No. _____

In The
Supreme Court of the United States

KENNETH SCOTT DUGGAN,

Petitioner,

v.

DEPARTMENT OF THE AIR FORCE
and NATIONAL GUARD BUREAU,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN R. WALKER
3009 South John Redditt Dr., Suite E, #324
Lufkin, Texas 75904
Telephone: (936) 635-8909
Facsimile: (512) 628-3355
Email: stephenwalkerlaw@yahoo.com

Attorney for Petitioner
Kenneth Scott Duggan

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

This is the first post-*Cooper* Privacy Act case before this Court that pivots around the pleading requirements of the "actual damages" bar. *F.A.A. v. Cooper*, 132 S.Ct. 1441, 1447 (2012). Under 5 U.S.C. § 552a(g)(4), an individual may bring a claim for actual damages when a court determines that an agency of the United States violated the Privacy Act in a manner that was intentional or willful. Regarding the pleading requirements of the "actual damages" bar under *Cooper*, the circuits are irreconcilably split. The decision of the United States Court of Appeals for the Fifth Circuit is an outlier and violates Federal Rule of Civil Procedure 12(b)(6). The decision ignores the precedent of this Court and other circuits that have properly analyzed the pleading requirements of the "actual damages" bar under *Cooper*.

Did the Fifth Circuit err when it affirmed the dismissal of Duggan's Privacy Act complaint based upon sovereign immunity?

Does *Cooper* create a heightened pleading standard for actual damages under 5 U.S.C. § 552a(g)(4), such that a court may now make evidentiary conclusions regarding causation solely based upon the facts pleaded in a Privacy Act complaint?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kenneth Scott Duggan ("Duggan") petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 617 Fed. App'x 321. (App. 1-10). The two decisions of the United States District Court for the Southern District of Texas, Houston Division, are unreported. (App. 11-13 & 16-25).

JURISDICTION

The Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 (providing judicial review from all final decisions of the district courts of the United States). The Fifth Circuit issued its decision on July 8, 2015. (App. 1-10). On September 15, 2015, the Fifth Circuit denied Duggan's petition for rehearing *en banc.* (App. 26-27). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of the Privacy Act, 5 U.S.C. § 552a, are reproduced at App. 28-29.

STATEMENT OF THE CASE

This case addresses an irreconcilable split amongst the circuits regarding the pleading requirements of the "actual damages" bar under *Cooper*. The Fifth Circuit ignored this Court's decision in *Cooper* and split with the other circuits when it affirmed the dismissal of Duggan's Privacy Act complaint based upon sovereign immunity. *Cooper* did not create a heightened pleading standard for actual damages under 5 U.S.C. § 552a(g)(4), and it certainly did not empower the Fifth Circuit to make evidentiary conclusions regarding causation solely based upon the facts pleaded in Duggan's Privacy Act complaint. If Duggan would have appealed his case to the D.C. Circuit or the Eleventh Circuit, these circuits would have reversed and remanded Duggan's case for discovery and trial.

Under the Privacy Act, an individual may bring a claim for actual damages when a court determines that an agency of the United States violated the Privacy Act in a manner that was intentional or willful. 5 U.S.C. § 552a(g)(4).

In *Cooper*, this Court clarified that the Privacy Act only waives the federal government's sovereign immunity with respect to actual damages flowing from pecuniary and economic loss. *Cooper*, 132 S.Ct.

at 1448-57. In the *Cooper* decision, this Court set forth a threshold standard for pleading pecuniary and economic loss under the Privacy Act. "Upon showing some pecuniary harm, no matter how slight, [the plaintiff] can recover the statutory minimum of $1,000.00, presumably for any unproven harm." (emphasis added). *Id.* at 1451.

Duggan was a U.S. soldier and had an impeccable service record. Respondents Department of the Air Force and National Guard Bureau ("Military Defendants") repeatedly violated Duggan's rights under the Privacy Act for the sole purpose of fabricating a reason to demonstrate Duggan was unfit for military service. The Privacy Act violations were after Duggan's military supervisor punched Duggan in the face and tried to kill Duggan with his military issued knife. The Privacy Act violations were also after the Military Defendants repeatedly tried to charge Duggan with military crimes he did not commit.

Duggan suffered and pleaded actual damages as allowed under *Cooper*. The Fifth Circuit's decision misinterpreted *Cooper* by creating an elevated standard for reviewing a Privacy Act complaint (in comparison to all other complaints). Further, the Fifth Circuit misinterpreted and misapplied critical facts in Duggan's complaint that contributed to the erroneous decision.

When the *Cooper* decision is applied to Duggan's complaint, it is clear that sovereign immunity has been waived because Duggan pleaded actual damages

from pecuniary and economic loss, including, but not limited to, medical treatment, lost income due to Duggan's separation from the military, and other consequential economic damages due to Duggan's separation from the military.

Instead of following *Cooper* and the prior decisions of other circuits that have properly analyzed *Cooper*, the Fifth Circuit decided to seek guidance from an unpublished *summary judgment* decision issued long before *Cooper*. Using this misguided decision, the Fifth Circuit made an evidentiary conclusion that Duggan failed to prove actual damages and stated that his "attempts to distinguish *Cooper* [were] unavailing." (App. 6).

COURSE OF PROCEEDINGS AND DISPOSITION

This was Duggan's second appeal to the Fifth Circuit in this case. Duggan's first appeal was brought solely to address the district court's error in concluding his Privacy Act complaint was barred by the *Feres* doctrine. (App. 16-25); *Feres v. United States*, 340 U.S. 135 (1950); Document: 00511964665; USCA No. 12-20420; *Duggan v. Air Force and National Guard Bureau*. Duggan demonstrated that the district court's dismissal of his Privacy Act complaint based upon the *Feres* doctrine was inconsistent with the Fifth Circuit's precedent. *Pierce v. Dep't of the Air*

Force, 512 F.3d 184 (5th Cir. 2007).[1] Further, this Court has never ruled that the *Feres* doctrine precluded Privacy Act claims by military personnel. In addition, Duggan revealed a split in the circuits as to whether the *Feres* doctrine bars Privacy Act claims by military personnel. *Cf. Cummings v. Dep't of the Navy*, 279 F.3d 1051, 1056-57 (D.C. Cir. 2002) (holding that the *Feres* doctrine does not apply to bar service members from filing a Privacy Act claim); *Uhl v. Swanstrom*, 79 F.3d 751, 754 (8th Cir. 1996) (holding that the *Feres* doctrine barred Privacy Act suit).

In response to Duggan's first appeal, the Military Defendants reversed course by filing a motion to vacate the district court's dismissal of Duggan's Privacy Act complaint and requested remand. *See* Document: 00512095595; USCA No. 12-20420. It is important to highlight that the Military Defendants' motion to vacate is a judicial admission that the United States military would no longer assert the *Feres* doctrine to bar Duggan's Privacy Act complaint or assert the *Feres* doctrine to bar any future Privacy Act claims of other military personnel. *Id.* Duggan filed a response to the motion to vacate. *See* Document: 00512110944; USCA No. 12-20420. On February 5, 2013, the Fifth Circuit granted the motion to vacate and remanded Duggan's Privacy Act complaint back to the district. (ROA. 213). *See* Document: 00512135799; USCA No. 12-20420.

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[1] Writ of certiorari denied, *Pierce v. Dep't of the Air Force*, 553 U.S. 1019 (2008).

After remand to the district court, the Military Defendants obstructed the discovery process with excuses for delay and by not responding to acknowledge written requests for discovery. In June 2014, after Duggan was forced to unilaterally schedule multiple depositions, the district court stayed discovery. (ROA. 456-462, 480-486, 529-535, 543-544). Previously, on May 15, 2014, the Military Defendants had filed a second motion to dismiss alleging that sovereign immunity bars Duggan's Privacy Act complaint because he did not plead any actual damages. (ROA. 464-479); citing *F.A.A. v. Cooper*, 132 S.Ct. 1441 (2012). On August 6, 2014, the district court again dismissed Duggan's Privacy Act complaint. (ROA. 562-563).

On July 8, 2015, the Fifth Circuit affirmed the district court's dismissal of Duggan's Privacy Act complaint. (App. 1-10). On September 15, 2015, the Fifth Circuit denied Duggan's petition for rehearing *en banc*. (App. 26-27).

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit misinterpreted and misapplied *Cooper*, irreconcilably split the circuits and ruptured the heliosphere provided by Rule 12(b)(6).

This is the first post-*Cooper* Privacy Act case before this Court that pivots around the pleading requirements of the "actual damages" bar. *F.A.A. v. Cooper*, 132 S.Ct. 1441, 1447 (2012). This Court should

intervene because the Fifth Circuit's decision clashes directly with the logic of *Cooper* by creating an elevated pleading standard for Privacy Act claims (in comparison to all other complaints). Further, intervention is necessary because this decision makes the Fifth Circuit an outlier and it irreconcilably splits with the circuits that have properly analyzed the pleading requirements of the "actual damages" bar under *Cooper*. Finally, the Fifth Circuit completely misinterpreted and misapplied critical facts in Duggan's complaint that poisoned the decision.

The Fifth Circuit's decision, if allowed to stand, will permit district courts and other circuits to deny injured citizens the infrangible right to petition government for redress of grievances. It is necessary for this Court to intervene because it will restore the balance created by *Cooper*. It will also secure and maintain uniformity of the decisions amongst the circuits.

A. The Fifth Circuit misinterpreted and misapplied *Cooper*.

In *Cooper*, the plaintiff sued the F.A.A. for Privacy Act violations and alleged the violations caused him "humiliation, embarrassment, mental anguish, fear of social ostracism and other severe emotional distress." *F.A.A. v. Cooper*, 132 S.Ct. 1441, 1447 (2012); citing *Cooper v. F.A.A, et al.*, 816 F. Supp. 2d 778 (N.D. Cal. 2008). The plaintiff in *Cooper* did not allege he suffered any pecuniary or economic loss.

The district court in *Cooper* granted *summary judgment* in favor of the federal government stating that while there was a Privacy Act violation, plaintiff could not recover any damages because plaintiff had only pleaded general damages flowing from mental and emotional harm. The district court ruled the term "actual damages" was "facially ambiguous" and, therefore, in order for the federal government to waive sovereign immunity under the Privacy Act, the plaintiff was required to have alleged actual damages from pecuniary or economic loss. *Id.*

The court of appeals in *Cooper* reversed the district court and remanded because the term "actual damages" was a "chameleon," and its definitions changed depending on what statute it is found in. The court of appeals concluded that actual damages within the civil remedies provision of the Privacy Act included damages from mental and emotional distress. *Id.*

This Court in *Cooper* granted the federal government's petition for writ of certiorari to decide whether the civil remedies provision of the Privacy Act waives the federal government's sovereign immunity with respect to damages flowing from mental and emotional harm. *Id.* at 1448. After a multi-circuit, multi-agency, multi-statute and multi-dictionary review to determine the true definition of actual damages, this Court ultimately ruled that the Privacy Act does not waive the federal government's sovereign immunity with respect to general damages flowing from mental and emotional harm. Therefore, the

Privacy Act only waives the federal government's sovereign immunity with respect to actual damages flowing from pecuniary and economic loss. *Id.* at 1448-57.

Importantly, *Cooper* sets forth a threshold standard for pleading pecuniary and economic loss. In fact, *Cooper* does not quantify the amount of actual damages a plaintiff must plead to overcome the sovereign immunity of a federal government defendant in a Privacy Act claim. Instead, *Cooper* states, "Upon showing some pecuniary harm, no matter how slight, [the plaintiff] can recover the statutory minimum of $1,000.00, presumably for any unproven harm." (emphasis added). *Id.* at 1451.

The Fifth Circuit's decision in the Duggan matter goes well beyond the post-*Cooper* pleading requirements. When the *Cooper* decision is applied to Duggan's complaint, it is clear that sovereign immunity has been waived because Duggan pleaded actual damages from pecuniary and economic loss, including, but not limited to, medical treatment, lost income due to Duggan's separation from the military, and other consequential economic damages due to Duggan's separation from the military. Duggan also pleaded general damages due to mental and emotional harm.[2] (ROA. 77-104, 107-111, 114).

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[2] Duggan's complaint was filed on March 1, 2012. (ROA. 75). The *Cooper* decision was not decided until March 28, 2012. *Id.* at 1441. Prior to the *Cooper* decision, countless Privacy Act

(Continued on following page)

B. The circuits are irreconcilably split on the pleading requirements of the "actual damages" bar under *Cooper*.

The Fifth Circuit's decision is an outlier and irreconcilably splits with the circuits that have properly analyzed the pleading requirements of the "actual damages" bar under *Cooper*. Duggan has only found two other post-*Cooper* Privacy Act cases before the other circuits that have applied the pleading requirements of the "actual damages" bar. *See Earle v. Holder*, No. 11-5280, 2012 WL 1450574 (D.C. Cir. Apr. 20, 2012), and *Corbett v. TSA*, 568 Fed. App'x 690 (11th Cir. 2014). In *Earle*, the D.C. Circuit affirmed the dismissal of a Privacy Act claim filed by a pro se prisoner because "nothing in the [complaint] could be construed as alleging he sustained pecuniary loss as a result of [the alleged Privacy Act violation]." *Earle*, 2012 WL 1450574 *2. In *Corbett*, the Eleventh Circuit affirmed the dismissal of a Privacy Act claim filed by a pro se plaintiff because "he alleged no pecuniary loss or actual damages as a result of the Privacy Act violation." *Corbett*, 568 Fed. App'x at 702.

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claims in the United States were filed and lawfully adjudicated solely on emotional damages. At the time Duggan filed his complaint, emotional damages were not prohibited. Further, notwithstanding *Cooper*, it would have been impossible to tell Duggan's story if he did not also talk about the mental torment he suffered at the hands of the Military Defendants. Duggan understands that if this Court remands his case back to the district court for discovery and trial, he will not be allowed to submit a damage claim for non-economic damages.

It is clear that if Duggan would have appealed his case to the D.C. Circuit or the Eleventh Circuit, those circuits would have reversed and remanded Duggan's case for discovery and trial. The Fifth Circuit's misguided decision is holding Duggan to a higher standard than the one presented in *Cooper*, and certainly higher than the standard applied in *Earle* and *Corbett.*

C. The Fifth Circuit misinterpreted and misapplied critical facts.

The Fifth Circuit erred by misinterpreting and, as a result, misapplying critical facts pleaded in Duggan's complaint. Specifically, the Fifth Circuit came to an inappropriate evidentiary conclusion that Duggan's Privacy Act allegations could not be causally related to his actual damages because Duggan had "began terminal leave" from his military service "weeks prior" to the Privacy Act violations. (App. 7-8). The Fifth Circuit completely misinterpreted the phrase "began terminal leave" to mean that Duggan was terminated from the military and did not return to service. To the contrary, Duggan's complaint shows that his military service continued through the Privacy Act violations. The inappropriate evidentiary conclusion by the Fifth Circuit poisoned the decision.

From December 2008 to July 5, 2009, Duggan was federally activated on Title 10 orders, which is regular active military duty. 10 U.S.C. §§ 101, et seq. (ROA. 79-80). Immediately prior to December 2008

and after July 5, 2009, Duggan was on Title 32 orders, which is regular reserve military duty. 10 U.S.C. §§ 101, et seq. (ROA. 79-81, 86, 88). Duggan's discharge from the military did not occur until September 2010, and Duggan was still on Title 32 orders at that time. 32 U.S.C. §§ 101, et seq. (ROA. 104).

Duggan's use of the phrase "began terminal leave" exclusively related to the natural conclusion of Duggan's Title 10 active duty military orders he was serving under. It did not relate to the termination of Duggan's military service due to fabricated allegations of misconduct. By virtue of the process when Duggan's Title 10 orders expired, he automatically reverted to Title 32 orders for administrative accountability and potential future assignments. (ROA. 79-81).

The Fifth Circuit's conclusion that Duggan was terminated from the military on July 5, 2009, when his Title 10 orders expired, is undermined by the fact that the Military Defendants were trying to charge Duggan with AWOL on July 11, 2009. (ROA. 88). It is also undermined by Duggan's military defense attorney simultaneously telling Duggan that "he was no longer able to advise [Duggan] in any way because [Duggan] was on reserve duty and no longer on Title 10 active duty." *Id.*

Similarly, if Duggan had been terminated on July 5, 2009, then why were the Military Defendants trying to fabricate a medical reason to discharge Duggan during the Privacy Act violations on July 12,

2009 and August 25, 2009? At that time, Duggan was still on Title 32 orders and those orders did not terminate until Duggan's discharge from the military in September 2010. (ROA. 88-92 & 104). The Military Defendants' post-July 5, 2009 pursuit to find a reason to discharge Duggan belies the Fifth Circuit's improper evidentiary conclusion that Duggan had been terminated on July 5, 2009.

Strikingly, it is no coincidence that the Military Defendants told Duggan on July 11, 2009 that they are investigating him for AWOL, and then the *very next day*, on July 12, 2009, they were pilfering through Duggan's medical records trying to fabricate a medical reason to discharge him. (ROA. 88-92). The Military Defendants knew the AWOL allegations had no merit and they had to find another way to destroy Duggan's military career.

Further, the Military Defendants gave MSgt Richard Franks a sinecure "within within twelve (12) months of his military retirement" inside the same military unit commanded by the same individuals actively trying to destroy Duggan's military career. (Again, MSgt Franks had previously punched Duggan in the face and tried to kill Duggan with his military issued knife. MSgt Franks also happens to be a relative of an army flag officer, retired General Tommy Ray Franks.) In MSgt Franks' new position as a State Officer, he was allowed to bear arms and had full access to Ellington Field JRB, Houston, Texas "where Duggan was serving his Title 32 orders." (ROA. 81, 86 & footnote 1, 88-92, 109-111). From a linear perspective,

if MSgt Franks retired shortly after he tried to kill Duggan on March 5, 2009, and he was rehired within twelve (12) months, then MSgt Franks was rehired as early as the spring of 2010, which is past the Privacy Act violations and while Duggan is still serving his Title 32 orders.

In addition, Duggan stated that he "suffered adverse effects from learning that members of his military unit were briefed on his medical condition," "[it] adversely affected [his] relationship with his co-workers" and "some of [his] co-workers began to treat [him] differently as if he was damaged goods and both mentally and emotionally weak." (ROA. 88-92, 102, 109-111). These statements contradict the Fifth Circuit's timeline for Duggan's termination because Duggan's "*co-workers*" are treating him differently *after* the Privacy Act violations.

As another example, the Fifth Circuit stated, "Duggan was subject to disciplinary action for unauthorized leave" . . . "Though Duggan otherwise alleges that the basis of the discipline was unjust, he does not allege it resulted from the Privacy Act violations." (App. 8). As a result of the Fifth Circuit continuing to believe Duggan was terminated after he "began terminal leave," the Fifth Circuit mistakenly tried to penalize Duggan for failing to claim something resulted from the Privacy Act violations when it did not. It is axiomatic that Duggan did not make that allegation because Duggan's "terminal leave" had nothing to do with the timing of the Privacy Act violations in July and August, 2009.

The Fifth Circuit's evidentiary conclusion that Duggan was terminated prior to the Privacy Act violation is flat wrong. It is indisputable that Duggan: 1) was not terminated from military service after his Title 10 orders expired or he "began terminal leave" on July 5, 2009; 2) reverted back to Title 32 orders after the expiration of his Title 10 orders; 3) was under Title 32 orders during the Privacy Act violations; and 4) remained on Title 32 orders after the Privacy Act violations. Save for perjury, the Military Defendants cannot dispute these facts.

The Fifth Circuit's poisoned interpretation of the facts contributed to the evidentiary conclusion that Duggan's Privacy Act allegations could not be causally related to his actual damages.

D. The Fifth Circuit's decision applied an improperly elevated standard that conflicts with the precedent of this Court and the Fifth Circuit.

1. The proper standard for a motion to dismiss.

The Fifth Circuit has stated that it accepts "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotation marks and citation omitted). "A complaint must fail if it offers only naked assertions devoid of further factual enhancement." *Doe v. Robertson*, 751 F.3d 383, 387 (5th Cir. 2014) (internal quotation marks and citation omitted).

This Court stated that to survive dismissal, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

2. The Fifth Circuit improperly elevated the standard.

The Fifth Circuit applied an improperly elevated standard to conclude Duggan's complaint should be dismissed. Specifically, the Fifth Circuit relied almost exclusively on a distinguishable *summary judgment* decision (issued long before *Cooper*) to conclude that Duggan's Privacy Act allegations could not be causally related to his actual damages. (App. 7-8); *Sweeney v. Chertoff*, 178 Fed. App'x 354, 357-58 (5th Cir. 2006). *Sweeney* (aside from being an unpublished decision and therefore not binding) is distinguishable on both the law and facts. Importantly, the *Sweeney* case is distinguishable because the trial court granted *summary judgment* based upon direct evidence that proved: 1) the plaintiff's damages were not caused by Privacy Act violations and 2) the plaintiff failed to exhaust his administrative remedies prior to filing a complaint. *Sweeney v. Chertoff*, C.A. No. 4:03-cv-05865 at *9-10 (S.D. Tex. Jan. 24, 2005); *Sweeney*

v. Chertoff, 178 Fed. App'x at 357-58 (affirmed on damages issue). Importantly, the trial court and appellate court in *Sweeney* were not required to engage in complex mental gymnastics to arrive at their conclusions because there was direct evidence to justify the decision.

Unlike in *Sweeney*, the Fifth Circuit here went out of its way to reach a judgment type decision (i.e., summary judgment after full discovery) that is completely inappropriate when considering a complaint. Simply put, rather than applying the proper motion to dismiss standard (which is deferential to the plaintiff's complaint), the Fifth Circuit decided that it did not believe Duggan's allegations and discounted his theory of the case. "[W]ithin the *Twombly-Iqbal* framework, Duggan's recovery of actual damages for alleged Privacy Act violations could only result from a '*hypothetical, counterfactual situation*' which is insufficient to satisfy the plausibility requirements at the motion-to-dismiss stage." (App. 7-8); *Sweeney*, 178 Fed. App'x at 358.

This Court has stated, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Notwithstanding, the Fifth Circuit's decision contorts the *Twombly-Iqbal* plausibility standard into a probability standard with an

evidentiary twist. The Fifth Circuit had no discretion, given the facts pleaded in the complaint, to discount Duggan's allegations or his theory of the case.

3. The Fifth Circuit failed to consider all of the facts.

The Fifth Circuit failed to consider all of the facts pleaded in Duggan's complaint. Two prime examples are when the Fifth Circuit stated, "Duggan seeks a damage award . . . [for the Privacy Act violations], but does not further expand on the types of injury previously attributed to those violations." (App. 5-6). Further, the Fifth Circuit stated, "Duggan's claim therefore relies on his allegation of pecuniary harm through income loss, which he broadly attributes to [the Military Defendants'] 'unlawful and improper conduct.' " (App. 6-7). Both of these statements are inaccurate.

Referring to the Privacy Act violations, Duggan stated that the Military Defendants' "intentional, improper and unlawful dissemination of this information adversely affected [Duggan] and caused him pecuniary loss, and physical and mental injury and suffering. 5 U.S.C. § 552a(g)(1)(D)." (ROA. 109-110). Duggan's complaint prayed for $3,000,000.00 in actual damages. (ROA. 114).

In addition, Duggan stated:

> "The [Military Defendants] are liable to [Duggan] for this unlawful, improper and intentional disclosure as provided for under

> the Privacy Act. A damages award is requested for the adverse effects and harm caused by the unlawful, improper and intentional release of [Duggan]'s private medical information maintained by the Defendants, through their members, and for altering and manipulating [Duggan]'s Mental Health medical records. See Section VI, Subsection G, and Sections VII and VIII, as if fully set out herein. [Duggan] seeks unliquidated damages."

(ROA. 110-111).

In addition, Duggan stated:

> "[Duggan] has suffered pecuniary loss. As a result of the unlawful and improper conduct by [Military Defendants], [Duggan] was placed on restricted duties and ultimately forced to separate from the Texas National Guard in September 2010. [Duggan] was given no comparable or safe options to stay at Ellington Field JRB, Houston, Texas. [Duggan] has lost the income he received from his military service of 16 years. Further, in order to complete his 20 years of service to be eligible to receive his retirement benefits with the military, [Duggan] will be forced to join another military branch outside of the divisions of the U.S. Air Force and National Guard Bureau. Further, [Duggan] will be forced to retrain for a different military mission and duties.
>
> Unfortunately, in order for [Duggan] to join another branch of military service, he will

> have to perform his duties hundreds of miles away from his family and civilian job. Prior to this horrific event, [Duggan] was conveniently stationed at Ellington Field JRB, Houston, Texas, which was only a few miles from his home. Any options for [Duggan] to continue his military service will be extremely time consuming and expensive. Further, it will sacrifice [Duggan]'s time with his family. Further, any other military options will also put [Duggan]'s civilian job in jeopardy due to the extra time he will lose away from his civilian job in order to travel to another military base further away from his home."

(ROA. 110-111).

Another example of the Fifth Circuit failing to consider all of the facts is when the Fifth Circuit stated that Duggan's "ultimate termination in September 2010" undercut his claim that the Privacy Act violations (in July and August 2009) were causally related to his actual damages. (App. 8). The only reason the Military Defendants did not discharge Duggan closer to the Privacy Act violations is because the undersigned attorney showed up on the scene to help Duggan. It is also apparent that the Military Defendants were panicking due to the multiple investigations occurring within their military ranks and the U.S. Congress related to Duggan's outcry for help. (ROA. 92-98). The Military Defendants eventually realized they had to go forward with Duggan's discharge because they had been caught red-handed and reversing course would make them look even

more culpable. The delay in the Military Defendants delivering the *coup de grâce* to Duggan is not his fault and should not be used against him.

E. The district court erred in dismissing Duggan's Privacy Act complaint and failed to consider the facts.

The district court erred by failing to consider the facts related to Duggan's Privacy Act complaint. In the district court's 2014 dismissal order, it states: "The Court will not restate the factual background for the plaintiff's complaint. The facts are sufficiently set forth in the Court's [2012 dismissal order]." (App. 12, referencing App. 16-24). Unfortunately, a review of the facts set forth in the district court's 2012 dismissal order makes it clear that the district court did not consider the facts in Duggan's First Amended Original Complaint and certainly did not accept them as true. It also makes it clear that the district court made factual conclusions in a light most favorable to the Military Defendants.

For example, the district court incorrectly stated the following two (2) sentences in its 2012 dismissal order: 1) "The undisputed facts show that the plaintiff's medical information was released within the military command structure" (App. 23) and 2) "There is no pleading or suggestion that any release of medical information was released other than according to the rules and regulations of the military." (App. 23).

This first sentence by the district court is incorrect. It is undisputed that Duggan's private mental health and medical records were accessed and released to Major Gradney, Major Krupa, SSgt Tavira and the 50-60 other members in Duggan's military unit. It is undisputed that Major Krupa, SSgt Tavira and the majority of the 50-60 other members in Duggan's military unit were not in Duggan's military command structure. Further, it is undisputed that Major Gradney, Major Krupa and SSgt Tavira tampered with Duggan's private mental health and medical records and then intentionally, improperly and illegally released the documents via U.S. Mail to Major Gradney, Duggan, a third party private civilian physician and possibly others. All of the above actions were performed without Duggan's knowledge or consent, either direct or indirect. (ROA. 88-92, 109-111, 144-145).

The second sentence by the district court is equally incorrect. Duggan repeatedly stated in his complaint that the Military Defendants intentionally, improperly and illegally accessed and released his private medical records. Importantly, Duggan stated there were no emergent issues concerning Duggan's medical conditions that required the Military Defendants to access Duggan's medical records and violate his privacy rights. Also, there were no regulations authorizing the release of Duggan's private mental health and medical records without Duggan's knowledge or consent, either direct or indirect. Finally, Duggan stated the Military Defendants were not

acting under the "need to know" exception to the Privacy Act. (ROA. 88-92, 109-111, 144-145).

Additionally, the district court erred and incorrectly stated many other facts in this case, including, but not limited to, the following: "At the time of the alleged event, MSgt Franks was a military police officer and presumably but not asserted by the plaintiff, was not on duty at the time." (App. 20-21). This is incorrect. Duggan stated in his First Amended Original Complaint that MSgt Franks had assumed the duty as Non Commissioned Officer in Charge at the time he punched Duggan in the face and tried to kill him with his military issued knife. (ROA. 81-82).

Further, the district court erred and incorrectly stated, "the evidence shows that the plaintiff provoked the incident by spitting in MSgt Frank's face." (App. 23). This is equally incorrect. Duggan stated in his First Amended Original Complaint that he suffered an unconscious gag reflex or regurgitation after MSgt Franks was spitting tobacco juice in Duggan's face and mouth. (ROA. 82-83). The district court improperly used a summary judgment standard to decide a case wherein Duggan has not been allowed to present evidence. Fed. R. Civ. P. 56. Further, the district court is erroneously concluding that Duggan's facts are false and the Military Defendants' facts are true.

Finally, the district court erred and incorrectly concluded, "The plaintiff has attempted to establish actual damages by asserting the 'statutory minimum

of $1,000.00.' This claim is not based on actual damages but simply recites the statute. Without facts supporting a claim for actual pecuniary damages, the plaintiff's suit fails. A claim that one suffered emotional or emotional anguish does not suffice." (App. 12-13). It is painfully obvious the district court did not read Duggan's First Amended Original Complaint because the words "statutory minimum of $1,000.00" do not appear anywhere in the document. Further, Duggan specifically pled for economic and pecuniary loss, among other damages, and prayed for $3,000,000.00 in actual damages. (ROA. 101-104, 114).

The district court repeatedly failed to follow the requirements of Rule 12 of the Federal Rules of Civil Procedure and other binding legal precedent. These failures have resulted in two erroneous dismissals of Duggan's Privacy Act complaint.

CONCLUSION

The Fifth Circuit's decision clashes with *Cooper* and split with the other circuits when it affirmed the dismissal of Duggan's Privacy Act complaint based upon sovereign immunity. *Cooper* did not create a heightened pleading standard for actual damages under 5 U.S.C. § 552a(g)(4), and it certainly did not empower the Fifth Circuit to make evidentiary conclusions regarding causation solely based upon the facts pleaded in Duggan's Privacy Act complaint. Duggan suffered and pleaded actual damages as

allowed under *Cooper*. Further, the Fifth Circuit misinterpreted and misapplied critical facts in Duggan's complaint that contributed to the erroneous decision.

The Fifth Circuit's decision, if allowed to stand, will permit district courts and other circuits to deny injured citizens the infrangible right to petition government for redress of grievances. It is necessary for this Court to intervene because it will restore the balance created by *Cooper*. It will also secure and maintain uniformity of the decisions amongst the circuits.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner Kenneth Scott Duggan prays this Court grant the petition for writ of certiorari and all other relief to which he may be justly entitled.

Respectfully submitted,

STEPHEN R. WALKER
3009 South John Redditt Dr., Suite E, #324
Lufkin, Texas 75904
Telephone: (936) 635-8909
Facsimile: (512) 628-3355
Email: stephenwalkerlaw@yahoo.com

Attorney for Petitioner
Kenneth Scott Duggan

Dated December 10, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-20575
Summary Calendar

KENNETH SCOTT DUGGAN,

Plaintiff-Appellant

v.

DEPARTMENT OF THE AIR FORCE;
NATIONAL GUARD BUREAU,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:11-CV-2556

(Filed Jul. 8, 2015)

Before BENAVIDES, SOUTHWICK, and COSTA, Circuit Judges. PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellant Kenneth Duggan ("Duggan") appeals the district court's order dismissing his claims under the Privacy Act.[1] For the reasons below, we AFFIRM.

I. Factual and Procedural Background

Duggan's claims are founded on the following allegations. In early 2009, Duggan, then serving on active duty as a member of the Texas Air National Guard, alleges he was involved in an altercation with Master Sergeant Richard Franks ("Franks"), a non-commissioned officer, during which Franks threatened Duggan's life.[2] Shortly thereafter, Duggan alleges he was unjustly found to have assaulted Franks, and as a result was placed on restricted duty, given menial tasks, and formally disciplined.[3] Duggan then contacted United States Senators regarding his treatment.[4]

However, Duggan alleges that his punishment continued through the collaboration of authority figures with loyalty to Franks.[5] As a result of allegedly unjust accusations by these individuals that Duggan took unauthorized leave, "[a]s of June 26, 2009, [Duggan] was asked to not return to the base, and began terminal leave through the end of his Title 10

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[1] 5 U.S.C. § 552a(g)(1).

[2] ROA.81.

[3] ROA.83-85.

[4] ROA.85.

[5] *Id.*

activation orders."[6] As part of this campaign to see Duggan removed from military service, Duggan alleges that, on July 12, 2009 and August 25, 2009, Major Vincent Gradney and Major Debora Krupa accessed Duggan's medical records, directed their alteration and ultimately disclosed those records to Duggan's military unit.[7] Duggan ultimately separated from the Texas Air National Guard in September 2010.[8]

On July 11, 2011, Duggan filed his original complaint, asserting violations of the Privacy Act,[9] and on February 7, 2012, Duggan filed his first amended complaint, the live pleading at the time of the complained-of dismissal, in which he amended his Privacy Act claims and asserted additional claims falling under the Federal Tort Claims Act ("FTCA").[10]

On May 21, 2012, the district court granted Defendants' motion to dismiss Duggan's FTCA and Privacy Act claims pursuant to the *Feres* doctrine, under which certain tort claims of military service members are non-justiciable.[11] Duggan subsequently appealed only the dismissal of the Privacy Act

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[6] ROA.86-88.

[7] ROA.91-92.

[8] ROA.104.

[9] ROA.8-15.

[10] ROA.64, ROA.75-115. Duggan's additional claims included assault, battery, negligence per se, gross negligence, civil conspiracy, retaliation, and intentional infliction of emotional distress.

[11] ROA.183-89.

claims,[12] and this court granted the Defendants' motion to vacate in part the district court's order applying the *Feres* doctrine to the Privacy Act claim.[13]

On remand and motion of the Defendants, the district court dismissed Duggan's Privacy Act claim for failure to sufficiently allege actual damages within the requirements of the Privacy Act.[14] Duggan timely appealed.[15]

II. STANDARD OF REVIEW AND RELEVANT LAW

This court reviews a district court's grant of a motion to dismiss de novo.[16] To survive dismissal under Federal Rule of Civil Procedure 12(b)(6), all well-pleaded allegations "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[17] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[18] "To survive a motion to dismiss, a complaint must contain

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[12] Kenneth Duggan v. Air Force, et al, 12-20420.

[13] ROA.213.

[14] ROA.563.

[15] ROA.564-65.

[16] *In re Katrina Canal Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

[17] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and footnote omitted).

[18] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[19]

The Privacy Act broadly regulates the executive branch's handling of the private information of individuals when it is contained within a system of records,[20] and specifically imposes consent requirements on the disclosure of such information, subject to several exceptions not relevant here.[21] For claims of unauthorized disclosure, the Privacy Act provides for relief in the form of actual damages;[22] however, such damages are limited to "proven pecuniary or economic harm," to the exclusion of "damages for mental and emotional distress."[23]

III. DISCUSSION

Duggan's amended complaint alleges that the Privacy Act violations directly led to certain injuries, including harm to his relationships with his military co-workers, emotional turmoil, extreme embarrassment, "severe mental anguish," difficulty eating and sleeping, and paranoia.[24] Later in his complaint, Duggan seeks a damages award "for the adverse

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[19] *Id.* (internal quotation marks omitted).

[20] 5 U.S.C. § 552a.

[21] *See* 5 U.S.C. § 552a(b).

[22] 5 U.S.C. § 552a(g)(4).

[23] *See FAA v. Cooper*, 132 S. Ct. 1441, 1453 (2012); *see also Lonatro v. United States*, 714 F.3d 866 (5th Cir. 2013).

[24] ROA.102-03.

effects and harm caused by the [Privacy Act violations]," but does not further expand on the types of injury previously attributed to those violations.[25]

Duggan also alleges generally attributable, pecuniary injuries, averring that Defendants' *collective* conduct caused him emotional injury resulting in a diagnosis of hypertension requiring medication, and lost income and other damages related to his termination from the military.[26] We consider the arguments surrounding these injuries *seriatim*.

Regarding the specifically attributed injuries, the parties first dispute whether the Privacy Act encompasses claims for these non-pecuniary damages. In *F.A.A. v. Cooper*, the Supreme Court specifically considered the scope of "actual damages" in the civil remedies provision of the Privacy Act, and held that those remedies do not extend to "loss of reputation, shame, mortification, injury to the feelings and the like."[27] *Cooper* squarely forecloses Duggan's recovery for these damages, and allegations thereof are insufficient to support the claim. Duggan's attempts to distinguish *Cooper* are unavailing.

Duggan's claim therefore relies on his allegations of pecuniary harm through income loss, which he broadly attributes to Defendants' "unlawful and

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[25] 25 ROA.110-11.

[26] ROA.103-04.

[27] 132 S. Ct. at 1451.

improper conduct."[28] There is no dispute that these alleged damages comprise "actual damages" recoverable under the Privacy Act. However, Defendants argue that there is no plausible basis for their specific attribution to the Privacy Act violations.[29] In support, Defendants cite to *Sweeney v. Chertoff*, which held that a Privacy Act claimant's alleged injury (loss of pay) was too attenuated from the alleged violation (nondisclosure of a medical form's voluntary nature) to satisfy causation requirements.[30] In doing so, the *Sweeney* panel acknowledged the possibility that the injury might not have occurred but for the violation; the panel nevertheless concluded that, in light of evidence that the loss of pay resulted from the plaintiff's suspension after an internal agency disciplinary action, "such a hypothetical counterfactual situation is not sufficient to meet the causation requirement."[31]

Though not binding, *Sweeney*'s reasoning is persuasive, notwithstanding its application to the summary-judgment context or its issuance prior to the current pleading requirements. This is so because, considering Duggan's allegations within the *Twombly-Iqbal* framework, Duggan's recovery of actual damages for the alleged Privacy Act violations could only result from a "hypothetical, counterfactual situation" which

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[28] ROA.104, ¶ 87.

[29] Red. Br. 8.

[30] 178 F. App'x 354, 357-58 (5th Cir. 2006).

[31] *Id.* at 358.

is insufficient to satisfy the plausibility requirements at the motion-to-dismiss stage. Like the *Sweeney* plaintiff, Duggan was subject to disciplinary action for unauthorized leave, pursuant to which Duggan alleges he was "completely relieved of all duties, asked to return to the base, and began terminal leave."[32] Though Duggan otherwise alleges that the basis of this discipline was unjust, he does not allege it resulted from the Privacy Act violations.

Significantly and unlike the *Sweeney* plaintiff, Duggan experienced this injury prior to the alleged Privacy Act violations, which further undercuts any causal inference between the events. The inference is not strengthened by Duggan's argument in his reply that he was ultimately terminated in September of 2010.[33] According to Duggan's allegations, he "began terminal leave" weeks prior to the alleged Privacy Act violations and did not return to service prior to his ultimate termination; the progression of the alleged injury had all but concluded by the time the Privacy Act violations are alleged to have occurred.

IV. CONCLUSION

Duggan's allegations simply do not support a plausible inference that the Privacy Act violations were causally related to his relief from duties and

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[32] ROA.87, ¶ 31.

[33] Reply Br. 8-9.

ultimate termination. Absent such a connection, there is no basis for Duggan's right to "actual damages" within the meaning of the Privacy Act. As a result, the district court did not err in dismissing Duggan's Privacy Act claims, and we AFFIRM.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-20575
Summary Calendar

D.C. Docket No. 4:11-CV-2556

KENNETH SCOTT DUGGAN,

Plaintiff-Appellant

v.

DEPARTMENT OF THE AIR FORCE;
NATIONAL GUARD BUREAU,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before BENAVIDES, SOUTHWICK, and COSTA, Circuit Judges.

JUDGMENT

(Filed Jul. 8, 2015)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KENNETH SCOTT DUGGAN, Plaintiff,	§	
VS.	§	CIVIL ACTION
DEPARTMENT OF THE AIR FORCE, *el al*,	§	NO. 4:11-CV-2556
Defendants.	§	

ORDER OF DISMISSAL

(Filed Aug. 6, 2014)

I.

Previously, the Court entered its Memorandum and. Order dismissing the plaintiff's, Kenneth Scott Duggan, suit against the defendants, Department of the Air Force and National Guard Bureau. *See* [Doc. No. 27]. The plaintiff sought an appeal only on the issue of whether the Court's application of the Feres Doctrine to his Privacy Act claim was proper. The defendants persuaded the Fifth Circuit Court of Appeals to vacate this Court's decision only with regard to the Privacy Act claim and to remand the case for further proceedings. The Fifth Circuit granted the defendants' motion to vacate on or about February 5, 2013, and remanded the case.

Since the remand, the defendants have filed a second motion to dismiss or, alternatively for summary judgment [Doc. No. 48]. The plaintiff filed a

response and the defendants filed a reply. *See* [Doc. Nos. 59 and 60, respectively]. Having reviewed the documents, the Court is of the opinion that the defendants' motion to dismiss should be granted.

II.

The Court will not restate the factual background for the plaintiff's complaint. The facts are sufficiently set forth in the Court's earlier Memorandum and Order [Doc. No. 27]. It is sufficient to identify the single issue upon which the plaintiff must establish a justiciable claim. A failure to state a claim upon which relief may be granted or failure to allege sufficient facts to raise a right to relief are bases for the dismissal of a suit. *See* FED. R. CIV. P. 12(b)(6); *Bell Atl Corp. v. Twombly*, 550 U.S. 554, 555 (2007).

III.

The issue before the Court is whether the plaintiff's Privacy Act claim advances his suit or is that claim barred by sovereign immunity? The Court is of the opinion that the plaintiff's Privacy Act claim is barred by sovereign immunity. *See FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012). Sovereign immunity has not been waived by the defendants, therefore, actual damages must be pled and proved. The plaintiff has attempted to establish actual damages by asserting the "statutory minimum of $1,000." This claim is not based on actual or pecuniary damages but simply recites the statute. Without facts supporting a claim

for actual pecuniary damages, the plaintiff's suit fails. A claim that one suffered emotional or mental anguish does not suffice.

Therefore, the defendants' motion to dismiss with prejudice is granted.

It is so Ordered.

SIGNED on this 6th day of August, 2014.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-20420

KENNETH SCOTT DUGGAN,

Plaintiff-Appellant

v.

DEPARTMENT OF THE AIR FORCE;
NATIONAL GUARD BUREAU,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Feb. 5, 2013)

Before HIGGINBOTHAM, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of appellees to vacate District Court's order dismissing appellant's Privacy Act claims is [granted]

IT IS FURTHER ORDERED that the motion of appellees to remand case to the District Court for proceedings under the Privacy Act is [granted]

IT IS FURTHER ORDERED that the alternative motion of appellees for a thirty day extension of time to file appellees' brief from the date of this court's denial is [denied as unnecessary]

/s/ PEB PRO LHS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KENNETH SCOTT DUGGAN, Plaintiff,	§	
VS.	§	CIVIL ACTION
DEPARTMENT OF THE AIR FORCE, *et al.*,	§	NO. H-11-CV-2556
Defendants.	§	

MEMORANDUM AND ORDER

(Filed May 21, 2012)

I.

Before the Court is the defendants', the Department of the Air Force and National Guard Bureau, motion to dismiss [Docket No. 19] the plaintiff's, Kenneth Scott Duggan, complaint pursuant to the Federal Rules of Civil Procedure, 12(b)(1) and 12(b)(6). The plaintiff has filed a response [Docket No. 23] challenging the defendants' claims. The Court has reviewed the defendants' motion and the plaintiff's response and, being fully advised, determines that the defendants' motion should be granted.

II.

According to the pleadings, the plaintiff joined the Air Force National Guard in January of 1993. He maintains that his military record was impeccable

until March 5, 2009. On that day, the plaintiff maintains that his superior officer, Master Sergeant Richard Franks, "violently punched [him] in the face." After punching the plaintiff, allegedly MSgt. Franks "pulled his military knife . . . and charged after [the] plaintiff screaming, "I am going to kill you!" The plaintiff asserts that he never fought back, but instead immediately retreated to a safe location.

After the event, the plaintiff asserts, his superior officers "conspired to retaliate against [him] by subjecting him to false charges, unnecessary duty restrictions, malicious prosecution, multiple false AWOL charges, violations of the Privacy Act and numerous counts of reprisal." The plaintiff also asserts that MSgt. Franks was permitted to retire, was rehired as a civilian, but never charged or disciplined for his conduct.

On or about June 5, 2009, the plaintiff made contact with the United States Congress. He reported the allegedly wrongful treatment by his superiors. This reporting was not favorably received by military officials and, according to the plaintiff, resulted in an attempt to cover-up their "improper actions taken against [the plaintiff]." On or about June 9, 2009, the plaintiff was separated from the military. He brought suit on July 11, 2011, asserting claims for negligence, violation of privacy, conspiracy, assault, intentional infliction of emotional distress and retaliation pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. The defendants have moved to dismiss the

plaintiff's suit for failure to state a claim and for lack of subject matter jurisdiction.

III.

A. Standard Under Rule 12(b)(1) and 12(b)(6)

Rule 12(b)(1) permits the dismissal of an action for the lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "If [a federal] court determines at any time that it lacks subject-matter jurisdiction, [it] must dismiss the action." Fed. R. Civ. P. 12(h)(3); *see also Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 880 n.3 (3d Cir. 1992) (citing *Rubin v. Buckman*, 727 F.2d 71, 72 (3d Cir. 1984)) (reasoning that "[t]he distinction between a Rule 12(h)(3) motion and a Rule 12(b)(1) motion is simply that the former may be asserted at any time and need not be responsive to any pleading of the other party.") Since federal courts are considered courts of limited jurisdiction, absent jurisdiction conferred by statute, they lack the power to adjudicate claims. *See*, *e.g.*, *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998) (citing *Veldhoen v. United States Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994). Therefore, the party seeking to invoke the jurisdiction of a federal court carries "the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009) (citing *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008); *see also Stockman*, 138 F.3d at 151.

When evaluating jurisdiction, "a [federal] court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *MDPhysicians & Assoc., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)); *see also Vantage Trailers*, 567 F.3d at 748 (reasoning that "[i]n evaluating jurisdiction, the district court must resolve disputed facts without giving a presumption of truthfulness to the plaintiff's allegations.") In making its ruling, the court may rely on any of the following: "(1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *MDPhysicians*, 957 F.2d at 181 n.2 (citing *Williamson*, 645 F.2d at 413).

Federal Rule of Civil Procedure 12(b)(6) authorizes a defendant to move to dismiss for "failure to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). Under the demanding strictures of a Rule 12(b)(6) motion, "the plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Sec., Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). In essence, "the district court must examine the complaint to determine whether the allegations provide relief on any possible theory." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001.) Under Rule 12(b)(6), a court will dismiss a complaint only if the "[f]actual allegations [are]

enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1965.

IV.

The plaintiff does not dispute the defendants' claim that the Court does not have subject matter jurisdiction to hear his Military Whistle Blower Act claim. *See* 10 U.S.C. § 1034. The plaintiff also concedes that he cannot sue the Department of the Air Force or the National Guard Bureau because they are federal agencies. *See* 28 U.S.C. § 1346(b)(1). Therefore, the plaintiff seeks permission to amend his complaint and substitute the United States of America as the proper defendant under the Act. *See Forman v. Davis*, 371 U.S. 178, 182 (1962). However, even if the United States were the named defendant, the plaintiff's suit fails for lack of jurisdiction.

The plaintiff admittedly on active duty on March 5, 2009, seeks to distinguish between the status of a soldier who, although is on active duty, is "not performing any military functions" and one who is performing a military functions. In this regard, the plaintiff asserts that he had completed his military duties for the day. At the time of the alleged event,

MSgt. Franks was a military police officer and presumably but not asserted by the plaintiff, was not on duty at the time. Therefore, the plaintiff contends that because MSgt. Franks was empowered at all times to execute military orders and arrest soldiers for violations of the law, the defendants have waived sovereign immunity as it relates to MSgt. Franks' conduct. *See* 28 U.S.C. § 2680(g). Hence, the plaintiff asserts that the *Feres* doctrine does not bar the plaintiff's claims. *See Feres v. United States*, 340 U.S. 135 (1950).

The plaintiff also seeks to distinguish permissible conduct of the military officials before June 26, 2009, after the date that he was relieved of duty and barred from the military base, from permissible conduct after his discharge. He claims that on July 12, 2009, after he was relieved from active duty, the defendants violated the Privacy Act by disseminating private health care and mental health information about the plaintiff to his military unit after he was separated that adversely affected him, causing pecuniary loss and physical and mental injury and suffering, referring to 5 U.S.C. § 552a(g)(1). The sum of the plaintiff's complaint is that the defendants reported that he was not medically fit to serve in the military to his unit. Each of the plaintiff's distinctions in the time is designed to establish that the *Feres* doctrine is applicable. These distinctions are without a difference as it relates to the plaintiff's complaint.

V.

The FTCA waives governmental immunity in cases for monetary claims where, if a private person, the person would be liable to a claimant in accordance with the law where the act or omission occurred. 28 U.S.C. § 1346(b)(1). However, there are exceptions to this waiver. One such waiver is for injuries that a soldier suffers during or in the course of activity that is incident to military service. *See Feres* 340 U.S. at 146 (overruled on other grounds). An example of activity incident to military service may be an event where a military police officer attempts to arrest a soldier for a violation of federal or military law, whether the soldier is engaged in an assigned duty or not. Also, the *Feres* doctrine would apply in a circumstance where the solider who seeks damages is the provocateur, assaulting his fellow soldier whom he later claims assaulted him. *See Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Hence, conduct that threatens or disrupts the order and command is barred by the *Feres* doctrine even though an assault may occur. *See United States v. Brown*, 348 U.S. 110, 111-12 (1954).

In light of the facts presented in the plaintiff's complaint, the Court concludes that the plaintiff's alleged damages occurred "incident to service." *See Parker v. United States*, 611 F.2d 1007, 1013-15 (5th Cir. 1980). The facts show that the plaintiff was on active duty at the time of the incident with MSgt. Franks. Moreover, the incident occurred between the plaintiff and MSgt. Franks on the military

installation where they were assigned. Any injury suffered by the plaintiff, whether an injury relating to the alleged assault or whether resulting from the investigation and outcome occurred on the military installation. *See Miller v. United States*, 42 F.3d 297, 301 (5th Cir. 1995). Third, the evidence shows that the plaintiff provoked the incident by spitting in MSgt. Franks' face. Obviously, the alleged assault on the plaintiff was a result of a personal matter between the plaintiff and MSgt. Franks. Hence, the blow thrown by MSgt. Franks was an intentional tort unrelated to his military duties. *See* 28 U.S.C. § 2680(h); *Leleux v. United States*, 178 F.3d 750, 756 (5th Cir. 1999).

Finally, the plaintiff's claim concerning the investigation of the incident and the ultimate resolution are all incident to his service and are *Feres* doctrine barred. Hence, whether the investigation concluded before or after the plaintiff was placed on inactive reserve status in the Texas Air National Guard is of no consequence since the incident out of which any subsequent investigation arose occurred while the plaintiff was on active duty.

The plaintiff's claim that the *Feres* doctrine does not bar his Privacy Act claim also fails. The undisputed facts show that the plaintiff's medical information was released within the military command structure. There is no pleading or suggestion that any release of medical information was released other than according to the rules and regulations of the military. The Court is of the opinion that the plaintiff has no

actionable suit due to the Court's lack of subject matter jurisdiction.

It is therefore ORDERED that the plaintiff's suit shall be, and it is hereby DISMISSED.

SIGNED at Houston, Texas this 22nd day of May, 2012.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KENNETH SCOTT DUGGAN, Plaintiff,	§	
VS.	§	CIVIL ACTION
DEPARTMENT OF THE AIR FORCE, *et al.*,	§	NO. H-11-CV-2556
Defendants.	§	

FINAL JUDGMENT

(Filed May 21, 2012)

Pursuant to the Memorandum and Order entered in this case the plaintiff's suit is Dismissed.

This is a Final Judgment.

SIGNED at Houston, Texas this 22nd day of May, 2012.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-20575

KENNETH SCOTT DUGGAN,

Plaintiff-Appellant

v.

DEPARTMENT OF THE AIR FORCE;
NATIONAL GUARD BUREAU,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Sep. 15, 2015)

(Opinion 7/8/15, 5 Cir., ___, ___, F.3d ___)

Before BENAVIDES, SOUTHWICK, and COSTA, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH

CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato C. Benavides
UNITED STATES CIRCUIT JUDGE

THE PRIVACY ACT OF 1974
5 U.S.C. § 552A

(b) CONDITIONS OF DISCLOSURE. – No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be –

> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties

* * *

(g)(1) CIVIL REMEDIES. – Whenever any agency:

* * *

> (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

* * *

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States

shall be liable to the individual in an amount equal to the sum of –

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

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