IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01612-PAB-MEH

ADAM DERITO,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

REPLY IN SUPPORT OF MOTION TO DISMISS (ECF No. 46)

DeRito's opposition demonstrates that his claims must be dismissed. He begins his argument by citing to a new document from his ongoing administrative challenge with the Air Force—which is, of course, improper on a motion to dismiss—but that document only serves to highlight the misguided nature of this lawsuit. Congress provided a specific mechanism by which members of the military may administratively seek to correct their military records, the very process DeRito is exercising. If at the end of that process, DeRito is still dissatisfied, he may seek judicial review of the final agency action. But his claims in this lawsuit are improper and meritless.

I. DeRito has no due process right related to the content of his military records.

DeRito's complaint states that he is seeking to compel Air Force officials to reverse their assessment of his fitness for duty. *See* ECF No. 37 ¶¶ 62-72 & 22. DeRito does not dispute that claims challenging such military personnel decisions are non-justiciable. *See, e.g., Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989) (claim for retroactive promotion non-justiciable); *Daniels v. United States*, 947 F. Supp. 2d

11, 19 (D.D.C. 2013) (decision to discharge midshipmen from Naval Academy non-justiciable). To avoid a non-justiciability problem, DeRito narrows his claims substantially, asserting that he now seeks only the correction of his Air Force medical records.[1] *Id.* at 3-4; ECF No. 35 at 21-22. No matter how he recharacterizes his claims, DeRito's due process claims still fail.

A. The Court lacks jurisdiction to order the correction of DeRito's records under the federal statute governing actions by military "special boards."

DeRito argues for the first time that his "substantive and due process claims fall directly under 10 U.S.C. 1558(f)(3)." Section 1558(f)(3) provides that "[a] court of the United States may review a recommendation of a special board or an action of the Secretary of the military department concerned on the report of a special board." *Id.* A "special board," as defined in the same statute, means a board that has been convened by the Secretary of the Air Force to make recommendations concerning certain personnel actions. *Id.* § 1558(b)(1)(A). Here, DeRito is not seeking review of a recommendation issued by a "special board." *See Crumley v. United States*, 122 Fed. Cl. 804, 806 (2015) (dismissing for lack of jurisdiction where no "special board" decision). As such, he cannot rely on 10 U.S.C. § 1558(f)(3) as a basis for jurisdiction.[2]

B. DeRito's due process rights have not been violated.

Even if DeRito's due process claims are justiciable, the claims fail on the merits. DeRito alleges that in June 2011, a year after he was disenrolled from the Academy, an Air Force psychologist entered information about various psychological diagnoses in his military medical

[1] As DeRito no longer defends his claims as he pleaded them, the Court should dismiss all his pleaded claims challenging allegedly improper military personnel decisions, including his disenrollment from the Air Force Academy, as the parties agree those claims are non-justiciable.
[2] DeRito alleges that he filed administrative requests with the AFBCMR to have his military records corrected. That process is ongoing. If DeRito is unhappy with the final decision of the AFBCMR, he may seek review of that decision. *Clinton v. Goldsmith*, 526 U.S. 529, 539 (1999).

records. He disagrees with the psychologist's assessment and alleges that this allegedly defamatory information caused him to be denied a promotion in the Army National Guard in April 2017. ECF No. 37 ¶¶ 12, 20, 81, 89, & *passim*. DeRito's allegations state no claim because he was not deprived of a constitutionally protected liberty or property interest. Even if he had been, Congress created a process for DeRito to use to address that alleged deprivation, a process he is presently exercising, which is all the process that could be due. There is no violation of due process.

1. DeRito has not been deprived of a constitutionally protected interest.

DeRito does not deny that he has no constitutionally protected interest in military service or any matters related to military service, including the contents of his military records. ECF No. 46 at 5-6. He now argues that he has been deprived of "a reputational liberty interest," ECF No. 51 at 5—a due process claim he did not plead in his complaint. Regardless, DeRito's claim still fails.

The Supreme Court has emphasized that a due process claim based on allegedly defamatory statements is rarely available. The Court "has repeatedly admonished judges to be wary of turning the Due Process Clause into 'a font of tort law' by permitting plaintiffs to constitutionalize state tort claims through artful pleading. For that reason, the Supreme Court has required plaintiffs in cases involving allegedly defamatory statements by the government to show more than reputational injury in order to prevail on a constitutional claim." *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 314-15 (4th Cir. 2012). "[I]njury to reputation by itself [is] not a 'liberty' interest protected under the [Due Process Clause]." *Siegert v. Gilley*, 500 U.S. 226, 233 (1991).

The Supreme Court has specifically limited due process claims based on reputational injury in several critical ways. DeRito's claim fails to meet any of those limitations:

First, the alleged defamation must "occur in the course of the termination of employment."

Paul v. Davis, 424 U.S. 693, 710 (1976); *see also Siegert*, 500 U.S. at 234 (a letter "written several weeks later" is not sufficient). As DeRito alleges, the alleged defamation—the June 2011 entries in DeRito's Air Force medical records—occurred more than a year after he was terminated. This is plainly outside of the "course of termination" required to state a claim.

Second, the allegedly defamatory statement must make the employee "all but unemployable in the future, by marking him as one who lost his job because of dishonesty or other job-related moral turpitude," and effectively "exclud[e] him from his occupation" in order for due process protections to be required." *Lawson v. Sheriff of Tippecanoe Cnty.*, 725 F.2d 1136, 1139 (7th Cir. 1984). DeRito has not been rendered nearly unemployable because of the information. Instead, he merely alleges he was once (six years later) denied a promotion in the National Guard.

Third, the information in DeRito's Air Force medical records has not been "made public" so as to implicate a liberty interest. *Bishop v. Wood*, 426 U.S. 341, 348 (1976). "To impinge on a liberty interest, the stigmatizing information must be made public by the offending governmental entity." *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1227 (10th Cir. 1984); *Burton v. Town of Littleton*, 426 F.3d 9, 17 (1st Cir. 2005) (statement must be "disseminated by the employer and stigmatize the employee so that the employee's freedom to obtain alternative employment is significantly impaired"). DeRito has not alleged that the allegedly defamatory statement in his private personnel file was publicly disseminated. The people who know about these diagnoses—other than in connection with his publicly announcing them in this lawsuit—are persons in his chain of command in the Army and other government employees "involved in the promotional processes." Response at 6 n.6. That is not public dissemination by a federal official. And this limited, non-public dissemination within the federal government was at *DeRito's* own request to

obtain a promotion. *Rich*, 735 F.2d at 1227 (consented disclosure not a violation).

DeRito has not been deprived of a reputational liberty interest. Nor has he been deprived of any other type of liberty interest, including the alleged interest in "freedom from arbitrary exercise of government power." ECF No. 51 at 6-7. DeRito's analysis makes no sense. Placing information in his Air Force medical records did not deprive him of "personal autonomy." *Id.* at 6. It did not lead to government interference of any sort or place any restrictions on his movement or his choices about how to live. Neither has DeRito pointed to any law suggesting that he has a "privacy" right in avoiding the placement of information with which he personally disagrees in his military medical records. DeRito was deprived of no liberty interest.

2. DeRito has adequate process to address any alleged deprivation.

Even if DeRito had a protected interest, the most that due process would accord is an "opportunity to refute" the allegedly defamatory statement. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972). But Congress and the Air Force have already established a specific process providing service members with an opportunity to be heard regarding any "error or injustice" in military records. 10 U.S.C. § 1552; 32 C.F.R. Part 865. DeRito is using that process now. *See* ECF No. 51-1 (referencing AFBCMR Case # BC-2018-00615).

DeRito objects that the process is insufficient because his records were changed "post military service," but the procedures apply to all military records and may be brought by "any member or former member" of the Air Force. 32 C.F.R. § 865.3(a). The procedures further allow the submission of supporting documentary evidence, *id.* § 865.3(e), (i), which alleviates any of DeRito's concerns regarding an "opportunity to respond with … a second medical opinion." ECF No. 51 at 7. In sum, DeRito's procedural due process rights were not violated.

C. The substantive due process claim fails.

DeRito's claim does not implicate substantive due process. As noted above, DeRito has no constitutionally protected interest in his military records, which necessarily means this claim fails. But even if he had a protected interest, his claim falls short of the "conscience-shocking standard." Because the Supreme Court has "always been reluctant to expand the concept of substantive due process," *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998), "little governmental action is held unconstitutional" under this standard. *Williams v. Berney*, 519 F.3d 1216, 1221 (10th Cir. 2008) (unprovoked physical assault by a license inspector not sufficient); *Livsey v. Salt Lake Cty.*, 275 F.3d 952, 957-58 (10th Cir. 2001) (gratuitous public disclosure of private sexual practices, "however ill-advised, inappropriate, or ill-considered," not sufficient); *Pettigrew v. Zavaras*, 574 F. App'x 801, 815 (10th Cir. 2014) (denial of parole based in part on false information "does not come close to shocking the judicial conscience"). "[A] plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Livsey*, 275 F.3d at 957.[3] Allegations that an Air Force doctor placed a defamatory statement in DeRito's medical records that allegedly caused him to lose out on a promotion six years later does not come close to meeting this standard. The claim must be dismissed.

II. The Court lacks jurisdiction over DeRito's FTCA claim.

DeRito's various arguments supporting his FTCA claim are meritless.

First, DeRito concedes his FTCA claim arises out of an allegedly defamatory statement in his military record. ECF No. 51 at 10. But the FTCA's limited waiver of sovereign immunity expressly excludes "[a]ny claim *arising out of* ... libel, slander, misrepresentation, deceit." 28

[3] DeRito's assertion that this is a jury question is contrary to law—the standard is whether the challenged action "would 'shock the conscience of federal judges.'" *Livsey*, 275 F.3d at 957.

U.S.C. § 2680(h). As the Supreme Court held in *United States v. Shearer*, 473 U.S. 52, 55 (1985) (plurality), a plaintiff cannot avoid the reach of section 2680(h) by pleading a negligence claim. The "sweeping language" in section 2680(h) excludes any claim "*arising out of*" defamation, including any claim that "sound[s] in negligence but stem[s]" from defamation.[4] *Id.*; *see also Hobdy v. United States*, 968 F.2d 20, 1992 WL 149871, at *3 (10th Cir. 1992) (unpublished) (negligence claim barred because it arose out of defamatory statements). Because DeRito concedes his claim arises out of a defamatory statement, his FTCA claim, however characterized, is outside the waiver of sovereign immunity and must be dismissed for lack of jurisdiction.

Second, DeRito's claim is barred because he failed to file a claim with the Air Force. DeRito insists that his administrative request to remove the allegedly false and defamatory statement in his medical record suffices. It does not. The statute, 28 U.S.C. § 2675(a), requires the plaintiff to present the agency with "(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." *Estate of Trentadue ex rel. Aguilar v. United States,* 397 F.3d 840, 852 (10th Cir. 2005). His request to change his military record is insufficient and does not include a sum certain damages claim. Because he failed to first present his damages claim to the agency, the Court lacks jurisdiction.[5]

Third, DeRito's claim is barred by the *Feres* doctrine. Under *Feres*, "service members cannot bring tort suits against the Government for injuries that 'arise out of or are in the course of activity incident to service.'" *United States v. Johnson*, 481 U.S. 681, 686 (1987) (quoting

[4] *Shearer* concerned a negligence claim arising out of a battery, which is another tort excluded pursuant to 28 U.S.C. § 2680(h). The reasoning applies equally to all of the listed exclusions.
[5] The presentment requirement is a limitation on the waiver of sovereign immunity and thus jurisdictional. *Aguilar*, 397 F.3d at 852. DeRito failed to meet his burden to establish that the Court has jurisdiction. *Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005).

Feres v. United States, 340 U.S. 135, 146 (1950)). DeRito's FTCA claim alleges that he was injured, and seeks damages for that injury, based on alleged defamatory statements placed in his military personnel record. This injury would not have occurred but for "his military relationship with the Government," *id.* at 689, and thus arose out of his service in the military.

III. The Court lacks jurisdiction over DeRito's Military Pay Act claim.

DeRito's Military Pay Act claim, seeking back pay and other costs in connection with a promotion he was allegedly denied, may only be brought in the Court of Federal Claims. The Military Pay Act contains no jurisdictional grant or waiver of sovereign immunity. Instead, in order to bring such a claim, a service member must rely on the Tucker Act, which "vests exclusive jurisdiction with the Court of Federal Claims for claims against the United States founded upon the Constitution, Acts of Congress, executive regulations, or contracts and seeking amounts greater than $10,000." *Burkins v. United States*, 112 F.3d 444, 449 (10th Cir. 1997).

Relying on *Wyodak Res. Dev. Corp. v. United States*, 637 F.3d 1127, 1130 (10th Cir. 2011), DeRito argues that "[i]f there is an independent source of subject-matter jurisdiction over a claim against the United States, and some waiver of sovereign immunity other than the Tucker Act, [he] is free to proceed in district court." *Id.* But DeRito is unable to identify any of those "rare statutes that both waives sovereign immunity and grants subject-matter jurisdiction to the district courts," *id.*, for his Military Pay Act claim because none exists. And the fact that he is bringing *other* claims does not vest this court with jurisdiction.[6] Because there is no statute that waives sovereign immunity and grants jurisdiction for DeRito to bring his Military Pay Act

[6] The FTCA's limited waiver of sovereign immunity does not apply to claims where federal law provides the source of alleged liability. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994).

claim in a district court, this Court must dismiss the claim for lack of jurisdiction.[7]

IV. DeRito's disenrollment claim fails.

DeRito fails in his attempt to preserve his claim challenging his Academy disenrollment.

The claim suffers from two threshold defects. First, the claim is a non-justiciable attack on a military personnel decision, which concluded that DeRito would be disenrolled for a long list of misconduct, including sexual misconduct with a Preparatory School Cadet. ECF No. 11 at 5, 9, 18, 20-21. DeRito disagrees with that disenrollment decision, which is a non-justiciable decision about the "composition" of the military. *Gilligan*, 413 U.S. at 10. DeRito points to no contrary law. He asserts that his claim has nothing to do with "training, equipping or deploying of military units," ECF 51 at 13, but that is beside the point. He ignores the Supreme Court's directive that decisions about the "composition" of the military—the relevant issue here—are non-justiciable.

Second, the claim has been time-barred since June 25, 2016, six years after he was disenrolled. ECF No. 11 at 32. DeRito asserts that his alleged discovery of the medical records issue in April 2017 is the "linchpin" for the disenrollment claim, ECF No. 51 at 14, but that is contradicted by the well-pleaded facts. By June 25, 2010, DeRito knew of his injuries when he was notified that he had been disenrolled from the Academy and would not receive his degree—the very relief he now seeks. ECF No. 37 ¶ 88. The medical records allegedly created a year later are irrelevant to his claim, but even if they were not, they cannot save this time-barred claim. *Baker v. Bd. of Regents*, 991 F.2d 628, 632 (10th Cir. 1993) (claimant need not know all of the evidence for

[7] In addition, as explained in the motion, DeRito's Military Pay Act claim is premised on his assertion that he was wrongfully denied a promotion. ECF No. 37 ¶ 90. That claim is non-justiciable, another jurisdictional flaw with his claim. ECF No. 46 at 14-15. He does not defend the justiciability of this claim, instead arguing he is not seeking a promotion, but only to have his records corrected, which he believes would make him eligible for a promotion with the National Guard. ECF No. 51 at 3. If that is so, then he has no claim under the Military Pay Act.

cause of action to accrue). DeRito's disenrollment claim accrued in June 2010 and is time barred.

Even if the claim survived these threshold defects, it fails. DeRito does not dispute that he had no constitutionally protected liberty or property interest in being enrolled in the Academy. *See* ECF No. 51 at 13; *Spadone v. McHugh*, 842 F. Supp. 2d 295, 304 (D.D.C. 2012). That alone dooms his claim. But even though no process was required, DeRito nevertheless received a full panoply of procedural protections, including a full hearing.[8]

DeRito does not deny that he received this process, and he has not alleged that it was constitutionally deficient. His complaint is not that he was denied process but that he disagrees with the outcome his hearing. That is not a viable due process claim.

V. The Declaratory Judgment Act claim is not a proper independent claim.

With no viable substantive claim, DeRito's purported Declaratory Judgment Act claim fails. The Declaratory Judgment Act does not expand jurisdiction; it is "procedural" only—making available a remedy—but leaving all "substantive rights unchanged." *Medtronic, Inc. v. Mirowski Family Ventures*, 134 S. Ct. 843, 848-89 (2014). Because DeRito has no viable substantive claim, he necessarily cannot obtain any declaratory relief. The claim must be dismissed.

Respectfully submitted on July 11, 2019.

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[8] On April 19, 2010, the Academy Commandant of Cadets notified DeRito that he was initiating action to discharge DeRito based on six violations of Air Force policy. ECF No. 37 ¶ 44; ECF No. 11 at 20-22. He was notified that he would receive process and an opportunity to be heard, to have access to advisory military counsel, to obtain civilian counsel, to present his case to a Hearing Officer, to use military witnesses, and to submit statements. ECF No. 11 at 20-24, 29-30. DeRito took his case to hearing, where he was assisted by an Air Force Area Defense Counsel; he called witnesses and presented documentary evidence. *Id.* at 25-26, 29-30.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on July 11, 2019, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will electronically send notice to:

Clayton W. Barnett, Esq.
Matthew J. Greife, Esq.
Herbert Rubenstein, Esq.

s/ *Susan Prose*
Susan Prose
United States Attorney's Office