (2003). Ultimately, however, the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. Taylor v. United States, 303 F.3d 1357, 1359 (Fed. Cir. 2002).

The Tucker Act

The Tucker Act both confers jurisdiction upon the United States Court of Federal Claims and waives sovereign immunity with respect to certain actions for monetary relief brought against the United States. See United States v. Mitchell, 463 U.S. 206, 212-18 (1983); Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc). Under the Tucker Act, sovereign immunity is waived for "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).

While Plaintiff's Complaint does not aver an explicit jurisdictional basis or a succinctly stated cause of action, it is the traditional role of the Court, with respect to pro se plaintiffs, to examine the record "to see if plaintiff has a cause of action somewhere displayed." Ruderer v. United States, 188 Ct. Cl. 456, 468 (1969). Still, the fact that Plaintiff "acted pro se in the drafting of his complaint may explain its ambiguities, but it does not excuse its failures, if such there be." Henke v. United States, 60 F.3d 795, 799 (Fed. Cir. 1995). Therefore, the Court, examining the Complaint in a light most favorable to Plaintiff, will address claims that Plaintiff may purport to bring under the Back Pay Act, 5 U.S.C. § 5596, and Military Pay Acts, 37 U.S.C. §§ 204, 206.

It is well established that this Court does not have Tucker Act jurisdiction over Back Pay Act claims brought by members of the National Guard because National Guardsmen are not "federal employees." See Christoffersen v. United States, 230 Ct. Cl. 998 (1982); Gnagy v. United States, 225 Ct. Cl. 242, 250 (1980) (holding that "a member of a National Guard unit not in active federal service is not, insofar as his military capacity with the Guard is concerned, a federal employee for purposes of the Back Pay Act"); cf. Dehne v. United States, 970 F.2d 890, 892 (Fed. Cir. 1992).[7]

[7] In Maryland v. United States, 381 U.S. 41, vacated on other grounds, 382 U.S. 159 (1965), the Supreme Court noted that the fact that National Guard members were paid with federal funds and were required to conform to strict federal requirements did not change the reality that National Guardsmen were employed by the states:

> It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the

Because Plaintiff was a National Guardsman, not a federal employee under the Back Pay Act, he has no Back Pay Act claim in this Court. See Gnagy, 225 Ct. Cl. at 250 n.19 (noting that the court "was aware of no federal constitutional provision, statute, or regulation which authorizes this court to award monetary relief to a wrongfully discharged state employee").

While there is no Tucker Act jurisdiction for a Back Pay Act claim brought by a National Guard member, there is Tucker Act jurisdiction for claims brought pursuant to the military pay acts – 37 U.S.C. §§ 204, 206. See Dehne, 970 F.2d at 892-93. However, this does not end the jurisdictional inquiry because the Tucker Act does not, by itself, "'create any substantive right enforceable against the United States for money damages.'" United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Testan, 424 U.S. 392, 398 (1976)).

To properly invoke this Court's jurisdiction, "a plaintiff must identify a separate source of substantive law that creates the right to money damages," i.e. a source which is "money mandating." Fisher, 402 F.3d at 1172 (citation omitted). A statute or regulation is money mandating if it is "reasonably amenable to the reading that it mandates a right to recovery in damages," and while such a reading is not to be "'lightly inferred,'" a "'fair inference'" that money damages are allowable under the statute or regulation in question will suffice. Fisher, 402 F.3d at 1174 (citing United States v. White Mountain Apache Tribe, 537 U.S. 465, 472-73 (2003)). In this action, the Court, construing the complaint in a light most favorable to Plaintiff, discerns that Plaintiff seeks back pay and ancillary equitable relief pursuant to the Military Pay Act, 37 U.S.C. § 204, which is a "money-mandating statute applicable to military personnel claiming damages and ancillary relief for wrongful discharge." Holley v. United States, 124 F.3d 1462, 1465 (Fed. Cir. 1997). In relevant part, the Military Pay Act provides that uniformed service members on active duty are entitled to the basic pay of the pay grade to which they are assigned. 37 U.S.C. § 204. This statutory provision has been construed as money-mandating because "[i]f the discharge was wrongful the statutory right to pay continues; this right serves as the basis for Tucker Act jurisdiction." Holley v. United States, 124 F.3d 1462, 1465 (Fed. Cir. 1997). As such, this Court has subject matter jurisdiction over Plaintiff's claim for relief stemming from his discharge from active duty in the AGR.

However, there is no money-mandating statute which would afford Plaintiff back pay for his discharge from the Massachusetts National Guard where he served as a reservist. Rather, 37 U.S.C.

> immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held.

Maryland, 381 U.S. at 48; see also Christoffersen, 230 Ct. Cl. at 1004 ("[A] military member of the [National Guard], not in active federal service, is a state employee [and] plaintiffs have no basis for recovery of monetary damages against the United States in these circumstances. Even if it can be shown that plaintiff['s] dismissal from the [National Guard] was improper, such an action would not properly be before this court."); Clark v. United States, 322 F.3d 1358, 1366 (Fed. Cir. 2003).

§ 206(a), the statute governing pay for part-time non-active duty reservists and members of the National Guard is not money mandating. As the Federal Circuit recognized in Martinez, 333 F.3d at 1310 n.3: "Mr. Martinez's suit for back pay is limited to the basic pay he would have received had he remained on active duty, because he would not be entitled to a pay remedy for improper discharge from the Reserves." See Palmer v. United States, 168 F.3d 1310, 1314 (Fed. Cir. 1999) ("The consequence of this difference in pay entitlement between full-time active duty personnel and those serving in part-time reserve duty is that a member who is serving in part-time reserve duty in a pay billet, or was wrongfully removed from one, has no lawful pay claim against the United States for unattended drills or for unperformed training duty."); Dehne, 970 F.2d at 893-94. As such, this Court lacks jurisdiction over Plaintiff's claim for back pay stemming from his discharge from the Army National Guard.

The Statute of Limitations Bars Plaintiff's Claim Relating to His Discharge From Active Duty

The Tucker Act's jurisdictional grant is limited by 28 U.S.C. § 2501, which states that "[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 (1994). In this Court, "[t]he 6-year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed" and "[e]xceptions to the limitations and conditions upon which the government consents to be sued are not to be implied." Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988); see also Inter-Coastal Xpress, Inc. v. United States, 296 F.3d 1357, 1365-66 (Fed. Cir. 2002); Jones v. United States, 801 F.2d 1334, 1335 (Fed. Cir. 1986); Coon v. United States, 30 Fed. Cl. 531, 534 (1994) ("[c]ompliance with the statute of limitations . . . is an explicit jurisdictional prerequisite for the commencement of suit.").

Under the Tucker Act, a claim accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citation omitted). Plaintiff argues that his cause of action accrued on the date of his discharge from part-time reservist position with the Massachusetts National Guard -- November 25, 1997. By this standard, the statute of limitations governing Plaintiff's claim would have run on November 25, 2003 -- one day after Plaintiff filed his complaint in this Court, rendering this action timely. However, as discussed above, Mr. Reaves' claim for relief stemming from his discharge from the Massachusetts National Guard is not within this court's jurisdiction and must be dismissed for that reason.

Turning to Plaintiff's claim relating to his discharge from the AGR, it is well established that in a military discharge case, the plaintiff's cause of action for back pay accrues at the time of the plaintiff's discharge. Martinez, 333 F.3d at 1303; see Bowen v. United States, 292 F.3d 1383, 1386 (Fed. Cir. 2002). In Martinez, the Federal Circuit noted that "a Tucker Act claim for back pay accrues all at once at the time of discharge; the claim for back pay is not a 'continuing claim' that accrues each time a payment would be due throughout the period that the service member would

have remained on active duty." Martinez, 333 F.3d at 1303.

As in Martinez, Plaintiff's cause of action here accrued on his date of discharge from AGR, November 6, 1997, not on his subsequent discharge from non-active duty. See Martinez, 333 F.3d at 1310 n.3 ("[b]ecause Mr. Martinez was separated from active duty in 1992, his monetary and incidental equitable claims with respect to his active duty status accrued at that time, not in 1997 [when he was discharged from the army reserves]."). [8] Accordingly, the six-year statute of limitations ran on November 6, 2003, and Plaintiff's action filed on Nov. 27, 2003 is time-barred.

In his request for stay, Plaintiff appears to argue that his pursuit of a remedy with the Army Discharge Review Board tolled the statute of limitations. [9] Specifically, Plaintiff points out that the Army Discharge Review Board corrected his record to reflect an honorable discharge which dates back to the original date of his separation from the Army National Guard of Massachusetts, effective November 25, 1997. [10]

For purposes of applying the statute of limitations, resort to the Discharge Review Board is no different than resort to a correction board -- both are permissive administrative remedies that do not toll the statute of limitations. Sherwin v. United States, 42 Fed. Cl. 672, 676 (1999); Kirby v. United States, 201 Ct. Cl. 527, 528 (1973) (plaintiff's appeals to the Discharge Review Board and Air Force Board for Correction of Military Records "were permissive in nature and do not serve to toll the running of the statute of limitations."); Kirk v. United States, 164 Ct. Cl. 738, 740 (1964) ("[t]he life of the plaintiff's claim was not extended by reason of the 1962 proceedings before the

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[8] On the date Plaintiff was discharged from AGR duty, his status as a reservist in the National Guard made him a state employee. Gnagy, 634 F.2d at 579 & n.19 ("we hold that a member of a National Guard unit not in active federal service is not, insofar as his military capacity with the Guard is concerned, a federal employee for purposes of the Back Pay Act. Rather he is a state employee").

[9] A Discharge Review Board has the authority to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force. A motion or request for review must be filed within 15 years after the date of discharge or dismissal. The board may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings. 10 U.S.C. § 1553.

[10] The record indicates only that Plaintiff's discharge from the Army National Guard of Massachusetts was converted to an honorable discharge nunc pro tunc, but this is immaterial since the Court lacks subject matter jurisdiction over this aspect of the action for lack of a money-mandating statute. There is no indication in the record that Plaintiff's discharge from the AGR was converted to an honorable discharge. Even if Plaintiff's discharge from the AGR had been converted to an honorable discharge, this would not affect Plaintiff's claims because his separation from active duty would not have been "altered or exacerbated" by the decision of the Discharge Review Board. See Martinez, 333 F.3d at 1314, 1315 n.4.

Army Discharge Review Board.”).

Conclusion

For the foregoing reasons, Defendant’s motion to dismiss is granted.

The Clerk is directed to dismiss this action. No costs.

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MARY ELLEN COSTER WILLIAMS
Judge