

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

2014 NOV 12 P 2:11

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

CHRISTOPHER P. DOWNEY,

Plaintiff,

v.

COMPLAINT

**UNITED STATES DEPARTMENT OF
THE ARMY; and JOHN M. MCHUGH,**
Secretary of the United States Department
of the Army,

1.14CV1503
LMS/TGB

Defendants.

Plaintiff Christopher P. Downey, by and through his undersigned counsel, brings this Complaint against Defendants United States Department of the Army and John M. McHugh, Secretary of the United States Department of the Army, in his official capacity, and his agents and successors in office, and in support thereof alleges the following upon information and belief:

INTRODUCTION

1. This action seeks to redress a clear injustice suffered by a distinguished combat veteran and active duty Army commander, who has at all times acted only to protect the safety and integrity of his soldiers and his country. Lieutenant Colonel ("LTC") Christopher P. Downey has led his soldiers in accordance with the Army's Command Policy which requires commanding officers:

(1) to show in themselves a good example of virtue, honor, patriotism, and subordination; (2) to be vigilant in inspecting the conduct of all persons who are

placed under their command; (3) to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and (4) to take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

10 U.S.C. § 3583; Army Regulation ("AR") 600-20, para. 1-5(c)(4)(d).

2. LTC Downey was deprived of the right to due process afforded him by the Fifth Amendment to the United States Constitution and by applicable Army regulations. As a result, false, politically-motivated accusations have been allowed to persist and have destroyed his good reputation and an otherwise promising military career.

3. Plaintiff seeks injunctive and declaratory relief and a reversal of the decision of the Army Board for the Correction of Military Records ("ABCMR") that failed to direct changes to LTC Downey's military records to correct material errors and remove injustice. LTC Downey has exhausted all available administrative remedies and now turns to this Honorable Court as the last resort to vindicate his constitutional rights and to seek redress for the injustices he has suffered.

JURISDICTION AND VENUE

4. This action arises under the Constitution and laws of the United States. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1331, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*

5. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e). Defendants and Plaintiff reside in this district.

PLAINTIFF

6. LTC Downey is an active duty Lieutenant Colonel in the United States Army with over 24 years of distinguished service, including over 1,000 combat flight hours during

three combat tours of duty. He has been awarded 3 Bronze Stars and 7 Air Medals, one with a "V" device for valor in combat.

7. LTC Downey began his military career in 1987 as an enlisted soldier. He joined the Penn State Reserve Officer Training Program and received his commission to the aviation branch. LTC Downey graduated as a distinguished military graduate from the Pennsylvania State University in 1992.

8. He holds a Master of Arts degree in Military History, and has attended and excelled at the Army Command and General Staff College, Jumpmaster School, the Combined Arms and Services Staff School, the Aviation Officer Advanced Course, Pathfinder, Air Assault, and Airborne School.

9. LTC Downey served as a Squadron Executive Officer and Aviation Squadron Operations Officer at Fort Bragg, North Carolina and was deployed to Iraq between 2004 and 2005. In 2006 he was selected ahead of his peers to serve as the 82nd Combat Aviation Brigade Operations Officer and in this capacity deployed to Afghanistan where he was responsible for combat operations and training of more than 3,000 personnel; maintenance of 104 helicopters, 19 fixed wing aircraft, and 150 ground support vehicles; and planned and directed 80,000 combat flight hours.

10. LTC Downey was selected ahead of officers from all three of the other major services to become the Presidential Airlift Coordinator for the White House in Washington, D.C. from 2008 to 2010, where he was rated as the best officer in Airlift Operations. In this capacity he was responsible for planning, scheduling, and coordinating the use of all Department of Defense airlift assets flown in support of the President, Vice President, Cabinet, First Family, US Secret Service, and other senior government officials, and was a military liaison to senior

White House staff.

11. White House Deputy Director of Operations Lieutenant Colonel Bradley Hoagland, LTC Downey's direct supervisor and performance evaluator, described LTC Downey as "clearly in the top 1% of the handpicked officers of the White House Military Office Operations Directorate and in all of the Lieutenant Colonel's I have known in my 20 years of military service."

12. From 2010 to 2012, LTC Downey was selected to command an Aviation Squadron. He returned to combat as an Aviation Task Force Squadron Commander in Jalalabad, Afghanistan. In this capacity he directed an Army Aviation Task Force consisting of 550 employees, 40 aircraft consisting of all five types of Army helicopters (Apaches, Blackhawks, Chinooks, Kiowa Warriors, and MEDEVAC), and ground vehicles and equipment valued in excess of 600 million dollars. Under his direction, his unit exceeded Department of the Army maintenance standards for the 40 helicopters enabling an unprecedented 3,000 missions executed and 30,000 flight hours flown in the most complex and dangerous region of Afghanistan, the Kunar Valley.

13. LTC Downey has been awarded multiple medals for his service to his country, including the Air Medal with "V" Device for valor, which was awarded March 10, 2012, for: "exceptionally meritorious achievement and valor displayed on 25 May 2011 in support of Operation Enduring Freedom." This award recognizes that LTC Downey "displayed complete disregard for his own safety while initiating multiple engagements against an enemy with superior fields of fire over friendly forces. His actions were decisive in saving the lives of soldiers on the ground. His exceptional situational skills are in keeping with the finest traditions of military service. His heroic actions reflect great credit upon himself, Task Force Falcon,

Combined Joint Task Force-1 and the United States Army.”

14. LTC Downey managed the full spectrum of aviation operations in Afghanistan and focused on mentoring and training junior personnel to develop future Army senior leaders. As the Task Force Commander, LTC Downey led the unit to achieve two national level awards: The Ellis D. Parker Aviation Unit Award for the Top Combat Unit of the Year, which recognized that the unit operated in one of the most challenging and helicopter-dependent areas of operation while sustaining the finest safety record of any Aviation unit in theatre, and The Army Aviation Association of America Active Aviation Unit of the Year Award, which recognized that, among other things, the unit flew in excess of 30,000 accident free hours at altitudes reaching 10,000 feet in some of the most inhospitable flying terrain in the world and created freedom of maneuver for the coalition, protected the local populace, and solidified the mission of establishing and sustaining the government of Afghanistan. Under LTC Downey’s leadership, his team was recognized as the best by both national Army aviation institutions. This achievement was only matched one other time in the history of these awards.

15. LTC Downey was rated as the best Aviation Task Force Commander in all of Regional Command East by General John Campbell, the current Commander of the International Assistance Force (“ISAF”) and United States Forces in Afghanistan, and by General Daniel Allyn, the current Vice Chief of Staff of the Army.

16. LTC Downey was slated to attend the National War College, a significant milestone in his career achieved well before his peers, prior to the events that form the basis for this complaint.

DEFENDANTS

17. Defendant United States Department of the Army is an executive agency of the

United States government responsible for the administration and enforcement of policies, regulations, and actions challenged in this lawsuit.

18. Defendant John McHugh is the Secretary of the United States Army. He is sued in his official capacity. As Secretary of the Army, McHugh is responsible for and has the authority necessary to conduct all affairs of the Department of the Army. 10 U.S.C. § 3013. He has final decision making authority over the correction of Army records. 10 U.S.C. § 1552.

FACTS

19. On Saturday, April 14, 2012, a formal ball was held at the Commons, located on Fort Drum, to honor the 6th Squadron, 6th Cavalry ("TF 6-6"), 10th Combat Aviation Brigade, and their accomplishments during recent deployment, including TF 6-6's receipt of the Ellis D. Parker Award for the Top Combat Unit of the Year and The Army Aviation Association of America Active Aviation Unit of the Year Award. This was the second time in the history of these awards that both would be given to the same unit in one year.

20. Despite all LTC Downey's unit had to celebrate at that time, LTC Downey was greatly affected by a particularly upsetting incident that occurred during the unit's most recent deployment. While in Afghanistan, an enlisted male soldier in LTC Downey's unit was discovered taking videos of several female soldiers showering. LTC Downey exercised his responsibility as commander to pursue justice against the perpetrator and to ensure the privacy and well-being of the victims. LTC Downey was keenly aware of the devastating impact this incident had on the victims and his unit, and this incident was fresh on LTC Downey's mind because court-martial proceedings against the male soldier were ongoing at the time of the formal ball.

21. Toward the end of the formal event on April 14, 2012, Chief Warrant Officer

("CW2") [REDACTED] brought a situation to LTC Downey's attention. LTC Downey knew and trusted CW2 [REDACTED], who during the course of deployment to Jalalabad received multiple air medals and the Distinguished Flying Cross for his valor in combat on May 25, 2011, when he was part of a mission to save the Do Ab District Center which had been overrun by Taliban fighters. Prior to joining the Army, CW2 [REDACTED] had been an Air Force criminal investigator assigned to the U.S. Air Force Academy.

22. CW2 [REDACTED] alerted LTC Downey to inappropriate conduct that was occurring on the dance floor. Two of LTC Downey's female officers in full dress uniform, Captain ("CPT") [REDACTED] and Second Lieutenant ("2LT") [REDACTED], were engaging in prolonged "French-kissing," and other individuals of all ranks were videotaping and photographing the couple's intimate behavior. CW2 [REDACTED] expressed concern that these videos would be released on the Internet.

23. The intimate conduct between the captain and the second lieutenant on the dance floor, that was observed by LTC Downey and by other military personnel, amounted to an inappropriate Public Display of Affection ("PDA"), which is prohibited by the Army Standards of Conduct and under Article 134 of the Uniform Code of Military Justice (conduct prejudicial to good order and discipline).

24. In a January 19, 2012 online article, the Deputy Inspector General at Fort Drum discussed the rule about public displays of affection while in uniform and/or while taking part in a military sponsored event. He listed several examples of prohibited PDA including, "A soldier, in uniform, and his or her partner kissing and/or hugging in a public place/facility, civilian or military." www.drum.army.mil/mountaineer/Article.aspx?ID=6100 (last visited Oct. 30, 2014).

25. According to the Pentagon's ALARACT 350/2011 (all army action) entitled

“Clarification of Army Standards of Conduct Policies”:

Long-standing customs of the service prohibit public displays of affection by soldiers when in uniform. . . . Soldiers must project an image that leaves no doubt that they live by a common military standard and are responsible to military order and discipline. (emphasis added)

26. The Undersecretary of Defense’s Memorandum for Secretaries of Military Departments on the subject of Repeal of Don’t Ask Don’t Tell and Future Impact on Policy, dated January 28, 2011, states:

Upon repeal, existing standards of conduct shall continue to apply to all Service members regardless of sexual orientation. Enforcement of service standards of conduct, including those related to public displays of affection, dress and appearance, and fraternization will be sexual orientation neutral. All members are responsible for upholding and maintaining the high standards of the U.S. military at all times and at all places. Services retain the authority provided by law, Department and Service regulations to counsel, discipline, and involuntarily separate those Service members who fail to obey established standards. (emphasis added).

http://www.defense.gov/home/features/2010/0610_dadt/USD-PR-DADT_28Jan11.pdf (last visited Oct. 30, 2014)

27. The Undersecretary of Defense’s Memorandum specified a commander’s role and authority when confronted with an inappropriate public display of affection:

Leaders at all levels are entrusted to ensure impartial administration of these standards and to hold Service members accountable. In cases where conduct is prohibited, leaders shall be expected to take such appropriate corrective or disciplinary action as they determine may be necessary to preserve morale, good order and discipline, unit cohesion, military readiness and combat effectiveness. (emphasis added).

28. A commander is responsible for enforcing the “service standards of conduct” relating to public displays of affection regardless of the repeal of DADT or the sexual orientation of the offenders.

29. Once LTC Downey observed that CPT [REDACTED] and 2LT [REDACTED] were violating the Army standards of conduct relating to public displays of affection, it was his duty, and he

was authorized, to take corrective action, including asking the individuals to cease their improper conduct, in order to preserve the good order and discipline of his unit—*regardless of the officers' sexual orientation.*

30. LTC Downey sought to prevent the exploitation of his officers. He walked to the dancing area and as he approached, he motioned for people to lower their cameras. One of the cameras he attempted to lower made contact with Specialist ("SPC") [REDACTED]'s nose. Subsequently, the soldier lost his balance.

31. LTC Downey asked the female officers to alter their behavior, and the situation was resolved.

32. LTC Downey acted to fulfill his duty as commander to maintain good order and discipline and consistent with the standards of conduct set forth by the Undersecretary of Defense in the "Memorandum for Secretaries of Military Departments on the subject of Repeal of Don't Ask Don't Tell and Future Impact on Policy," dated January 28, 2011, which provided that standards of conduct with respect to public displays of affection, dress, appearance and fraternization remain in effect and enforcement of them will be sexual orientation neutral. It also stated that leaders at all levels are expected to take corrective action that they determine to be necessary to preserve morale, good order and discipline, and unit cohesion.

33. LTC Downey's action to lower SPC [REDACTED]'s camera was done with the sole intent to prevent SPC [REDACTED] from taking and posting on the Internet photos of CPT [REDACTED] and 2LT [REDACTED] during their improper display of affection to their individual detriment and to the detriment of the good order and discipline of the Army and the Unit. The Army's own investigation affirmed LTC Downey's intent and motivation.

34. LTC Downey's written and oral statements showed he used an open hand and

only touched SPC [REDACTED]'s camera. This fact was supported by all the witnesses who saw what transpired between LTC Downey and SPC [REDACTED]

35. Not one eyewitness gave a sworn statement or testified that LTC Downey's hand or fist came in contact with any part of SPC [REDACTED]'s face or body.

36. LTC Downey did not strike SPC [REDACTED] or strike his camera, nor did he intend to. He simply sought to lower the camera and used no more than the slight movement necessary to accomplish this legitimate and lawful objective.

37. SPC [REDACTED]'s slight injury was accidental and unforeseeable.

38. The following day, LTC Downey immediately informed his chain of command regarding the events that transpired the night of April 14, 2012.

39. Later in the day on April 15, 2012, LTC Downey learned from a third party that after he had left the dance floor to speak with SPC [REDACTED] outside, an altercation had occurred between CPT [REDACTED] and a Sergeant Major. CPT [REDACTED] alleged that the Sergeant Major discriminated against her by shoving her and making derogatory remarks.

40. When LTC Downey heard the allegations, he called CPT [REDACTED] to understand what had happen and suggested that she wait to go to the military police until an investigation could be conducted. He then called his commander, Colonel [REDACTED] again and requested an Army Regulation ("AR") 15-6 investigation of the Command Sergeant Major's conduct toward CPT [REDACTED]

41. CPT [REDACTED] did not inform LTC Downey of her interaction with the Sergeant Major on the night of the incident when she apologized to LTC Downey for her actions. She instead chose to engage with a media blog, which eventually resulted in a Huffington Post article.

42. Less than two hours after the incident, CPT [REDACTED] who was in the process of voluntarily separating from the Army at the time of the incident, posted a comment on an Internet blog: "I was just shoved across the dance floor by my command sergeant major for being gay...lovely end to my active duty career." She continued to publicize the incident on social media claiming that she was the victim of a hate crime, that she would like to do media interviews, and that she was ready to make the story national news.

43. CPT [REDACTED] participated in a Huffington Post article titled "Command Sergeant Major Allegedly Assaults Lesbian Captain at Military Ball." The article was posted on April 20, 2012, and claimed that the incident "may be the first instance of discrimination against LGBT service members" since the repeal of DADT.

44. LTC Downey reported the article to his commander Colonel [REDACTED] upon learning of its existence.

AR 15-6 Investigation

45. On April 18, 2012, Major General ("MG") Mark Milley appointed one of his subordinates, Colonel ("COL") [REDACTED] as an Investigating Officer under the provisions of Army Regulation 15-6 to conduct an investigation into alleged misconduct that occurred during the April 14, 2012 formal event.

46. An Article 15-6 investigation should be used to thoroughly and impartially ascertain facts and report them to the appointing authority with findings and recommendations in a memorandum format.

47. The Investigating Officer did not impartially conduct his investigation. The investigation was tainted by unlawful command influence.

48. On April 19, 2012, COL [REDACTED] interviewed LTC Downey, but did not inform

him that he was under investigation for any wrongdoing, and did not inform him of his rights at this time, including the right to remain silent.

49. On April 19, 2012, LTC Downey presented COL [REDACTED] with blog communications and Facebook information indicating that CPT [REDACTED] was going to collaborate on a Huffington Post Article.

50. The Huffington Post article initiated by CPT [REDACTED] and posted on the Internet on April 20, 2012, gave a one-sided account of CPT [REDACTED]'s confrontation with the Sergeant Major and also falsely attributed statements to her squadron commander (LTC Downey).

51. On April 20, 2012, LTC Downey was presented with a rights warning procedure/waiver certificate, which stated that the assigned investigator wanted to question him regarding accusations LTC Downey had committed assault against SPC [REDACTED]

52. LTC Downey declined to waive his rights, and invoked his right to an attorney.

53. On April 23, 2012, MG Milley issued a no contact order to LTC Downey preventing LTC Downey from having any contact with personnel assigned or attached to the 6th Squadron, 6th Cavalry Regiment, thereby effectively forestalling him from conducting an investigation on his own behalf.

54. On May 4, 2012, the Investigating Officer presented his 15-6 Investigative Report regarding his investigation into the April 14, 2012 incident to MG Milley. Among the Investigating Officer's recommendations was that "LTC Downey receive an Article 15 for the offense of assault consummated by a battery and be relieved from command of the 6/6 CAV."

55. The Investigating Officer incorrectly found that LTC Downey violated Army Directive 2011-01, which is the Repeal of the "Don't Ask, Don't Tell" policy ("DADT"), when he addressed the couple engaged in intimate contact on the dance floor.

56. The Investigating Officer disregarded his own 15-6 investigation which produced overwhelming evidence that LTC Downey had never discriminated against the two lesbian officers or any other person under his command on the basis of sexual orientation.

57. In his 15-6 Investigative Report, the Investigating Officer included sworn written statements as well as verbatim transcripts containing questions and answers from some of the witnesses who were present at the April 14, 2012 formal event and demonstrated that LTC Downey was innocent of any misconduct.

58. CW2 ██████'s sworn statement was a part of the 15-6 Investigative Report submitted to MG Milley and stated in pertinent part:

... CPT ██████ and 2LT ██████ were in the middle of the square shaped dance floor. They were now in a full-blown make out session. They were kissing each other for long periods of time. I began watching what was happening on the dance floor now, along with several other people in my immediate vicinity. A scene developed with a large number of people taking pictures with their phones and personal cameras, many of them making their way from off the dance floor to take pictures of the couple. In my opinion, it was beginning to resemble a scene from a spring break party. I took a few steps over to LTC Downey who was not really watching the dance floor. I said "Sir, have you seen what's happening on the dance floor?" He turned and looked at the dance floor. I then said something to the effect of "this is going to be on You Tube" or something along that line.

59. CW2 ██████'s statement also provided that he saw LTC Downey approach the dance floor:

There were two people taking pictures on the edge of the dance floor directly in LTC Downey's path. When he got within reaching distance LTC Downey reached up and pulled one of the camera's down and almost at the same time he moved to the second person, a 1LT, and pulled his camera down. At no time did it appear to me that LTC Downey was assaulting or going to assault the individuals.

60. CW2 ██████ further stated that:

I am certain LTC Downey was trying to diffuse the situation quickly and protect his soldiers, especially CPT ██████ and 2LT ██████. I find it very unfortunate anyone was injured, but it appeared to be purely accidental.

61. The 15-6 Report also contained a verbatim transcript of the investigative interview of CW2 [REDACTED]. CW2 [REDACTED] was asked whether he saw CPT [REDACTED] and 2LT [REDACTED] kissing each other and responded:

Absolutely. I mean, I'd seen—Captain [REDACTED] has been known to be a homosexual for a long time, and I've never really gave it a thought. They were kissing, what I would consider to be appropriate for the event, earlier in the night—I mentioned that in my statement. At this point in time, it was beginning—it was a little more, like I said, a full-blown makeout, like, you know, they did not even realize what all was going on around them; they were concentrating on each other. And it was creating a scene on the dance floor.

62. When asked if he saw other couples behaving in a similar fashion, CW2 [REDACTED] responded:

There was a lot of couples dancing and kissing in a brief manner. There was nobody else, that I saw, that was—throughout the entire night that was making out, you know, kissing for more than a few seconds at a time. And they were kissing for minutes at a time. Overt for anybody, but considering their nature -- nature of their relationship, I think that it was probably -- that's why I noticed and remember it more than anything else.

63. The AR 15-6 Report contained verbatim testimony from several other Army personnel including Lieutenant [REDACTED], Specialist [REDACTED], Sergeant [REDACTED] and Staff Sergeant [REDACTED] which described the inappropriate public display of affection exhibited by CPT [REDACTED] and 2LT [REDACTED] and demonstrated the need for corrective action.

64. When asked if he saw anything he would consider inappropriate public displays of affection during the evening from anyone at the formal event, Lieutenant [REDACTED] responded: "Under military, I would say yes. . . . Military, officers in uniform, I would say, you know, when you're in military uniform, you probably shouldn't be, you know, kissing or, you know, being a little too intimate with your other." When asked who he was referring to, Lieutenant [REDACTED]

responded: "The two girls, I had noticed them earlier in the evening; they did - they were kissing on the dance floor."

65. When asked if he saw any potential misconduct, Specialist [REDACTED] responded in pertinent part:

Well, whatever happened was right after the formal. I was there with my wife, Sergeant [REDACTED] and—this was after she—after Sergeant [REDACTED] had gone home and changed because we want to be able to dance together and stuff like that. You know how once you're in uniform you can't be expressing in public, you know, affection. So, we understand and that's one of the reasons why she went back home, changed, came back, and then we were just having a good time.

We were noticing how these two officers were dancing together, kissing, and pretty much taking each other's Class A's jackets off while dancing. At first—it was pretty shocking, yes, because you're not supposed to see that kind of behavior in uniform, especially from two officers. We just decided to just look away and go back to our table.

66. When asked to describe what she saw at the ball, Sergeant [REDACTED] (wife of Specialist [REDACTED]) responded in pertinent part:

After, like, 8 PM, they say "Okay, the formal part is over." So everybody went to the dance floor and they start dancing and everything. And at first I saw the two ladies dancing, but, you know, like, sometimes when there are no males available people use to dance, you know, but then they started, you know, like, hugging and, like, you know, like, getting very, very close, like, in a improper manner, you know. So, like, people look, but nobody say nothing because it's a captain, it's a lieutenant. Who's going to something, you know.

67. Staff Sergeant [REDACTED] was asked: "As far as the behavior of Captain [REDACTED] and Lieutenant [REDACTED] you said they were touching and kissing inappropriately. Were they doing it—were other couples doing the same thing?" And he responded:

The only thing I really saw with other people and it's something me and my wife do as well, you know, like a little peck on the lips during, like, a slow dance or something. I mean, they were, like, full-blown, like, making-out, grabbing each other on the butt, stuff like that. I didn't see any other couple to the extent that they were at. I saw a couple other couples, you know, peck on the lips, you know, stuff like that during, like a love song or something, so - - -

68. The Investigating Officer did not interview important relevant eye-witnesses, ignored exculpatory evidence, and failed to obtain pertinent evidence such as photographs showing the female officers engaged in public displays of affection, which is specifically prohibited by Army standards, policies, regulations and the Uniform Code of Military Justice.

69. The Article 15-6 Investigative Report found that the climate that LTC Downey fostered in general and in response to the repeal of DADT was a positive one.

70. As to the assault allegation, the Investigating Officer incorrectly reported that SPC ██████ had been diagnosed with a fractured nose and a concussion. Although x-rays of the nose were taken, the investigator never sought the radiologist's report on the x-ray or confirmation of this diagnosis from a medical doctor.

71. The radiologist's report on the x-ray of SPC ██████'s nose taken on the night of the incident showed his nose had not been broken.

72. Captain ██████ a trained emergency medical technician, examined SPC ██████ at the scene of the incident and concluded his nose was not broken.

73. The Investigating Officer incorrectly found that LTC Downey had pushed the camera held by SPC ██████ into the soldier's face with enough force to fracture his nose, despite the existence of clear evidence to the contrary.

74. The Investigating Officer disregarded the overwhelming evidence that there was no assault.

75. The Investigating Officer incorrectly found that LTC Downey's actions in attempting to simply lower SPC ██████'s camera to prevent damaging photos of the two officers engaged in inappropriate displays of public affection being posted on the Internet constituted an assault consummated by a battery.

76. The discovery of the radiology report concerning the x-ray taken immediately after the alleged assault on 14 April 2012, which shows SPC [REDACTED] *did not have a fractured nose*, contradicts a crucial finding of the AR 15-6 Investigative Report and the conclusions of the Article 15 Hearing Commanding Officer.

77. Captain [REDACTED], the unit Physician Assistant, examined SPC [REDACTED] on April 16, 2012, the Monday following the incident. However, he was never interviewed during the AR 15-6 investigation.

78. In a statement given to LTC Downey's original appellate lawyer, Tory J. Langemo, CPT [REDACTED] noted that SPC [REDACTED] had none of the outward signs typically associated with a nose fracture. He further stated: "*Overall a benign exam. Clinical findings are not consistent with a forceful blow to the face referencing malicious intent.*" (emphasis added).

79. CPT [REDACTED]'s professional opinion was that SPC [REDACTED] had not suffered a fractured nose, and further, there was no forceful blow as described by the Investigating Officer. In his follow-up examination less than 36 hours after the incident, he cleared SPC [REDACTED] for all duty.

80. The x-ray and the radiologist's report indicating no fractured nose is new evidence which contradicts a crucial finding of the Article 15-6 investigation: "*that LTC Downey pushed a camera held by SPC [REDACTED] into SPC [REDACTED]'s face with enough force to fracture the Soldier's nose.*" This new evidence indicates that SPC [REDACTED]'s injury as described by the Investigating Officer in his AR 15-6 Investigation Report and which formed a major premise of the Article 15 Officer's determination, did not occur.

81. Neither the Investigating Officer, nor the Article 15 hearing officer was aware of the x-ray report showing no fractured nose. The significance of the x-ray showing no fractured nose bears directly on the amount of force used and direction and kind of contact with the camera made by LTC Downey. This new information, which was never considered by the Article 15 Commanding Officer, would have most likely changed the Article 15 determination. Accordingly, setting aside the Article 15 action is the only appropriate remedy for this injustice to LTC Downey.

82. The action LTC Downey took was legitimate and necessary to protect his soldiers and the good order and discipline of his unit.

Article 15 Hearing

83. An Article 15 hearing is presided over by a commander; it is authorized by the Uniform Code of Military Justice, Art. 15, 10 U.S.C. § 815, and described in Army Regulations ("AR") 27-10, Chapter 3. It is a nonjudicial proceeding

84. In an Article 15 hearing, the commander holding the hearing is not bound by the rules of evidence and may consider any relevant matter, including unsworn statements. AR 27-10, para. 3-18j. Although formal rules of evidence do not apply to an Article 15 hearing, fundamental principles of law and fairness do apply.

85. An Article 15 hearing considers disciplinary matters in the parlance of criminal charges and specifications as set forth in the Manual for Courts Martial, implemented and amplified at Chapter 3 of AR 27-10.

86. The commanding officer may not impose any punishment unless all elements of the allegations are proved beyond a reasonable doubt. AR 27-10, 101, para. 3-18(i).

87. In determining the appropriateness of an Article 15 punishment, the commanding

officer should consider the experience, age, maturity, and prior military record of the soldier. AR 27-10, para. 3-5.

88. If the punishment imposed by the commanding officer results in clear injustice, for instance if new evidence is discovered exculpating the soldier, the punishment may be set aside. AR 27-10, para. 3-28.

89. LTC Downey was advised that his commander, MG Milley, was considering issuing him Article 15 punishment for: (1) Violation of Article 128, Assault Consummated by Battery; (2) Violation of Article 133, Disorderly Conduct; and (3) Violation of Article 134, Obstruction of Justice.

90. LTC Downey was not informed of the maximum punishment he could face if found guilty of these charges, in violation of Army Regulation 27-10, para. 3-18.

91. LTC Downey initially informed his military attorney that he wanted to proceed with a court-martial instead of submitting to nonjudicial punishment under UCMJ Article 15.

92. His attorney informed him that if he chose to do so, he would have to hire a civilian lawyer and would have to pay for those services.

93. LTC Downey agreed to proceed with the Article 15 hearing, waiving his right to a lawyer, without his lawyer being present and without being fully informed of his rights and the inquisition he was about to face.

94. At a court-martial, LTC Downey would have had the right to full discovery, to call and examine witnesses on his behalf, to cross-examine government witnesses, to have his guilt or innocence determined by a panel of military members or by an impartial judge, and a Sixth Amendment right to counsel.

95. LTC Downey was denied the benefit of legal representation at the Article 15 hearing, despite his initial request for representation, because his counsel informed him that she had had a conversation with the Command Staff Judge Advocate and that the hearing would merely be a "commanders' conversation." Accordingly, she recommended that she not accompany him to the hearing because her presence would make him "appear weak," or words to that effect.

96. The Article 15 Hearing took place before Commanding Officer MG Milley in a conference room on May 30, 2012. It lasted approximately 5 hours.

97. The Article 15 hearing was adversarial in nature, with the Commanding Officer acting in effect as the prosecution. The Commanding Officer, MG Milley, was advised by military counsel who sat adjacent to him at the hearing while LTC Downey sat alone in the middle of the room with no one to advise him.

98. Present at the Article 15 hearing was MG Milley with his Command Sergeant Major ("CSM") [REDACTED]. MG Milley was flanked by two lawyers of the 10th Mountain Division, Staff Judge Advocate COL [REDACTED] and Staff Judge Advocate LTC [REDACTED]. Also present was LTC Downey, his immediate superior, COL [REDACTED], and CSM [REDACTED]. CSM [REDACTED] and CSM [REDACTED] did not stay for the entire hearing.

99. MG Milley, as the hearing officer, had the responsibility of determining whether the charges alleged against LTC Downey were proven beyond a reasonable doubt.

100. Tainting the entire Article 15 proceedings was the fact that on May 10, 2012, two weeks before the Article 15 Hearing, a Department of Defense press statement entitled "*Report Shows Success of 'Don't Ask, Don't Tell Repeal'*" trumpeted the conclusion that the Don't Ask Don't Tell repeal was being implemented successfully. Secretary of Defense Leon Panetta was

quoted as saying *"It's not impacting on morale. It's not impacting on unit cohesion. It's not impacting on readiness."* And Chairman of the Joint Chiefs of Staff, General Martin E. Dempsey, claimed he had not seen *"any negative effect on good order and discipline"* resulting from the repeal. The aforementioned public statements amounted to unlawful command influence, the mortal enemy of military justice, and undermined LTC Downey's right to a fair hearing. <http://www.defense.gov/news/newsarticle.aspx?id=116291> (last visited Oct. 30, 2014).

101. The Article 15 proceedings were unduly influenced by concern over adverse media attention, offending homosexual advocacy groups, and contradicting the Department of Defense's position that repeal of DADT was being successfully implemented.

102. During the five hour hearing, LTC Downey was required to answer legal questions that he could not answer without an attorney.

103. The Commanding Officer was hostile to witnesses that were favorable to LTC Downey's defense. The physician assistant who examined Specialist ██████ attempted to testify that SPC ██████'s injuries were consistent with an accident rather than an assault, but his testimony was disregarded and cut short by the Commanding Officer.

104. CW2 ██████'s testimony regarding the inappropriate conduct of the two female officers on the dance floor was also cut short and disregarded.

105. The Commanding Officer would not allow LTC Downey to fully defend himself or allow him a reasonable opportunity to speak.

106. The Commanding Officer never addressed LTC Downey's integrity and character during the hearing and did not reference the multiple General Officer letters of support that were presented.

107. The Commanding Officer angrily told LTC Downey that he was tired of hearing LTC Downey criticize the investigation and was keeping track of the number of times LTC Downey said something negative about the investigation.

108. The Commanding Officer accepted the results of an incomplete investigation and relied on those findings despite the investigator's failure to collect relevant exculpatory evidence and reliance on internally inconsistent and biased testimony.

109. The Commanding Officer relied on the belief that SPC ██████'s nose had been broken when he rejected LTC Downey's explanation that the injury was accidental and the result of a legitimate, lawful, and justified attempt to simply lower a camera.

110. The Commanding Officer did not call the alleged victim of assault to testify, despite his availability. He was standing by in the building during the hearing, but was never called.

111. LTC Downey was not permitted to confront witnesses.

112. Upon information and belief, consistent with statements he provided outside of the Article 15 proceedings, SPC ██████ would have testified that he was not a victim of assault, that he understood LTC Downey never intended to harm him, and that any injury he suffered was an accidental side effect of LTC Downey attempting to protect the integrity of his officers and the good order and discipline of the unit.

113. Even though LTC Downey's conduct toward CPT ██████ and 2LT ██████ was not an alleged offense to be determined by the Article 15 hearing, the Commanding Officer spent an inordinate amount of time at the hearing discussing LTC Downey's purported poor judgment in interceding between the officers as a discriminatory act.

114. LTC Downey was ordered to view an entire binder of random photographs which had been taken throughout the night of the formal ball and characterize the behavior of the individuals depicted in the photos as "appropriate" or "inappropriate." The photos did not capture the time of the improper display of affection because the official photographer had already left.

115. In LTC Downey's hearing, there was much discussion and berating for his alleged different treatment of the two female officers. Based on the findings of 15-6 Investigative Report and witness statements, there was no legitimate reason to engage in such humiliating inquiry of an officer and distinguished war commander.

116. The Article 15 Commanding Officer ignored and never discussed the Investigating Officer's conclusions in his 15-6 Investigative Report that:

I find that the command climate with regards to the repeal of DADT is a positive one within the TF 6-6 CAV. SSG [REDACTED] the TF equal opportunity (EO) advisor since November, 2010 stated he had not received any formal complaints or received any informal reports of unequal treatment due to sexual orientation from any Soldiers.

117. The conclusions of the Investigating Officer were based on several statements enumerated in his 15-6 Report including those from Captain [REDACTED] of LTC Downey's unit reflecting that "Senior chain of command maintained a positive attitude regarding the repeal" and that "None of her Soldiers have reported being harassed because of sexual orientation."

118. The 15-6 Report also noted statements from CPT [REDACTED] that prior to the incidents of April 14, 2012, she has experienced no harassment because of her sexual orientation and that leadership in her unit, which would include LTC Downey, expressed "zero tolerance for harassment."

119. The Investigating Officer also interviewed Majors [REDACTED] and [REDACTED] concerning the command climate over repeal of DADT. Both stated there was a positive attitude. Both stated that they never heard LTC Downey say anything hut supportive comments about the repeal.

120. Based on the testimony contained in the 15-6 Investigative Report and findings of the 15-6 Investigating Officer, to conclude that LTC Downey discriminated against the two officers because of their sexual orientation is an abuse of discretion. The plain fact that emerges from the investigation is that LTC Downey took action because two of his officers were being photographed and videotaped violating standards of conduct, which would place them and the unit in a had light.

121. The alleged victims of discrimination were not called to testify during the Article 15 proceedings. Upon information and belief, consistent with statements provided outside of the Article 15 proceedings, they would have testified that LTC Downey never discriminated against them because of their sexuality or for any other reason and he was always genuine in his concern for them.

122. 1LT [REDACTED] (LT [REDACTED] married CPT [REDACTED]), in a personal interview with MAJ [REDACTED] on January 28, 2013, told him that she never felt as though LTC Downey discriminated against her because of her sexuality, or for any reason. She believed LTC Downey was always genuine and honest with her in any conversation. When asked whether anyone in the command discriminated against her because of her sexuality, she responded "absolutely not."

123. LTC Downey was informed that he would receive a reprimand for violating DADT, before he was given the results from the 15-6 investigation, before the Article 15

hearing, and before he was able to rebut the accusations.

124. LTC Downey was wrongfully found guilty of Violation of Article 128, assault consummated by battery. On June 4, 2012, he was issued a General Officer Memorandum of Reprimand for the assault charge and one for the alleged violation of U.S. Army Directive 2011-01, and was relieved of command. He was subsequently issued a referred Officer Evaluation Report ("OER") and was removed from the attendance list of the National War College.

Appeal

125. LTC Downey appealed the Article 15 guilty finding as provided by Army Regulation.

126. LTC Downey had a right to fully present his case, including a right to appeal. AR 27-10, para. 3-18(e),(m).

127. LTC Downey was denied the Article 15 hearing notes and was not afforded an opportunity to review records of the Article 15 proceedings prior to submitting his appeal.

128. LTC Downey had no one representing him in the Article 15 hearing to take notes and had to rely only on his memory of the five hour hearing to prosecute his appeal.

129. LTC Downey's civilian attorneys attempted on multiple occasions to retrieve notes and other evidence from the hearing, but the requests were denied by the Staff Judge Advocate who attended the Article 15 hearing, [REDACTED]

130. LTC Downey, on his own, submitted a FOIA request, but the Army still refused to provide any notes or record of the hearing.

131. The lack of any record of proceedings prevented LTC Downey's civilian counsel from being effective regarding his appeal and denied LTC Downey the ability to fully appeal all matters involving the Article 15.

132. LTC Downey's appeal to Army Forces Command was denied on June 29, 2012.

Army Board for the Correction of Military Records ("ABCMR")

133. After the no contact order was lifted, LTC Downey's representative was able to contact SPC [REDACTED]. SPC [REDACTED] provided LTC Downey with SPC [REDACTED]'s x-ray and medical records showing that his nose was never broken on April 14, 2012, and confirming that any injury was minor and consistent with LTC Downey's description of events.

134. LTC Downey sought reconsideration and submitted the new medical evidence to U.S. Army Forces Command on March 5, 2013. This reconsideration was denied on March 25, 2013, with a letter from the Office of the Staff Judge Advocate stating that Army Forces Command had no authority to act on LTC Downey's request and that LTC Downey may submit his request to remove the Article 15 and related matters from his personnel file to the Army Board for the Correction of Military Records ("ABCMR").

135. The ABCMR is a civilian board established by the Secretary of the Army that is tasked to review all matters properly before it to determine the existence of error or injustice. 32 C.F.R. § 581.3(b)(4); 10 U.S.C. § 1552. LTC Downey submitted his request to the ABCMR on August 16, 2013.

136. The ABCMR issued its decision denying LTC Downey's request on October 21, 2013, without addressing significant arguments and without providing reasoned explanation for its decision.

137. The ABCMR failed to address, consider, or provide reasoned explanation for its decision regarding exculpatory new evidence which contradicts crucial investigation and Article 15 findings, and which LTC Downey argues demonstrates that the Commanding Officer's decision was clearly unsupported by the evidence. SPC [REDACTED]'s medical records proved that

his nose was never broken, contrary to the findings of the 15-6 Investigator and what was accepted and relied upon to find LTC Downey guilty of assault consummated by battery.

138. The ABCMR failed to address, consider, or provide reasoned explanation for its decision regarding the majority of LTC Downey's claims including but not limited to the following: that the Commander who found him guilty of assault made his determination based on an incomplete investigation and outside influence by matters not within the scope of the investigation; that the Article 128 Specification was legally deficient; that the discovery of new exculpatory x-ray evidence demonstrates that the Article 15 Commander's finding that LTC Downey was guilty of assault was clearly unjust and not supported by competent or substantial evidence; that the Commander's determination that LTC Downey had violated DADT and had committed assault consummated by battery was not supported by the evidence or law and resulted in a clear injustice; that there was an abuse of the hearing process; that Defendants' refusal to provide notes or any record of the Article 15 hearing thwarted LTC Downey's right of appeal and to effective assistance of counsel; that LTC Downey was denied the presumption of innocence and the Commander failed to consider his outstanding military career when considering reasonable doubt of guilt; that the Article 15 proceedings were tainted by unlawful command influence and concern over adverse media attention; and that the Commanding officer prevented LTC Downey from presenting a full defense to the charges against him.

Show Cause Board Finds the Allegations Against LTC Downey Not Supported by a Preponderance of the Evidence

139. As a consequence of the Article 15, relief from command, and relief for cause OER, a Show Cause Board was held at the Office of the Staff Advocate, Military District of Washington on July 19, 2013, to determine whether LTC Downey should be retained in the Army. The Board consisted of two Colonels and one Lieutenant Colonel who heard testimony

from multiple witnesses to the events which formed the basis of the Article 15.

140. The Show Cause Board found that the allegation of derogatory activity resulting in LTC Downey's referred OER in the notification of proposed separation was *not supported by a preponderance of the evidence and voted unanimously to retain LTC Downey in the Army.*

141. The existence of the Article 15 and the relief for cause OER in LTC Downey's personnel file has caused LTC Downey to be denied promotion to Colonel.

142. LTC Downey was passed over for promotion to Colonel despite the fact that his previous OERs described him as "best qualified" for promotion, his rater's "number 1 Task Force Commander" and "absolute first choice to command an Aviation Brigade," and described him as a "must and immediate select" for promotion to Colonel ahead of his peers.

143. LTC Downey was passed over for promotion a second time and has been informed that his file is being reviewed on November 12, 2014, to consider him for selection for early retirement.

144. As a direct and proximate result of Defendants' violations of applicable Army regulations and denial of due process, LTC Downey has suffered severe damage to his good name and reputation, and loss of career opportunities. After dedicating his life to serving his country, he has been wrongly and unjustly found guilty of assaulting and discriminating against the very soldiers he has passionately led throughout his career.

145. As a direct and proximate result of Defendants' arbitrary and capricious actions, abuse of discretion, and failure to correct clear injustice, LTC Downey has suffered significant harm including, but not limited to, damage to his reputation and career.

COUNT I

The ABCMR's decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise contrary to law.

146. Plaintiff hereby incorporates by reference all stated paragraphs.

147. The ABCMR is obligated to review applications before it and to take such corrective action as is necessary to correct error and remove injustice. 10 U.S.C. § 1552.

148. The ABCMR's decision to deny LTC Downey full and complete relief to correct errors and remove injustice was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

149. The ABCMR's decision is unsupported by the evidence and contrary to law.

150. The Article 15 proceedings and the subsequent denial of LTC Downey's petition to correct his military records resulted in a clear injustice.

151. The ABCMR failed to address, consider, and provide reasoned explanation for the denial of each of LTC Downey's claims.

152. The ABCMR acted arbitrarily and capriciously in failing to set aside the Article 15 and all the negative consequences flowing from the Article 15.

COUNT II

The ABCMR's decision was contrary to applicable regulations and violated Plaintiff's constitutional right to Due Process.

153. Plaintiff hereby incorporates by reference all stated paragraphs.

154. The Army failed to comply with its own rules, regulations and standards, including but not limited to AR 15-6, AR 27-10, and UCMJ Article 15, and this failure resulted in a violation of LTC Downey's right to due process.

155. The ABCMR's decision failed to address and correct each of the due process violations described in LTC Downey's petition to correct his military records.

156. The standard of proof in an Article 15 hearing is proof beyond a reasonable doubt and this standard was not applied or met in violation of Army Reg 27-10, para 3-18(l) and due process.

157. Exculpatory evidence, including the alleged assault victim's negative x-ray, demonstrates LTC Downey's innocence of the assault charge and failure to consider this evidence was an abuse of discretion.

158. LTC Downey was denied the ability to present a full and fair defense to the charges against him in violation of Army Regulation 27-10, para 3-18(e) and due process.

159. LTC Downey was denied a record of the Article 15 proceedings and thereby denied the ability to fully and fairly appeal the Article 15 findings.

COUNT III

Defendants' actions have deprived Plaintiff of his constitutional right to Due Process.

160. Plaintiff hereby incorporates by reference all stated paragraphs.

161. The Army failed to adhere to the protections of the United States Constitution and violated LTC Downey's right to due process under the Fifth Amendment.

162. LTC Downey was denied the ability to present a full and fair defense to the charges against him in violation of Army Regulation 27-10, para 3-18(e) and due process.

163. LTC Downey was not afforded the presumption of innocence and was found guilty of assault on less than a beyond a reasonable doubt standard in violation of Army Reg 27-10, para 3-18(l) and due process.

164. LTC Downey was denied the ability to collect evidence and to proffer evidence and witness testimony demonstrating his innocence of the Article 15 charges.

165. The Article 15 Commanding Officer failed to consider all relevant and exculpatory evidence before finding LTC Downey guilty of assault consummated by battery and failed to apply the appropriate legal standard.

166. The Article 15 hearing was not conducted in a fair and impartial manner and was tainted by unlawful command influence and concern over adverse media attention.

167. LTC Downey was denied a meaningful opportunity to be heard and to demonstrate his innocence of assault consummated by battery.

168. Exculpatory evidence, including the alleged assault victim's negative x-ray, demonstrates LTC Downey's innocence of the assault charge and failure to consider this evidence was an abuse of discretion.

169. LTC Downey's election of nonjudicial punishment and his waiver of the right to counsel was not knowing, voluntary, and intelligent.

170. LTC Downey was denied the notes and records of the Article 15 proceedings and thereby denied the ability to fully and fairly appeal the Article 15 findings.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this court to take the following action:

A. Reverse the decision of the ABCMR and declare that Defendants violated LTC Downey's fundamental rights as set forth in this Complaint;

B. Enjoin Defendants from instituting separation proceedings against LTC Downey pending complete resolution of this action;

C. Direct Defendants to remove the Record of Proceedings under Article 15 and the relief for cause OER from LTC Downey's personnel file.

D. Direct a Special Selection Board to convene or equivalent to restore LTC Downey to his position prior to the events that form the subject of this complaint as a very competitive candidate for promotion to Colonel and selection for Brigade Command as an enrollee at the National War College;

E. Award LTC Downey his costs and reasonable attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 and as otherwise allowed by law; and

F. Grant and order such further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury of all issues triable of right by a jury.

Date: November 12, 2014

Respectfully submitted,

Law Office of Samuel C. Moore, PLLC



Sam C. Moore, Esq (VA Bar No. 73233)
815 King St., Suite 210
Alexandria, VA 22314
Tel (703)-535-7809
scmoore@scmoorelaw.com

THOMAS MORE LAW CENTER

s/Erin Kuenzig

*Erin Kuenzig, Esq. (MI Bar No. P78077)

*Erin Mersino, Esq. (MI Bar No. P70886)

*Richard Thompson, Esq. (MI Bar No. P21410)

24 Frank Lloyd Wright Drive, P.O. Box 393

Ann Arbor, Michigan 48106

Tel (734) 827-2001; Fax (734) 930-7160

ekuenzig@thomasmore.org

**Pro hac vice pending*