IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CLARENCE E. JARRETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 01-800 GMS
	)	
THOMAS E WHITE, Honorable, Secretary of the Army,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On December 3, 2001, the plaintiff, Clarence E. Jarrett, filed a complaint seeking review of the United States Army's ("Army") refusal to change his discharge status. Specifically, Jarrett seeks to change his discharge status from an "Undesirable Discharge" to an "Honorable Discharge." Jarrett's amended complaint alleges that the Army's failure to upgrade his discharge status violates the Administrative Procedure Act ("APA") 5 U.S.C. § 701; the Tucker Act, 28 U.S.C. § 1346; the Privacy Act, 5 U.S.C. § 552a(d); the All Writs Act, 28 U.S.C. § 1651; and the Declaratory Judgment Act, 28 U.S.C. § 2201-02.[1]

Presently before the court are two motions - the defendant's motion to dismiss, or in the alternative, for summary judgment and the plaintiff's cross-motion for summary judgment. The Secretary contends that the claims under the Tucker Act and the Privacy Act are time-barred and

[1] The plaintiff also asserts the Fifth Amendment to the United States Constitution as a basis for jurisdiction. However, the complaint does not assert a separate cause of action under the Fifth Amendment. Indeed, the Fifth Amendment is only relevant to the plaintiff's allegations of racial discrimination which are included in the discussion of whether the Army's failure to change Jarrett's discharge status was arbitrary and capricious. For these reasons, the court will not provide a separate discussion of any Fifth Amendment issues.

therefore should be dismissed. In support of this argument, the defendant points out that although Jarrett was discharged in 1969, this action was not filed until 2001, thirty-two years after the original discharge. The plaintiff responds that he was required to exhaust his administrative remedies under the Tucker Act, and therefore the applicable statute of limitations did not run until he had completed his exhaustion requirements. He also maintains that his Privacy Act claims are not time-barred because the denial of a proper discharge constituted a "continuing violation" of his rights, thereby extending the limitations period.

The Secretary further argues that Jarrett's APA claim should be dismissed because the Army's refusal to change Jarrett's discharge status was not arbitrary and capricious. The plaintiff responds that the defendant's motion for summary judgment should be denied and his cross- motion should be granted because several facts indicate that the decision was arbitrary and capricious. The plaintiff argues that the decision was made arbitrarily and capriciously because the trivial military offenses Jarrett committed did not warrant an unsatisfactory discharge. Jarrett complains that he received limited legal advice on the affect of his unsatisfactory discharge. He further contends that he would be eligible for an honorable discharge under current Army regulations. Jarrett also argues that since he had an alcoholism problem, he should have been afforded treatment for his condition. Finally, Jarrett maintains that his unsatisfactory discharge was the result of discriminatory treatment at the hands of his white superiors because he is African American. The defendant responds that the Army's denial was neither arbitrary nor capricious because the Army considered each of these arguments and properly rejected them.

Upon review of the parties' submissions, the administrative record, and the applicable law, the court will grant the defendant's motion for summary judgment and deny the plaintiff's cross-motion. The court finds that the plaintiff's claims under both the Tucker Act and the Privacy Act are time-barred. Moreover, the defendant is entitled to summary judgment on the APA, All Writs, and Declaratory Judgment Act claims because the plaintiff has failed to demonstrate that the Army's denial was arbitrary and capricious. The court will now explain its reasoning.

II. FACTS

Clarence Jarrett enlisted in the Army on August 2, 1967. He was required to serve a three year tour of duty. During basic training, Jarrett displayed "aggressive behavior" in a minor altercation with another enlistee and was sent to the emergency room. The emergency room doctor determined that although Jarrett had excessive anger, he had no psychological problems at the time.

On October 4, 1967, Jarrett received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (hereinafter an "Article 15") for disrespect to a superior officer. As punishment, Jarrett was ordered to forfeit $45.00 in pay for two months. He was nevertheless promoted to Private (E-2) on December 17, 1967.

After completing basic training, the Army assigned the plaintiff to a battalion in Korea on January 12, 1968. In February 1968, Jarrett received another Article 15 for leaving his sentry post before being properly relieved. He was restricted to his base for fourteen days and was ordered to forfeit $24.00 in pay. On March 13, 1968, Jarrett earned yet another Article 15, this time for appearing drunk and disorderly. Despite these disciplinary problems, Jarrett was promoted to Private First Class (E-3) on April 6, 1968.

The promotion did not prevent Jarrett from receiving further discipline. On April 26, 1968, he was given another Article 15 for leaving the base without signing out on pass. He was demoted to Private (E-2), ordered to forfeit $20.00 of pay, and was reassigned to another company for rehabilitative purposes.

In June 1968, Lieutenant Goldberg, Jarrett's commanding officer, confronted him about his failure to report for bed check on June 4 and his failure to report for duty on June 5. The confrontation led to an argument and extra work assignments for Jarrett. On June 18, 1968, the two had another altercation wherein Lt. Goldberg allegedly yelled at Jarrett and spat on him. As Lt. Goldberg was leaving, he saluted Jarrett, and Jarrett corrected his salute in front of several others. As a result of Jarrett's actions, Lt. Goldberg brought charges against Jarrett for disrespect to a superior officer, failure to report for bed check, failure to report for work and reveille formations, and disobedience of a non-commissioned officer's orders.

On July 8, 1968, a Special Court Martial convicted Jarrett of all charges and sentenced him to be reduced in rank, to be confined to six months hard labor, and to forfeit $40.00 pay for six months. Additionally, while Jarrett was incarcerated, he was sent to solitary confinement for forty-five days for a breach of prison discipline. During this time, Jarrett was subjected to a psychological evaluation. The examining psychiatrist noted that Jarrett was able to distinguish right from wrong, and was able to understand any charges against him and testify on his own behalf. However, the doctor also recommended that Jarrett should be returned to active duty upon release from the stockade.

While Jarrett was confined, Lt. Goldberg initiated proceedings to separate Jarrett from the Army for unsuitability or unfitness.[2] On November 14, 1968, Jarrett was notified that a board of officers would convene to determine whether he should be discharged. Jarrett was represented by an attorney during these proceedings. However, he alleges that the attorney never adequately explained the consequences of a less-than-favorable discharge.

On December 5, 1968, the board of officers convened and heard testimony from the relevant witnesses. The board recommended that Jarrett receive an undesirable discharge. Jarrett was subsequently returned to the stockade. He was transferred and then given an undesirable discharge on April 3, 1969. At the time of his discharge, Jarrett had served a little more than one and a half years. Of that time, Jarrett spent 188 days incarcerated or otherwise being punished for various infractions.

In 1970, Jarrett applied to the Army Discharge Review Board ("ADRB") to request an upgrade of his discharge status. On March 18, 1971, the request was denied. Jarrett applied to the Army Board for Correction of Military Records ("ABCMR" or "Board") for an upgrade on May 10, 1999. The ABCMR denied his request on August 12, 1999. In its written disposition, the ABCMR recounted the relevant facts, and considered each of Jarrett's arguments. The Board first addressed Jarrett's contention that he would be entitled to an honorable discharge under current military regulations. The Board agreed that, when viewed individually, most of Jarrett's infractions were not serious. The Board concluded, however, that the number and pattern of transgressions would make him eligible for a less-than-honorable discharge.

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[2] During this time, Jarrett's father passed away and he requested an emergency leave. However, his leave was denied because he was "flagged" as being processed for an unsuitability discharge.

Jarrett also alleged that he had been not been properly advised on the distinctions between honorable and less-than-honorable discharges. Jarrett cited *White v. Secretary of the Army*, 878 F.2d 501 (D.C. Cir. 1989) in support of his contention. However, the Board noted that by his second or third Article 15 infraction, Jarrett should have known that his conduct was less-than-honorable. Moreover, the Board found that even if Jarrett had been advised of the consequences associated with a less-than-honorable discharge, given his behavior at the time, his knowledge of the consequences would not have influenced that behavior. Finally, the Board distinguished the *White* case by finding that in *White*, the discharge was in lieu of a court-martial, whereas Jarrett was discharged after being court-martialed and serving his sentence.

Jarrett also alleged that his discharge was the result of racial bias because similarly situated white enlistees were not treated in the same manner. In response to these allegations, the Board stated that Jarrett was punished by at least three different company commanders and continued to experience discipline issues in a fourth company. The Board also noted that Jarrett had two similar, although minor altercations, with "civil authorities" before enlisting.

Finally, the Board also rejected Jarrett's claim that his behavior worsened after being denied leave to see his father. Moreover, to the extent that Jarrett contended that alcohol abuse fueled his misconduct, the Board found that there was no evidence of alcoholism in the medical records. For all of these reasons, the Board denied Jarrett's request for a change of his discharge status.

Jarrett sought further review of the Board's decision on March 1, 2000. His request was denied on July 20, 2000. This lawsuit was filed on December 3, 2001.

III. STANDARD OF REVIEW[3]

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P 56(c). A fact is material if it might affect the outcome of the case, and an issue is genuine if the evidence is such that a reasonable factfinder could return a verdict in favor of the nonmovant. *See In re Headquarters Dodge, Inc.*, 13 F.3d 674, 679 (3d Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). When deciding a motion for summary judgment, the court must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). The nonmoving party, however, must demonstrate the existence of a material fact supplying sufficient evidence -- not mere allegations -- for a reasonable jury to find for the nonmovant. *See Olson v. General Elec. Aerospace*, 101 F.3d 947, 951 (3d Cir. 1996) (citation omitted). To raise a genuine issue of material fact, the nonmovant "need not match, item for item, each piece of evidence proffered by the movant but simply must exceed the 'mere scintilla' [of evidence] standard." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.,* 998 F.2d 1224, 1230 (3d Cir. 1993) (citations omitted). The nonmovant's evidence, however, must be sufficient for a reasonable jury to find in favor of the party, given the applicable burden of proof. *See Anderson*, 477 U.S. at 249-50.

IV. DISCUSSION

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[3] The defendant's motion is titled as a motion to dismiss, or in the alternative for summary judgment. The court will treat it as a motion for summary judgment because it considered matters outside the pleadings. *See* FED. R. CIV. P. 12(b). The court finds that the title of the motion served proper notice of summary judgment to the plaintiff. *See* FED. R. CIV. P. 56(e). Moreover, the fact that the plaintiff filed his own motion for summary judgment indicates that the plaintiff does not object to these issues being addressed through the summary judgment procedure. Therefore, the court will employ the summary judgment standard.

1. Tucker Act Claims

Claims under the Tucker Act are subject to a six year statute of limitations. *See* 28 U.S.C. § 2501. Although the parties agree that this is the applicable statute of limitations, they disagree on when the limitations period began to run in this case. The plaintiff contends that the cause of action under the Tucker Act does not accrue until there has been a final agency action. Jarrett asserts that the final agency action in this case occurred on July 20, 2000, less than six before his complaint was filed. The defendant argues that the statute of limitations under the Tucker Act began to run on the date of Jarrett's discharge, and since Jarrett was discharged in 1969, his complaint was filed well after the six year limitations period.

Despite the plaintiff's contention that the final agency decision is the action that triggers his rights under the Tucker Act, the Federal Circuit has consistently held that the statute of limitations under the Tucker Act for claims alleging wrongful discharge begins to run on the enlistee's date of discharge.[4] *See Hurick v. Lehman***,** 782 F.2d 984, 986 (Fed. Cir. 1986) ("[A] claim based on an alleged unlawful discharge from the military service accrues on the date of discharge.")(collecting Federal Circuit cases). *See also June v. Secretary of the Navy*, 577 F. Supp. 144, 148 (E.D. Pa. 1982) (same). Although the plaintiff cites some cases in support of his contention, the cases are distinguishable because, although they address the APA, they do not address the requirements of the Tucker Act. Thus, the court finds that the plaintiff's cause of action accrued when he was discharged in 1969.

Jarrett further argues that the statute of limitations should be tolled over this thirty-two year

[4] Pursuant to 28 U.S.C. § 1295(a)(2), the Federal Circuit has exclusive appellate jurisdiction over non-tort, monetary claims arising under the Tucker Act. Therefore, Federal Circuit precedent is binding on this issue.

period because he was required to exhaust his administrative remedies as a prerequisite to filing suit. The court is not persuaded for two reasons. First, under current case law, Jarrett was not required to exhaust his administrative remedies. The Federal Circuit has held that in military discharge cases, administrative exhaustion is permissive, rather than mandatory, and will not toll the statute of limitations. *See Bonen v. United States*, 666 F.2d 536, 539 (Fed. Cir. 1981) ("This court has long held that resort to permissive administrative procedures such as petition to a corrections board does not toll the statute of limitations.").[5] Second, even if Jarrett were required to exhaust his remedies, he failed to do so in a timely manner. Although he first sought review of his discharge by the ADRB in 1970, he waited over thirty years before filing a claim with the ABCMR and thereby fully pursuing all available administrative channels. Where the plaintiff does not pursue available administrative remedies, however, the statute of limitations will not be tolled. *See Walters v. Secretary of Defense*, 725 F.2d 107, 115 (D.C. Cir. 1983). Jarrett did not avail himself of the remedies that existed. Moreover, he has failed to provide any evidence that he was unable to do so or that doing so would have been futile. For these reasons, the court will not find that the statute of limitations under the Tucker Act was tolled for exhaustion of remedies.

The cause of action accrued in 1969. Since the six-year statute of limitations was not tolled,

[5] *Geyen v. Marsh*, 782 F.2d 1351 (5th Cir. 1986), seems to suggest that while the Federal Circuit does not require exhaustion in the military discharge context, the separate circuits can impose their own requirements. *Id.* at 1352 (noting that Fifth Circuit required exhaustion while Federal Circuit did not). However, to the extent that the Third Circuit can impose an exhaustion requirement, the court has found no Third Circuit case explicitly imposing such an exhaustion requirement in the military discharge context.

Jarrett had until 1975 to file a timely claim. Jarrett's 2001 complaint is therefore over twenty-five years late. Thus, the court finds that the claim is untimely and will grant summary judgment for the defendant on this claim.[6]

2. Privacy Act Claims

A claim under the Privacy Act accrues when: 1) an error is made in maintaining the plaintiff's records; 2) the plaintiff was harmed by the error; and 3) the plaintiff either knew or had reason to know of such error. *See Bergman v. United States,* 751 F.2d 314, 316 (10th Cir. 1984). Privacy Act claims are subject to a two year statute of limitations. *See* 5 U.S.C. § 552a(g)(5).

The court will assume, without deciding, that the plaintiff has a viable claim under the Privacy Act.[7] However, Jarrett first sought review of his discharge status in 1970. This action indicates that Jarrett had reason to believe that his discharge status was "incorrect" and would prejudice him in some manner. Thus, in 1970 Jarrett had reason to know that an "error" in maintaining his records had been made and that he was harmed by the "error." Therefore, any Privacy Act claim Jarrett might have accrued in 1970. However, since the Privacy Act was enacted in 1974, see Pub. L. No. 93-579 § 1, the court will assume that Jarrett's claim accrued in 1974.[8]

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[6] Given this resolution of the claim, the court need not discuss whether the plaintiff's claims exceed the jurisdictional amounts set forth in the "Big Tucker Act" and the "Little Tucker Act."

[7] The defendant contends that the Privacy Act claim should also be dismissed for failure to state a claim because the Army made no error in maintaining Jarrett's records. However, in light of the court's conclusion that the claim is time-barred, the merits of the claim will not be discussed.

[8] Given the court's determination that the plaintiff's cause of action accrued in 1970, the claim accrued before the Privacy Act existed. However, the Privacy Act does not seem to create a retroactive cause of action. *See* Pub. L. 93-579 § 8 (stating that action shall be effective "on

Jarrett attempts to circumvent the Privacy Act's statute of limitations by arguing that the refusal to correct his discharge status is a wrong that has continued since his discharge, thereby tolling the statute of limitations. This argument is without merit because the "continuing wrong" doctrine has been rejected in the Privacy Act context. *See Davis v. U.S. Dept. of Justice*, 204 F.3d 723, 726 (7th Cir. 2000) ("A Privacy Act claim is not tolled by continuing violations."); *Bergman,* 751 F.2d at 317 (same). Indeed, subscribing to Jarrett's argument would mean that, "in practical effect . . . the two-year statute would never run." *Diliberti v. United States,* 817 F.2d 1259, 1264 (7th Cir. 1987)(citing *Bergman,* 751 F.2d at 317). The court is satisfied that the policy outlined in this persuasive precedent presents a sound view, and therefore will not apply the continuing wrong doctrine to save Jarrett's claim.

The Privacy Act claim accrued in 1974 at the latest. Jarrett therefore had until 1976 to file his Privacy Act claim. However, his complaint was filed over twenty years after the statute of limitations expired. Therefore, Jarrett's claim is time-barred. Accordingly, the defendants are entitled to summary judgment on that claim.

C. APA Claims[9]

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and *after*" the date of enactment [December 31, 1974]) (emphasis added). Although not raised by the defendant, since the Privacy Act claim pre-dated the Privacy Act, the court could dismiss the Privacy Act claims *sua sponte* for lack of subject matter jurisdiction. Nevertheless, even if the plaintiff's accrual date is extended to 1974, the claim is still more than twenty years out of date and will not save his claim. Therefore, there is no harm in engaging in a small legal fiction to extend the accrual date of the plaintiff's claim to 1974.

[9] The complaint also asserts claims under the All Writs Act and the Declaratory Judgment Act. The only basis for these two claims is that the Army's decision was arbitrary and capricious. (*See* D.I. 9 at ¶ 59, 61.) However, since the parties only briefed the arbitrary and capricious arguments in the APA context, the court will limit its discussion to the APA. In the above discussion, the court finds that the Board's decision was neither arbitrary nor capricious. Since the APA, All Writs, and Declaratory Judgment claims are all predicated upon a finding

The ABCMR and ADRB have the discretion to correct military records to prevent injustice. *See Wolfe v. Marsh*, 835 F.2d 354, 358 (D.C. Cir. 1987). However, a review board's failure to exercise its discretion under the appropriate circumstances is subject to judicial review under the APA. *See id. See also Dougherty v. U.S. Navy Bd. for Correction of Naval Records*, 784 F.2d 499, 500 (3d Cir. 1986). "The district court is to set aside the [agency's] action if it finds it to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *See id.* at 501 (citations omitted). The district court must also determine whether the agency's decision was supported by substantial evidence and whether the agency considered all of the proffered evidence. *See Mozur v. Orr*, 600 F. Supp. 772, 776 (E.D. Pa. 1985); *Smith v. Dalton*, 927 F.Supp. 1, 5 (D.D.C. 1996). The plaintiff has the burden of proving arbitrary and capricious behavior by providing "'cogent and clearly convincing evidence' and must 'overcome the presumption that military administrators discharge their duties correctly, lawfully, and in good faith.'" *See id.* (citations omitted). The district court's review of the evidence is generally limited to consideration of the administrative record. *See Dougherty,* 784 F.2d at 501. With this standard in mind, the court will determine whether the Army's failure to exercise its discretion to change Jarrett's discharge status was arbitrary and capricious on the present record.

Jarrett first argues that under current military regulations, namely AR 635-200 ¶ 14-12, ("chapter 14") he would have received an honorable discharge. In the alternative, the plaintiff argues that he could also have been processed under current regulation AR 635-200 ¶ 13-2 ("chapter 13"), which allows a soldier to be dismissed for unsatisfactory performance. The court is not persuaded

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that the Board's action was arbitrary and capricious, and the court finds that it was not, the court will grant summary judgment for the defendant on each of the three claims.

by either contention. The court will address the chapter 13 argument first. Although not explicitly stated, chapter 13 discharges appear to be appropriate where the soldier's duties are unsuccessfully performed or the soldier is incapable of performing his or her required duties. *See* AR 635-200 ¶ 13-2(d) (noting that a pregnant soldier can be processed under this section when her "substandard duty performance is not caused solely by pregnancy."). The ABCMR interpreted the regulation in the same manner. Under this interpretation, Jarrett would only be eligible for a chapter 13 discharge if his duties were performed in a substandard manner. Although the record suggests that at times, Jarrett chose *not* to perform his required duties, the record does not indicate that Jarrett was unable to perform his duties when he chose to do so. Neither is there any indication that Jarrett's work was unsatisfactorily performed. In light of these facts, the ABCMR's conclusion that Jarrett was ineligible for separation under chapter 13 was correct.

The Board's conclusion that Jarrett should have been processed under chapter 14 is also supported by the evidence. Chapter 14 permits separation for misconduct. Although the plaintiff argues that his offenses were relatively minor, the regulations clearly state that separation may be appropriate "for a pattern of misconduct consisting *solely* of minor military discipline infractions." AR 635-200 ¶ 14-12 (emphasis added). The record clearly indicates that Jarrett engaged in a pattern of these minor infractions. He had four Article 15 punishments and a court-marital. Moreover, all of these infractions occurred in a relatively short time span, and caused Jarrett to lose more than six months of his approximately twenty months of military service. Given Jarrett's pattern of violations and the resulting loss of productivity, the court finds that the ABCMR's conclusion Jarrett was eligible for separation under chapter 14 was supported by substantial evidence. Additionally, although Jarrett contends that he was still eligible for an honorable discharge under chapter 14, the

applicable military regulations indicate that a discharge under "other-than-honorable conditions" may be appropriate where the separation is "based on a pattern of behavior that constitutes a significant departure from the conduct expected of soldiers of the Army." AR 635-200 ¶ 3-7. Thus, the Board's refusal to change Jarrett's discharge status was not without basis in law.

Jarrett also appears to argue that his alcoholism entitled him to treatment prior to any discharge. The court is also unpersuaded by this argument. Although Jarrett's superior officers may have had a duty to advise him about alcoholism and arrange treatment if his condition was known, there is absolutely no evidence that his supervisors were or should have been aware of his alcoholism. Indeed, the medical records do not contain any mention of alcoholism. Although Jarrett was punished once for being drunk and disorderly, one drunken episode would not necessarily lead to the conclusion that Jarrett was an alcoholic, especially since the record does not disclose a pattern of punishment for drunk and disorderly offenses. Thus, Jarrett has failed to meet his burden of presenting clear and convincing evidence that his alcoholism should have affected his discharge status.

Jarrett also argues that he received inadequate legal advice regarding the effect of his less-than-honorable discharge. This argument is similarly without merit. Jarrett relies heavily upon *White v. Secretary of the Army*, in support of his contention. However, the *White* case is distinguishable for two reasons. First, in *White* the lawyer erroneously told his soldier-client that the special court-martial had the authority to give him a less-than-honorable discharge. *See id.* at 502. In the present case, the undesirable discharge Board that was convened clearly had the authority to give Jarrett the administrative discharge he received.

Second, and more important, in *White*, the soldier voluntarily agreed to an administrative

discharge for the good of the service in lieu of a court-martial. *See id.* Thus, White's consent to the administrative discharge was an essential part of his "plea bargain." *See id.* at 505 (analogizing discharge in lieu of court-martial to guilty plea). The legal advice was therefore necessary to ensure that White's consent was informed. Conversely, Jarrett agrees that no charges were pending against him at the time of his discharge. Thus, unlike *White*, this was not a situation where the soldier's consent was required in order to avoid a court-martial. In fact, Jarrett did not consent to his discharge. Moreover, he *could not* voluntarily agree to his discharge because unlike *White*, he did not initiate the administrative discharge proceedings. Since Jarrett did not and could not consent to his discharge, legal advice on the effect of his discharge was not essential. The discharge would have taken place with or without Jarrett's knowledge of its effects. Thus, the court finds that the ABCMR's conclusions that *White* was inapposite and legal advice about the effects of discharge was unnecessary were well-supported.

Jarrett's final argument is that his discharge was racially motivated. He asserts that his commanding officers targeted him for harsher treatment because he is African American. Jarrett asserts that this discrimination is prohibited under the Fifth Amendment.

Plaintiffs alleging discrimination under the Fifth Amendment must prove that such discrimination was intentional or purposeful. *See Washington v. Davis*, 426 U.S. 229, 239-41 (1976). The only evidence presented in support of the claims of racism is Jarrett's sworn statement. Although the court accepts the facts in the statement as true, the court also finds that statement alone is insufficient to prove that Jarrett was the victim of intentional racial discrimination. Jarrett alleges

that Lt. Goldberg verbally abused him, spat on him, and "called him names." He also alleges that another superior singled him out for "harsh treatment." Although this is some evidence that Jarrett was treated poorly, it is not direct evidence of racially discriminatory motive on the part of his superiors. There is no evidence of racially charged language, jokes, slurs, conversations, or the like.

The court is aware that a discriminatory purpose can be inferred. *See id.* However, there is nothing in the statement from which a discriminatory purpose can be gleaned. The statement does not include any facts concerning the fate of other similarly situated white soldiers or other facts from which a racial motive could be presumed. *See id.* Furthermore, the fact that Jarrett was similarly disciplined by at least four different commanders militates against the presumption of such a motive. Thus, the statement's vague and general allegations of racism are not clear and convincing evidence of a racially discriminatory purpose. The court therefore finds that, on the record before it, the ABCMR's conclusion that Jarrett was not discriminated against based on his race was justified.

For all of the foregoing reasons, the court concludes that the ABCMR's refusal to change Jarrett's discharge status was not arbitrary and capricious under the APA. Therefore, the court will enter summary judgment in favor of the defendants on this claim.[10]

V. CONCLUSION

Since the applicable statutes of limitations were not tolled for any reason, the Tucker Act and Privacy Act claims are time-barred. Moreover, the ABCMR's rejection of Jarrett's request for a change of his discharge status was not arbitrary and capricious. Thus, his remaining claims under the APA, the All Writs Act, and the Declaratory Judgment Act can not stand. Therefore, the

[10] Given this disposition of the claim, the court need not discuss the jurisdictional issues raised by the defendant on the APA claim.

defendant is entitled to summary judgment on each of Jarrett's claims. Consequently, Jarrett's cross-motion for summary judgment on these claims must be denied.

NOW, THEREFORE IT IS HEREBY ORDERED THAT:

1. The Plaintiff's Cross-Motion for Summary Judgment (D.I. 17) is DENIED.

2. The Defendant's Motion for Summary Judgment (D.I. 11) is GRANTED.

3. Judgment be and hereby is ENTERED in favor of the defendant on all claims.

4. The clerk shall close this case.

Dated: June 17, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE