

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY A. TRUEMAN : CIVIL ACTION
: :
v. : :
: :
ERIC LEKBERG, GARY POWELL, : :
JAMES DELONG, and : :
UNITED STATES OF AMERICA : No. 97-1018

M E M O R A N D U M

Ludwig, J.

April 15, 1998

Defendants Eric Lekberg, Gary Powell, James Delong, and the United States of America moved to dismiss the complaint or, in the alternative, for summary judgment. Fed R. Civ. P. 12(b)(6), 56. Because matters outside the complaint were considered, the motion was treated as one for summary judgment. By order, December 23, 1997, the motion was granted.

This action for false arrest, false imprisonment, and malicious prosecution arises from an incident that occurred on May 27, 1994 at the Willow Grove (Pa.) Naval Air Station. The complaint alleges constitutional claims under the First, Fourth, and Fifth Amendments, as well as Pennsylvania common law claims, against the three individual defendants - together with a claim against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. Damages and injunctive relief are requested. Second amended complaint, ¶ 41. Jurisdiction is federal question, 28 U.S.C. § 1331 (1994), and exclusive inasmuch as the United States is a defendant, 28 U.S.C. § 1346 (1994).

Factually: On November 19, 1993 plaintiff Jeffrey A. Trueman, a Navy yeoman first class, was transferred from the Willow

Grove Naval Air Station to the Philadelphia Naval Station. See defendants' motion, exh. a (declaration of Lt. Randy C. Bryan, JAGC, USNR [Bryan declaration]). On the same day, defendant Eric Lekberg, a Navy captain, who was the commanding officer at Willow Grove, issued a letter order prohibiting plaintiff from re-entering the base without permission.¹ Second amended complaint, ¶ 14; Bryan declaration, exh. a. On January 13, 1994 plaintiff was honorably discharged. Second amended complaint, ¶ 10. On May 27, 1994 plaintiff returned to the Willow Grove base to retrieve his personnel records. Id. ¶ 11. When defendant Powell, a Navy commander and the base executive officer, learned of plaintiff's presence, he directed defendant DeLong, a security officer, to apprehend and arrest plaintiff for violating the commanding officer's re-entry prohibition order. Id. ¶¶ 12-13. DeLong took plaintiff into custody and thereupon turned him over to a Horsham Township police officer, who issued a citation to plaintiff for defiant criminal trespass, a third degree misdemeanor under Pennsylvania law, see 18 Pa. Cons. Stat. Ann. § 3503(b) ("Defiant trespasser (1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters . . . any place as to which notice against trespass is given by: (i) actual

¹ The order found plaintiff to be "detrimental to the good order and discipline of this air station" and required him to receive written permission from the executive or administrative officer of the base prior to re-entry. Bryan declaration, exh. a. No underlying explanation accompanied the order, and none has been given by defendants Lekberg or the United States. As to plaintiff's position, see note 6 infra.

communication to the actor"). Id. ¶¶ 13, 17, 19. He was not detained. On July 6, 1994 a Montgomery County district justice dismissed the charge at a preliminary hearing. Id. ¶ 22.²

I.

Defendants urge that the doctrine of Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), bars plaintiff's claims – inasmuch as they involve an order entered while he was still in the Navy. Feres, however, pertains only to military service personnel. It will not bar claims enuring to a civilian. See Valn v. United States, 708 F.2d 116, 119-20 (3d Cir. 1983). Once plaintiff was discharged from the Navy, second amended complaint, § 10, Feres, at least arguably, became inapplicable, given that his claims arose when his status was that of a civilian.³ But see infra note 8.

II.

Constitutional Claims Against the Individual Defendants – Count I

Count I alleges that the individual defendants, based on Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388

² On July 5, 1996 plaintiff filed an action in the United States District Court for the District of Minnesota, which, on February 11, 1997, was transferred to the Eastern District of Pennsylvania.

³ Defendants concede that Feres does not bar plaintiff's claims against defendants Powell and DeLong. See defendants' second supplemental brief, at 6.

(1971), violated plaintiff's First and Fourth Amendment rights.⁴ With the exception of malicious prosecution, these claims, as defendants contend, are barred by the applicable statute of limitations. Moreover, the defense of qualified immunity applies to the Bivens malicious prosecution claim.

A.

The Fourth Amendment Claims Based on False Arrest and False Imprisonment, the First Amendment Retaliation Claim, and the "Negligent Failure to Advise" Bivens Claim

In a Bivens action, the applicable statute of limitations is supplied by the state in which the tort occurred. See Napier v. Thirty or More Unidentified Federal Agents, 855 F.2d 1080, 1087 n.3 (3d Cir. 1988). Pennsylvania's limitations period for false arrest and false imprisonment is two years. 42 Pa. C.S.A. § 5524 (1997). Federal law governs when the period begins to run. See Deary v. Three Un-Named Police Officers, 746 F.2d 185, 197 n.16 (3d Cir. 1984). A federal claim for false arrest or false imprisonment accrues when the claimant "knew or had reason to know of the injury that constitutes the basis of [the] action." See Sandutch v.

⁴ The complaint also asserts Fifth Amendment violations. See ¶ 31. In Albright v. Oliver, 510 U.S. 266, 275, 114 S. Ct. 807, 813-14, 127 L. Ed.2d 114 (1994), the Court held that there is no Fourteenth Amendment substantive due process right to be free from prosecution without probable cause. It suggested, in dicta, that such claims might arise under the Fourth Amendment. See id. at 273-75, 114 S. Ct. at 813. To the extent that plaintiff's constitutional claims sound in false arrest, false imprisonment, and malicious prosecution, they will be treated as Fourth Amendment claims rather than substantive due process claims.

Muroski, 684 F.2d 252, 254 (3d Cir. 1982) (per curiam). Our Circuit has repeatedly held that an action for false arrest accrues on the date of arrest. See Rose v. Bartle, 871 F.2d 331, 350-51 (3d Cir. 1989); Sandutch, 684 F.2d at 254. Likewise, a claim of false imprisonment accrues on the date of imprisonment. See Deary, 746 F.2d at 197 n.16. Here, plaintiff was arrested and detained on May 27, 1994 and released the same day. Second amended complaint, ¶¶ 11-12, 17-20. This action was not initiated until July 5, 1996, which was more than two years later. Therefore, the Bivens claims based on false arrest and false imprisonment are time-barred.

Plaintiff's First Amendment claim and the "Negligent Failure to Advise" claim – if such a cause of action exists⁵ – also appear, as torts, to be governed by Pennsylvania's two-year statute of limitations. 42 Pa. C.S.A. § 5524(2) (1997) ("An action to recover damages for injuries to the person . . . caused by the wrongful act or neglect or unlawful violence or negligence of another"); § 5524(7) ("Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct . . ."). Since these claims also accrued on the arrest and release-from-custody date, they too are time-barred.⁶

⁵ The claim for "Negligent Failure to Advise" posits a duty on the Navy's part to inform plaintiff that the order in question remained in effect after his discharge. Plaintiff has not cited any authority for this proposition and there appears to be none.

⁶ The complaint also predicates the First Amendment
(continued...)

B.

Malicious Prosecution under the Fourth Amendment⁷

Plaintiff's Fourth Amendment claim for malicious prosecution cannot overcome the affirmative defense of qualified immunity, which has been delineated by the Supreme Court as follows:

⁶(...continued)

claim upon defendant Lekberg's alleged infringement of 10 U.S.C. § 1034, which prohibits retaliatory personnel actions against members of the armed forces who engage in certain protected communications with Members of Congress or the Inspector General of the Department of Defense. ¶ 16. It is alleged that Lekberg violated § 1034 by (1) issuing the re-entry prohibition order on November 17, 1993; (2) initiating disciplinary proceedings against plaintiff on November 18, 1993; and (3) discharge proceedings on January 13, 1994. See plaintiff's affidavit, ¶ 2.

Section 1034 confers an administrative remedy with a six-month statute of limitations, see § 1034(c)(1), (3), and creates no private right of action. See Acquisto v. United States, 70 F.3d 1010, 1011 (8th Cir. 1995) (no express or implied private right of action). In any event, the alleged events – as bases for plaintiff's First Amendment claim – are time-barred.

⁷ There is some uncertainty in our Circuit whether the elements of a constitutional claim for malicious prosecution are co-extensive with the elements under state law. In Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988), the elements of the constitutional tort were held to "coincide with those of the common law tort." Id. at 70. It has been suggested that the Supreme Court's decision in Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed.2d 114 (1994), abrogated this precedent and would require – in addition to the common law elements – "a deprivation of liberty consistent with the concept of seizure [under the Fourth Amendment]." Torres v. McLaughlin, 966 F. Supp. 1353, 1360, 1361 (E.D. Pa. 1997) (citing Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir. 1995) and Albright, 510 U.S. at 273-75, 114 S. Ct. at 813).

Our Court of Appeals, however, in Hilferty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996) – after Albright – cited Lee and again described the constitutional elements as identical to those at common law.

Qualified immunity shields [officers] from suit for damages if "a reasonable officer could have believed [his actions] to be lawful, in light of clearly established law and the information the . . . officers possessed." Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed.2d 523 (1987). Even law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity. Ibid. Moreover, because "[t]he entitlement is an immunity from suit rather than a mere defense to liability," Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed.2d 411 (1985), we have stressed the importance of resolving immunity questions at the earliest possible stage of the litigation [further citations omitted].

Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed.2d 589 (1991); see also Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed.2d 271 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

Here, qualified immunity protects the three individual defendants because of the objective legal reasonableness of (1) the order, issued by defendant Lekberg, barring plaintiff's re-entry without permission, see Bryan declaration, exh. a.;⁸ and (2) the undisputed reliance by defendants Powell and Delong on the validity of the order. See Pro v. Donatucci, 81 F.3d 1283, 1286 (3d Cir. 1996) (focus of qualified immunity is on the objective legal reasonableness of actions taken by public officials) (citing

⁸ Indeed, because the order was issued while plaintiff was still in the Navy, an action for damages against the commanding officer would appear to be barred by the doctrine of Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).

Anderson, 483 U.S. at 639, 107 S. Ct. at 3038). As held by the Supreme Court, a commanding officer has broad discretion to exclude civilians, as well as service personnel, from a military base – so long as the power is not exercised in a patently arbitrary or discriminatory manner. See United States v. Albertini, 472 U.S. 675, 690, 105 S. Ct. 2897, 2907, 86 L. Ed.2d 536 (1985). Moreover, it is not “inherently unreasonable for a commanding officer to issue a bar order of indefinite duration requiring a civilian to obtain written permission before reentering a military base.” Id.

Here, defendant Lekberg’s only involvement in the events of May 27, 1994 appears to have been his issuance of the re-entry prohibition order more than six months earlier. In detaining plaintiff and turning him over to the local police, defendants Powell and Delong unquestionably relied on that order. Nothing in the order appears to have been patently arbitrary or discriminatory; nor does it contain any durational limit. Given the contents of the order, there was no reason to believe that plaintiff’s discharge and civilian status would give him a greater right of entry onto the base than he had as a member of the Navy. Considering Albertini and the principle of military chain-of-command, a reasonable officer could and undoubtedly would have believed that arresting plaintiff and turning him over to the local police as a trespasser was lawful. Conversely, the failure to do so could have been a dereliction of the officer’s duty.

Moreover, the existence of a Fourth Amendment Bivens action for malicious prosecution was not clearly established in our

Circuit on the date of plaintiff's arrest. An official will be denied qualified immunity for having violated a clearly established right "when in the light of preexisting law the unlawfulness [is] apparent." Lee v. Mihalich, 847 F.2d 66, 71 (3d Cir. 1988) (quoting Anderson, 483 U.S. at 640, 107 S. Ct. at 3039) (internal quotations omitted). The state of the law must be considered as of the time of the challenged action, id. – here, May 27, 1994.

Prior to 1994, a cause of action for malicious prosecution based on 42 U.S.C. § 1983⁹ was grounded in a violation of substantive due process under the Fourteenth Amendment. See Lippay v. Christos, 996 F.2d 1490, 1502 (3d Cir. 1993); Lee, 847 F.2d at 70. In January, 1994, however, that landscape was changed; the Court held that such a claim could not be pursued. See Albright v. Oliver, 510 U.S. 266, 275, 114 S. Ct. 807, 813-14, 127 L. Ed.2d 114 (1994). The plurality opinion of Chief Justice Rehnquist, joined in by Justices O'Connor, Scalia, and Ginsberg,¹⁰ theorized that the Fourth Amendment could be a source of a malicious prosecution

⁹ "[C]ourts have generally relied upon the principles developed in the caselaw applying section 1983 to establish the outer perimeters of a Bivens claim against federal officials." Schrob v. Catterson, 948 F.2d 1402, 1408-09 (3d Cir. 1991).

¹⁰ Justice Ginsberg's concurrence in Albright suggested that a Fourth Amendment plaintiff basing a claim on false arrest or malicious prosecution remained "'seized' in the constitutionally relevant sense . . . so long as he is bound to appear in court and answer the state's charges." Id. at 279, 114 S. Ct. at 816 (Ginsberg, J., concurring). The concept of "continuous seizure" is not the law in our Circuit. Its effect on statute of limitations law for actions under § 1983 and Bivens for false arrest and malicious prosecution would be significant. See Torres v. McLaughlin, 966 F. Supp. 1353, 1363 (E.D. Pa. 1997).

claim. Id., 114 S. Ct. at 814. It was not until two and a half years later, in July, 1996, that our Court of Appeals, in Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996), announced that the tort of malicious prosecution was still a viable civil rights claim.¹¹ The existence of a Bivens action for malicious prosecution was, therefore, unclear as of the date of plaintiff's arrest. See Brooks v. Carrion, NO. 96-CV-1172, 1996 WL 563897 at *3 (E.D. Pa. Sept. 26, 1996) (constitutional cause of action for malicious prosecution in Third Circuit limbo between January 1994 and July 1996).

In short: The individual defendants' conduct was objectively legally reasonable under Albertini. At the time of the challenged actions, the law as to constitutional malicious prosecution actions was uncertain. For each of these reasons, as applied to the various claims, the individual defendants are entitled to qualified immunity.

Also, as to Delong, plaintiff concedes that this defendant had probable cause to arrest him given the outstanding re-entry prohibition order. See plaintiff's "Supplemental Memorandum," at 4. He cannot, therefore, make out a prima facie Bivens claim for malicious prosecution against Delong. See

¹¹ In December, 1994 in Barna v. City of Perth Amboy, 42 F.3d 809 (3d Cir. 1994), appellants had asserted the constitutional tort of malicious prosecution. Because the issue was not raised in the district court, it was concluded that there was "no occasion to consider what effect the Supreme Court's decision in Albright v. Oliver . . . has on our circuit jurisprudence." Id. at 812 n.12.

Hilfirty, 91 F.3d at 579 (lack of probable cause is necessary element of constitutional tort for malicious prosecution).

III.

Pennsylvania Common Law Claims Against the Individual Defendants – Count II

The supplemental state claims of false imprisonment, false arrest, and malicious prosecution against the individual defendants are also insupportable. It is settled that the Federal Tort Claims Act provides the exclusive remedy for torts committed by employees of the United States acting within the scope of their employment. See 28 U.S.C. § 2679(b)(1) (1994).¹² Acting under 28 U.S.C. § 2679(d)(1), the Attorney General has so certified. See defendants' motion, exh. b. Plaintiff offered no evidence warranting an evidentiary hearing on the issue of certification. See Melo v. Hafer, 13 F.3d 736, 747-748 (3d Cir. 1994) (plaintiff must present competent evidence to refute prima facie effect of scope certification). Consequently, as defendants assert, plaintiff's state law claims are precluded by the FTCA.

¹² The two exceptions to this rule – for Bivens actions and for actions otherwise authorized by federal statute, see 28 U.S.C. § 2679(b)(2) (1994) – are inapplicable to state law claims.

IV.

FTCA Claims – Count III

Count III contains claims against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1994), for false arrest, false imprisonment, "negligent failure to advise," and malicious prosecution. All but the malicious prosecution claim are barred by the applicable statute of limitations. Plaintiff's remaining claim under the FTCA – for malicious prosecution – also must fail. As noted supra Part II.B, the individual defendants are entitled to qualified immunity under federal law, and given probable cause, there is no federal malicious prosecution claim against defendant Delong. Moreover, plaintiff can not establish the liability of any of the individual defendants under state law.

A.

FTCA Claims Based on False Arrest, False Imprisonment, and "Negligent Failure to Advise"

Plaintiff's claims, other than malicious prosecution, accrued on the date of his arrest and release from custody, May 27, 1994. The defense of FTCA untimeliness has been raised. Under the FTCA, a claim against the United States is barred "unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b) (1994); Zelevnik v. United States, 770 F.2d 20, 22 (3d Cir. 1985). A claim

is "presented . . . to the appropriate federal agency" under § 2401(b) as of the date of receipt by the relevant agency. See 28 C.F.R. § 14.2(b)(1) (1997). Plaintiff's claim was received by the U.S. Attorney's office for the District of Minnesota on May 28, 1996 and by the Department of the Navy on May 30, 1996. See Bryan declaration, exh. d. Plaintiff argues that the earlier receipt – by the U.S. Attorney's office – satisfies § 2401(b).¹³ See plaintiff's response, at 9. The language of the federal regulation, however, is clear. The Department of the Navy, which is the appropriate agency, did not receive the claim until two days after the applicable limitations period. Accordingly, the FTCA claims based on false arrest, false imprisonment, and "negligent failure to advise" were barred by 28 C.F.R. § 14.2(b)(1); and were dismissed for lack of subject matter jurisdiction.

B.

Malicious Prosecution under the FTCA

Plaintiff cannot succeed in a malicious prosecution claim against the United States because he cannot establish the commission of that tort under either state or federal law. See Deary v. Three Un-Named Police Officers, 746 F.2d 185, 189 n.2 (3d Cir. 1984) ("Liability arises against the United States [under the FTCA]

¹³ May 27, 1996 was Memorial Day, and therefore, under Fed. R. Civ. P. 6(a), the claim expired unless received by May 28, 1996. See Monkelis v. Mobay Chemical, 827 F.2d 937, 938 (3d Cir. 1987) (Rule 6(a) applicable to statute of limitations in non-diversity cases).

only if the conduct of its employee violated state or federal law."). As noted above in Part II.B, defendant Lekberg, as well as the two other individual defendants, is entitled to qualified immunity under federal law. See Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed.2d 523 (1987); Karnes v. Skrutski, 62 F.3d 485, 491 (3d Cir. 1995).

As to FTCA liability generally, no claim for malicious prosecution exists against the individual defendants. Under the FTCA, only "investigative and law enforcement officers" can be liable for malicious prosecution.¹⁴ See 28 U.S.C. § 2680(h) (1994). Defendants Lekberg and Powell – the commanding officer and executive officer of the base, respectively – are not law enforcement officers under the FTCA. See defendants' motion, at 24 (citing Naval Operations Instruction 5580.1 (Oct. 20, 1986), which creates a separate security department headed by a security officer who "report[s] to the commanding officer via the executive officer. The security officer is the principal staff officer to the commanding officer for law enforcement and physical security matters." Bryan declaration, exh. e). There is no evidence that defendants Lekberg and Powell acted as investigative or law enforcement officers. See Metz v. United States, 788 F.2d 1528, 1531 (11th Cir.) ("[FTCA] liability on the basis of actions of law enforcement officers cannot be expanded to include governmental

¹⁴ Such officers are those "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h) (1994).

actors who procure law enforcement actions, but who are not themselves law enforcement officers.”), cert. denied 479 U.S. 930, 107 S. Ct. 400, 93 L. Ed.2d 353 (1986).

As to defendant Delong, the base security officer, his law enforcement status is clear. Nevertheless, as noted supra Part II.B, plaintiff does not contest that Delong had probable cause to arrest him. See plaintiff’s “Supplemental Memorandum,” at 4. Accordingly, he cannot maintain an FTCA malicious prosecution claim against this defendant based on either federal or state law. See Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996) (lack of probable cause is essential element of federal malicious prosecution claim); Griffiths v. CIGNA Corp., 988 F.2d 457, 463 (3d Cir.) (same under Pennsylvania law), cert. denied 510 U.S. 865, 114 S. Ct. 186, 126 L. Ed.2d 145 (1993). As to federal law, Delong is also protected by qualified immunity. Part II.B, supra.

V.

Injunctive Relief

The second amended complaint also requests injunctive relief against all defendants. ¶ 41.¹⁵ Under the FTCA, equitable

¹⁵ With regard to the individual defendants, the complaint, as amended, simply makes a general request without setting forth the specific nature of the relief requested. As to the United States, plaintiff’s brief mentions a desire to correct his naval records to allow his re-enlistment but does not state what in particular is sought to be enjoined. See plaintiff’s “Supplemental Memorandum,” at 6. Plaintiff’s pleadings also are silent on this subject. Assuming inferentially that plaintiff desires to have the Lekberg re-entry bar order expunged, he has
(continued...)

relief is unavailable against the United States. See Redland Soccer Club, Inc., et al. v. Department of the Army, 55 F.3d 827, 848 n.11 (3d Cir. 1995), cert. denied, 516 U.S. 1071, 116 S. Ct. 772, 133 L. Ed.2d 725 (1996). Our Court of Appeals has held that Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed.2d 586 (1983), does not preclude an equitable remedy against military personnel, see Jorden v. National Guard Bureau, 799 F.2d 99, 110 (3d Cir. 1986), cert. denied sub nom. Sajer v. Jordan, 484 U.S. 815, 108 S. Ct. 66, 98 L. Ed.2d 30 (1987). Plaintiff, however, lacks standing vis-à-vis the individual defendants.

To have Article III standing to sue for injunctive relief, "plaintiff must show that he . . . is immediately in danger of sustaining some direct injury as the result of the challenged . . . conduct and that the injury is both real and immediate, not conjectural or hypothetical." Roe v. Operation Rescue, 919 F.2d 857, 864 (3d Cir. 1990). The gravamen of this action involves the legality of plaintiff's arrest after he was honorably discharged and returned to civilian status over four years ago. Plaintiff is not likely to encounter any of the individual defendants again. He admits that none of them is now stationed at the Willow Grove Naval Air Station. Plaintiff's response, at 7. He has not offered any facts to prove his having any current or proposed future connection

¹⁵(...continued)

not shown any concerted effort to challenge the order directly through an administrative or military procedure. See note 6 supra. Moreover, there is no defendant in this action over whom jurisdiction could be exercised to direct such expungement.

with the Navy.¹⁶ In these circumstances, equitable relief would be inappropriate.

Edmund V. Ludwig, J.

¹⁶ By way of argument, plaintiff makes reference to being barred from re-enlistment, see plaintiff's "Supplemental Memorandum," at 6, but that issue, if it exists, is beyond this court's competence in this action.