

In the United States Court of Federal Claims

No. 09-375C
(Filed November 19, 2009)
(not for publication)

WILLIAM M. TYREE,

Plaintiff,

v.

THE UNITED STATES

Defendant.

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ORDER OF DISMISSAL AND TRANSFER

Plaintiff pro se William M. Tyree alleges a variety of claims arising from his discharge from the United States Army in 1982. Plaintiff argues that he was never properly discharged from the military, and he seeks correction of his military records, monetary damages and equitable relief. The Government seeks dismissal on the grounds that this Court lacks jurisdiction over Plaintiff’s claims. Because Plaintiff’s claims fall outside this Court’s jurisdiction, the Government’s motion is granted, and Plaintiff’s complaint is dismissed.¹

¹ Plaintiff filed a motion requesting that this Court appoint counsel for him. This Court declines to appoint counsel for Plaintiff. See Larisey v. United States, 861 F.2d 1267, 1270-71 (Fed. Cir. 1988) (recognizing that “a right to appointed counsel exists only when the indigent may lose his/her personal freedom if the action is lost” and that, “[b]eyond this narrow framework, the Supreme Court has not recognized a constitutional right to appointed counsel in civil matters”).

Plaintiff has filed numerous motions in this matter, many of which address the merits of his claims. Because this Court finds that it lacks jurisdiction over Plaintiff’s claims, all other outstanding motions are denied as moot.

Background²

Plaintiff originally enlisted in the United States Army on May 5, 1975. Am. Compl. ¶ 1; Appendix to Def.'s Mot. to Dismiss ("Def. App.") 33. After serving 18 months as a supply specialist, Plaintiff returned to civilian life on November 5, 1976, upon receiving a hardship discharge. Def. App. 33; Am. Compl. ¶ 1. Plaintiff re-enlisted in the Army on August 22, 1977, and again served as a supply specialist. Am. Compl. ¶ 2, Ex. 4; Def. App. 33. While serving on active duty, Plaintiff received non-judicial punishment on January 5, 1979, for selling military property and unlawful entry with intent to commit larceny. He was sentenced to, inter alia, a reduction to the E-1 pay grade and the forfeiture of \$209 per month for two months. Def. App. 1-2.

On February 13, 1979, while assigned to Fort Devens, Massachusetts, Plaintiff was arrested for the murder of his wife, Elaine Tyree. Am. Compl. ¶ 3, Ex. 2. Three days later, the Army changed Plaintiff's duty status from "present for duty" to "confined by civilian authorities." Id. Ex. 2. On February 29, 1980, the Commonwealth of Massachusetts convicted Plaintiff for the murder of his wife and sentenced him to life imprisonment. Id. ¶¶ 11-12, Ex. 2. Because Plaintiff was in civilian confinement, the Army stopped paying Plaintiff in March of 1979, and cancelled Plaintiff's February 1979 paycheck. Id. ¶¶ 24, 61, Ex. 6. Plaintiff's conviction was affirmed by the Supreme Judicial Court of Massachusetts in August of 1982. Commonwealth v. Tyree, 439 N.E.2d 263 (Mass. 1982). On October 15, 1982, Plaintiff received a General Discharge³ from the Army. Am. Compl. Ex. 4.

On May 16, 1994, Plaintiff submitted a Freedom of Information Act request to the National Personnel Records Center - Military Personnel Records ("NPRC") seeking his pay records and his discharge certificate ("DD 214"). Def. App. 5-6. The NPRC informed Plaintiff that he should contact the Defense Finance and Accounting Service Indianapolis Center to obtain his pay records. Id. at 6. Plaintiff claims that he first received his pay records in November of 2006. Am. Comp. ¶ 22.

At some point prior to May 1999, Plaintiff requested an investigation into the legality of his discharge under Article 138 of the Uniform Code of Military Justice. Am. Compl. Ex. 8.⁴ On

² This background is derived from Plaintiff's amended complaint and the attachments thereto, and the parties' motion papers.

³ A General Discharge is characterized as "Under Honorable Conditions," but it is less desirable than an "Honorable Discharge." See Department of Defense Instruction 1332.14, Enlisted Administrative Separations, Enclosure 4, ¶ 3.b.2.b (August 28, 2008); see also Sofranoff v. United States, 165 Ct. Cl. 470, 478 (1964) (explaining that a general discharge "under honorable conditions" is "less than an honorable one" and "stigmatizes the ex-serviceman.").

⁴ The record does not contain Plaintiff's request. See Am. Compl. Ex. 8. Article 138 of the Uniform Code of Military Justice is codified at 10 U.S.C. § 938. It provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall

May 6, 1999, the Army returned Plaintiff's request without taking action. Id. The Army explained that because Plaintiff was no longer a member of the Armed Forces, he was not entitled to relief under Article 138. "[O]nly members of the Active Army, United States Army Reserve on inactive duty for training, and Army National Board on active duty in Federal Service, may submit complaints under the provisions of Article 138," and Plaintiff met none of those criteria. Id.

On June 14, 1999, Plaintiff submitted an application for correction of his Army personnel records, and requested two hearings before the Army Board for Correction of Military Records ("ABCMR") -- one concerning his conviction for the murder of his wife, and the other concerning alleged alterations of his records regarding his involvement in two alleged joint Central Intelligence Agency and U.S. Army projects, which Plaintiff named Operation Watchtower and Operation Orwell. Def. App. 7-24.⁵ The ABCMR denied Plaintiff's request on October 3, 2000, as time-barred under the three-year statute of limitations for the correction of military records. Id. at 27-29, 38. The ABCMR stated that "[t]he alleged error or injustice [relating to Plaintiff's requested record correction] was, or with reasonable diligence should have been, discovered on 15

forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

10 U.S.C. § 938.

⁵ Plaintiff's personnel records indicate that he served as a supply clerk for just over a year before he was arrested for the murder of his wife. After he completed the Stock Control Supplyman Course, he was assigned as a stock supply specialist to the Service Company for the 10th Special Forces Group at Fort Devens in October of 1977. Def. App. 28-39.

In his detailed 17-page request, however, Plaintiff asked the ABCMR to expunge all mention of his murder conviction and to update his records to reflect various decorations and qualifications allegedly earned during his participation in Operation Watchtower and Operation Orwell. Plaintiff also claimed that an Army Colonel used information illegally gathered by Operation Orwell to blackmail a district attorney into prosecuting Plaintiff. Plaintiff claimed that his personnel records had been altered to remove all links between Plaintiff and the two operations, and he requested the correction of his records to indicate that he was highly decorated and qualified in multiple specialties. Plaintiff further requested that his discharge be upgraded from General to Honorable and that he be reinstated in the Army Special Forces at a rank not less than Master Sergeant, with all back pay and allowances. He further asked the ABCMR to update his records to show overseas duty and explain the classified nature of other omitted assignments. Plaintiff further requested that an arms room sign-in sheet from his old base be located and updated to show that a fellow soldier never signed in a shotgun, thus somehow incriminating the fellow soldier in the stabbing death of his wife. Def. App. 7-24, 28-33.

October 1982, the date of [Plaintiff's] discharge. The time for the applicant to file a request for correction of any error or injustice expired on 15 October 1985." Id. at 38.

On October 14, 1999, Plaintiff filed a complaint with the United States District Court for the District of Columbia seeking, among other things, correction of his military records. Id. at 40; Tyree v. Dept. of Army, No. 99-2709, slip op. at 1-3 (D.D.C. July 20, 2000), Def. App. 47-59. The District Court found that Plaintiff's request to correct his military records was time-barred under the six-year statute of limitations set forth in 28 U.S.C. § 2401(a). Tyree, No. 99-2709, slip op. at 9.

On December 7, 2006, Plaintiff sent the ABCMR his pay records, and requested that it reconsider its October 3, 2000 decision finding his correction request time-barred. Am. Compl. Ex. 7. Because the ABCMR did not receive Plaintiff's request for reconsideration within one year of its original decision, the ABCMR denied it as untimely. Id.

Meanwhile, Plaintiff sent another request for an Article 138 investigation to the Army. Am. Compl. Ex. 8. On March 26, 2007, the Army returned the request without taking action. Id.⁶ The Army again explained that only members of the Armed Forces may request relief under Article 138. Id. The Army further stated that Plaintiff's "assertion that [he had] not been properly discharged is not appropriate for action," and suggested that Plaintiff seek relief from the ABCMR. Id.

On December 11, 2007, Plaintiff filed a petition for habeas corpus with the United States District Court for the District of Massachusetts, asserting that his discharge from the Army was void because he did not receive his final pay. Tyree v. Sec'y of Army, C.A. No. 07-12308, slip op. at 1-2 (D. Mass February 4, 2008), Def. App. at 62-63. The District Court dismissed the action because Plaintiff's "disagreement with the Army about his military status" was not a valid basis for a habeas action. Id. at 2.

On April 1, 2008, Plaintiff filed a petition for habeas corpus with the United States District Court for the District of Columbia, and again argued that he was never discharged from the Army because he did not receive his final pay. Tyree v. Sec'y of Army, No. 08-0565, 2008 WL 1924913, at *1-2 (D.D.C. April 30, 2008); Def. App. at 64. The court dismissed Plaintiff's action because (1) Plaintiff did not name the proper respondent as he was not in the custody of the Army or a current member of the Army, (2) Plaintiff did not challenge the fact or duration of his custody, and (3) the court could not grant the relief sought by Plaintiff as Plaintiff and his custodian were not within the District of Columbia. Tyree, 2008 WL 1924913, at *1-2.

On January 20, 2009, Plaintiff filed another complaint⁷ with the United States District Court for the District of Massachusetts, this time alleging that the Secretary of the Army had, inter

⁶ The record does not include the request -- it includes only the cover letter returning the request. Am. Compl. Ex. 8.

⁷ Plaintiff has filed other complaints in the District Court of Massachusetts. For example, in 2007, he alleged that the Commonwealth of Massachusetts violated the law when it denied Plaintiff the right to vote in federal and state elections. Tyree v. Commonwealth of

alia, “negligently and wrongly” discharged Plaintiff from the Army without paying him his final pay, denied Plaintiff an Article 138 investigation, and “inflict[ed] intentional emotional distress” on Plaintiff. Def. App. at 70, 73-86.

On March 13, 2009, pursuant to 28 U.S.C. § 1631, the United States District Court for the District of Massachusetts transferred Plaintiff’s action to this Court. Id. at 72.⁸ Although Plaintiff characterized his claim as a tort, the United States District Court for the District of Massachusetts transferred Plaintiff’s action to this Court because it believed that Plaintiff was asserting “a contract claim against the government for unpaid wages.” Id. at 71.

Plaintiff filed an amended complaint with this Court on June 10, 2009, seeking a “remand” to the Army for a full investigation, back pay, correction of his records, monetary damages, and a declaratory judgment regarding the “rights of the parties in this action.” Am. Compl. ¶¶ 39, 84-94. Plaintiff’s claims fall into several categories. First, Plaintiff argues that his discharge was wrongful or void because (a) his civilian murder conviction was improper, (b) the government fraudulently discharged him, and (c) the government failed to deliver his final pay and discharge certificate. According to Plaintiff, because his purported discharge was void, this Court should order back pay and remand to the Army with an order to grant Plaintiff an Article 138 investigation. Second, Plaintiff argues that he is due back pay for the month of February, 1979, and for 29 days of lost leave. Third, Plaintiff alleges that the Secretary of the Army intentionally inflicted emotional distress on Plaintiff and seeks monetary damages. Fourth, Plaintiff alleges he is entitled to monetary relief under the Federal Tort Claims Act. Id.

Specifically, Plaintiff asserts that his murder conviction is the result of “a series of ineffective assistance of counsel errors [during his civilian criminal trial] which included, the failure to raise the illegal search of the barracks that allegedly produced the murder weapon.” Am. Compl. ¶ 12.⁹ Additionally, Plaintiff claims that his civilian criminal trial, as well as the subsequent appellate process, was tainted due to the “lack of [judicial] transcripts.” Id. ¶ 16; see also id. ¶¶ 10, 12, 15, 20-21. Plaintiff claims that these transcripts would have revealed that two witnesses committed fraud and perjury during the investigative process. Id. ¶¶ 21, 49. Plaintiff

Massachusetts, C.A. No. 06-10232, 2008 WL 427293 (D. Mass. Feb 17, 2008). The District Court of Massachusetts denied Plaintiff’s application to proceed in forma pauperis because he had already satisfied the “three strike” rule of 28 U.S.C. § 1915(g) by having had three prior actions dismissed as frivolous or for failure to state a claim. See, e.g., Memorandum and Order on Application to Proceed Without Prepayment of Fees, Tyree v. Maloney, C.A. No. 01-10342 (D. Mass. Mar. 7, 2001), App. to Def. Motion for Reconsideration of Grant of Plaintiff’s Application to Proceed In Forma Pauperis, at 2-3.

⁸ Under 28 U.S.C. § 1631, a federal district court may cure a want of jurisdiction by transferring a civil action “to any other such court in which the action . . . could have been brought at the time it was filed or noticed.”

⁹ Plaintiff continues: “trial counsel could not raise it, because the testimony/transcripts of CID Agent Burzenski and Mason went missing, leaving the trial court judge with no choice but to rule the search was legal and admit the knife.” Am. Compl. ¶ 12 (emphasis in original).

also alleges that the Army and the discharge board that voted to discharge him engaged in or knew of a “cover up.” Id. ¶ 13. According to Plaintiff, if not for these acts, he would have remained in the Army. Id. ¶¶ 21, 49.¹⁰

Plaintiff also asserts that his purported discharge from the Army in 1982 is void pursuant to 10 U.S.C. § 1168. Id. This statute provides:

A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.

§ 1168(a).

First, Plaintiff asserts that his discharge was not effected because he never received a copy of his discharge certificate (“DD 214”). Pl.’s Opposing Memorandum at 19. Plaintiff claims that his DD 214 was incorrectly mailed to Utah instead of his current address in Massachusetts. Id. Next, Plaintiff asserts that his discharge was not effected pursuant to § 1168 because he never received his final pay. Plaintiff claims that after he received his Army financial records, he discovered that the Army “had not provided [him] with his pay or wages from February 1, 1979 up to February 13, 1979, and 29.0 days of leave that would have been converted to cash - sum owed to [Plaintiff] of approximately \$1,035.00.” Amend. Compl. ¶ 24. Therefore, according to Plaintiff, his purported discharge from the Army is void pursuant to § 1168. Id. ¶ 39. Plaintiff further asserts that because the Secretary of the Army knew Plaintiff did not receive his final pay at time of discharge, Plaintiff’s discharge was fraudulent and prejudicial to the good order and discipline of the Army. Id. ¶ 45.

Plaintiff contends that he is still an enlisted member of the Army and asserts that because he was never discharged, he is owed back wages and interest on those wages. Id. ¶¶ 39, 51. Plaintiff also seeks reinstatement in the Army and an order directing the Army to conduct a “full investigation of [his] case pursuant to [Article 138].” Id. ¶ 39. Moreover, Plaintiff argues that his military records should be corrected to reflect that he should “never have been arrested, convicted and discharged.” Id.

Plaintiff further claims that as a result of his allegedly defective discharge, the Secretary of the Army (“the Secretary”) violated the Tucker Act, the Military Pay Act, and 10 U.S.C. §§ 884, and 934. Id. ¶¶ 45, 47, 80-83.¹¹ Furthermore, Plaintiff alleges that the Secretary inflicted

¹⁰ Plaintiff seeks reinstatement into the Army, back pay, and correction of his military records on the ground that his criminal conviction was invalid and therefore not a proper basis for discharge.

¹¹ 10 U.S.C. § 884 states:

Any person subject to this chapter who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by

“intentional emotional distress on [Plaintiff],” and Plaintiff suffered from “headaches; USA red tape- administrative run-a-round [sic], . . . sleepless nights tossing and turning, . . . [and] mental anguish” due to the Secretary’s actions. Id. ¶ 46. Plaintiff further states that the Secretary committed fraud, engaged in negligent and wrongful conduct, and violated multiple Constitutional Amendments including:

the 4th Amendment, (illegal seizure and denial of all back pay [i.e., property] due to Tyree); 5th Amendment, (denial of due process and property rights); 6th Amendment, (denial of final pay [i.e., property] without a trial, counsel, ect [sic]); 8th Amendment, (intentional infliction of emotional distress); 14th Amendment, (due process and equal protection rights).

Id. ¶ 47; see also id. at ¶¶ 59, 70.

Finally, Plaintiff claims that as a result of his alleged wrongful discharge, he has suffered “loss of property” and “personal injury” and that he is entitled to relief pursuant to the Federal Tort Claims Act. Id. ¶ 60; see also id. ¶ 39.

Discussion

Subject matter jurisdiction must be established at the outset of any case before the Court proceeds to the merits of the action. Hardie v. United States, 367 F.3d 1288, 1290 (Fed. Cir. 2004); BearingPoint, Inc. v. United States, 77 Fed. Cl. 189, 193 (2007) (citing Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 88-89 (1998)). “If the Court finds that it lacks jurisdiction over the subject matter, it must dismiss the claim.” Naskar v. United States, 82 Fed. Cl. 319, 320 (2008) (internal quotation omitted). Plaintiff bears the burden of establishing the Court’s jurisdiction. Id. (citing Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988)). When considering a motion to dismiss for lack of subject matter jurisdiction, the Court will accept the complaint’s undisputed allegations as true and construe the complaint in a manner favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Complaints drafted by pro se litigants are held to “less stringent standards than formal pleadings drafted by lawyers.” Naskar, 82 Fed. Cl. at 320 (quoting Haines v. Kerner, 404 U.S. 519, 520 (1972)). However, this latitude does not allow a pro se plaintiff to subvert the Court’s jurisdictional requirements. See Henke v. United States, 60 F.3d 795, 799 (Fed. Cir. 1995). Pro se plaintiffs still bear the burden

law, regulation, or order shall be punished as a court-martial may direct.

10 U.S.C. § 934 states:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

of establishing the Court's subject matter jurisdiction. Tindle v. United States, 56 Fed. Cl. 337, 341 (2003).

This Court's jurisdiction is set forth in the Tucker Act, 28 U.S.C. § 1491, which confers jurisdiction upon the United States Court of Federal Claims over cases in which a plaintiff alleges a claim against the United States for money damages. The Tucker Act states that this Court "shall have 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). The plaintiff must demonstrate that the source of substantive law he relies upon for his claim mandates compensation by the Federal Government for damages. United States v. Mitchell, 463 U.S. 206, 216-17 (1983). However, the Tucker Act, by itself, "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398 (1976). Accordingly, a plaintiff must identify a separate Constitutional provision, statute, or regulation which if violated, provides for a claim for money damages against the United States. Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) ("[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."); James v. Caldera, 159 F.3d 573, 580 (Fed. Cir. 1998). A statute provides for monetary damages against the United States if it is "reasonably amenable to the reading that it mandates a right of recovery in damages." United States v. White Mountain Apache Tribe, 537 U.S. 465, 473 (2003). In this instance, Plaintiff fails to demonstrate that this Court has jurisdiction over any of his claims.

Pursuant to the Tucker Act, 28 U.S.C. § 1491, and the Military Pay Act, 37 U.S.C. § 204, this Court has jurisdiction over a serviceman's claims for money damages against the Government "when the military, in violation of the Constitution, a statute, or a regulation, has denied military pay." Lewis v. United States, 458 F.3d 1372, 1376 (Fed. Cir. 2006) (quoting Dysart v. United States, 369 F.3d 1303, 1315 (Fed. Cir. 2004)). However, this Court's ability to review these claims is limited by the Tucker Act's six-year statute of limitations. 28 U.S.C. § 2501. As the Supreme Court has explained, this statute of limitations is jurisdictional in nature. John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008). Accordingly, this statute of limitations is "not subject to issue waiver by the Government or equitable tolling." Blueport Co., LLC v. United States, 533 F.3d 1374, 1380 (Fed. Cir. 2008).

"A claim first accrues when all the events have occurred that fix the alleged liability of the government and entitle the claimant to institute an action." Ingrum v. United States, 560 F.3d 1311, 1314 (Fed. Cir. 2009). In military discharge cases, a "plaintiff's cause of action for back pay accrues at the time of the plaintiff's discharge." Martinez v. United States, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc). Furthermore, a 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." Id. (citations omitted). If a plaintiff fails to file his claim within the statute of limitations, "the plaintiff loses all rights to sue for the loss of pay stemming from the challenged discharge." Id. at 1304.

Under limited circumstances, the accrual of a claim against the United States may be "suspended when an accrual date has been ascertained, but the plaintiff does not know of the

claim.” Ingrum, 360 F.3d at 1314 (citing Japanese War Notes Claimants Ass’n v. United States, 373 F.2d 356, 358-59 (Ct. Cl. 1967)). The accrual suspension rule, however, is “‘strictly and narrowly applied,’ and the accrual date of a cause of action will be suspended in only two circumstances.” Id. at 1315 (quoting Martinez, 333 F.3d at 1319). Plaintiff must show either that “‘defendant has concealed its acts with the result that plaintiff was unaware of their existence’” or that his “injury was inherently unknowable at the time the cause of action accrued.” Id. (internal quotation omitted). However, “a plaintiff’s ignorance of a claim that he should have been aware of is not enough to suspend the accrual of a claim.” Id. at 1314-15. Moreover, failure to seek relief from a correction board does not prevent the cause of action from accruing. Martinez, 333 F.3d at 1305.

In the instant case, Plaintiff’s various claims seeking back pay and asserting wrongful discharge, fraudulent discharge, and wrongful withholding of pay, accrued on or before his discharge from the Army on October 15, 1982. Plaintiff, however, asserts that his claims have not accrued as he is “still on active duty due to the fraudulent nature of his discharge and several outstanding [Army] pay problems.” Am. Compl. at ¶ 52.

The accrual suspension rule does not apply to this case. Plaintiff’s discharge and pay status were not inherently unknowable, and the government did not conceal his discharge or pay status. Plaintiff admits the government forwarded his discharge papers to his emergency contact address in Utah, and it was Plaintiff’s responsibility to update his contact information with the Army. The government did not conceal Plaintiff’s discharge from him when it mailed his discharge papers to Utah. Nor did the government conceal from Plaintiff that it stopped paying him in March of 1979, and cancelled his February 1979 paycheck. Therefore, regardless of their merits, Plaintiff’s various claims seeking back pay and asserting wrongful discharge, fraudulent discharge, and wrongful withholding of pay, are time-barred.¹²

Plaintiff’s tort claims -- i.e., his claims of intentional infliction of emotional distress, negligence, property damage, personal injury, fraud and harassment -- do not fall within this Court’s jurisdiction, as expressly stated in the Tucker Act. 28 U.S.C. § 1491; see Brown v. United States, 105 F.3d 621, 623 (Fed. Cir. 1997) (“Because [Plaintiffs’ claims] . . . are grounded upon fraud, which is a tort, the court lacks jurisdiction over those claims.”); Fullard v. United States, 77 Fed. Cl. 226, 230 (2007) (“This court lacks jurisdiction over plaintiff’s conspiracy claim because the Tucker Act specifically states that the Court of Federal Claims does not have jurisdiction over claims ‘sounding in tort.’”); Pratt v. United States, 50 Fed. Cl. 469, 482 (2001) (“The court lacks jurisdiction to award plaintiff’s prayer for damages for emotional distress and pain and suffering”).

Moreover, claims that arise under the Federal Tort Claims Act are heard exclusively by United States District Courts and cannot be adjudicated by this Court. 28 U.S.C. § 1346(b)(1); see also Wood v. United States, 961 F.2d 195, 197 (Fed. Cir. 1992). Similarly, like tort claims,

¹² Plaintiff’s claims that the Government violated various statutes in discharging him are also barred by the statute of limitations as they are encompassed within Plaintiff’s claims for military pay. See Lewis v. United States, 458 F.3d 1372, 1376 (Fed. Cir. 2006) (quoting Dysart v. United States, 369 F.3d 1303, 1315 (Fed. Cir. 2004)).

this Court lacks jurisdiction to adjudicate the criminal conduct alleged by Plaintiff. See Campbell v. United States, 229 Ct. Cl. 706, 707 (1981).

Further, to the extent that Plaintiff's claims are lodged against participants in his criminal trial proceedings, the Secretary of the Army in his individual capacity, and any other party other than the United States, these claims must be dismissed because this Court lacks jurisdiction over these entities and individuals. See, e.g., Stephenson v. United States, 58 Fed. Cl. 186, 190 (2003) (“[T]he only proper defendant for any matter before this court is the United States, not its officers, nor any other official.”).

Finally, Plaintiff's Constitutional claims, to the extent that they are not encompassed within his time-barred claims for back pay, fall outside this Court's jurisdiction. Plaintiff's claim that he received ineffective assistance of counsel before the Commonwealth of Massachusetts criminal court cannot be reviewed by this Court. A claim of ineffective assistance of counsel in violation of the Sixth Amendment to the Constitution does not independently mandate the payment of money damages by the United States. See Smith v. United States, 51 Fed. Cl. 36, 38 (2001); Milas v. United States, 42 Fed. Cl. 704, 710 (1999).¹³ Similarly, the Seventh Amendment's guarantee of a right to trial by jury is not money-mandating, and even if Plaintiff's complaint is construed to include an allegation that this right was violated, this allegation cannot be reviewed by this Court. Fullard v. United States, 77 Fed. Cl. 226, 230 (2007). The Fourth Amendment does not mandate the payment of money by the United States, and Plaintiff's Fourth Amendment claims also fall outside this Court's jurisdiction. LaChance v. United States, 15 Cl. Ct. 127, 130 (1988).

To the extent that Plaintiff alleges violations of his due process rights, these claims are not premised on a money-mandating Constitutional provision and also lie outside this Court's jurisdiction. “This Court's jurisdiction only extends to those provisions of the Constitution which are money-mandating and does not include claims based on the First Amendment, the Due Process Clause, the Eighth Amendment, or the Equal Protection Clause.” Cosma-Nelms v. United States, 72 Fed. Cl. 170, 172 (2006); accord LeBlanc v. United States, 50 F.3d 1025, 1028 (Fed. Cir. 1995)). Further, it is well established that this Court lacks jurisdiction over claims that derive from the Due Process Clause of the Fifth Amendment because it does not mandate “payment of money damages.” Prevado Vill. P'ship v. United States, 3 Cl. Ct. 219, 228 (1983) (citing Alabama Hosp. Ass'n v. United States, 228 Ct. Cl. 176, 180-81 (1981)).

Moreover, a takings claim under the Fifth Amendment is established only when the property has been taken for the “public use.” Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1332 (Fed. Cir. 2006). Although Plaintiff attempts to allege a takings claim under the Fifth Amendment, Plaintiff has not alleged that any of his property was taken for any public use.

¹³ However, in cases where this Court has traditional Tucker Act jurisdiction (e.g., the plaintiff seeks military back pay), this Court has jurisdiction to collaterally review a court-martial conviction for Constitutional defects such as ineffective assistance of counsel. See, e.g., Matias v. United States, 923 F.2d 821, 823 (Fed. Cir. 1990) (citing Bowling v. United States, 713 F.2d 1558, 1560 (Fed. Cir. 1983)); see also Moore v. United States, 61 Fed. Cl. 146, 152 (2004), aff'd, 121 Fed. Appx. 857 (2005).

Moreover, a claim for military pay and benefits is not a taking as “[n]either a government salary nor military benefits, however, are cognizable property interests for purposes of the Takings Clause.” Williams v. United States, 86 Fed. Cl. 594, 605-06 (Fed. Cl. 2009); see also Adams v. United States, 391 F.3d 1212, 1225 (Fed. Cir.2004) (“[A] statutory right to be paid money, at least in the context of federal employee compensation and benefit entitlement statutes, is not a property interest for purposes of the Takings Clause.”).

Transfer

On March 13, 2009, the United States District Court for the District of Massachusetts ordered:

Pursuant to 28 U.S.C. 1631, this case is transferred to the Court of Claims. Should that Court ultimately determine that it lacks jurisdiction, the case will be remanded to this Court re [docket number 10] MOTION to Certify This Case Pursuant to 28 USC 1331 As a Federal Question Case Involving a Federal Defendant’s Failure to [Perform] a Federal Statutory Duty at 10 USC 1168(a) or in the Alternative, Plaintiff’s Motion to Amend the Complaint to Reframe the Federal Question and Add Biven’s Action Claims Pursuant to Rule 15(B)(2) or in the Alternative to Transfer This Case to the Court of Claims Pursuant to 28 USC 1631 and or 28 USC 1406(a).

Def. App. 72 (emphasis added). This Court interprets the above order as requesting that this Court transfer this case back to the District Court if this Court does not have jurisdiction over Plaintiff’s claims. Accordingly, this Court transfers this case to the District Court of Massachusetts.

Conclusion

For the foregoing reasons, Defendant’s motion to dismiss is granted, and Plaintiff’s complaint is dismissed for lack of jurisdiction. In accordance with the District Court’s request, because this Court lacks jurisdiction over Plaintiff’s claims, this case is transferred back to the United States District Court for the District of Massachusetts.¹⁴

MARY ELLEN COSTER WILLIAMS
Judge

¹⁴ In transferring the case, this Court makes no findings of fact or conclusions of law regarding jurisdiction, timelines, or the merits of Plaintiff’s action in the District Court.