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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Gene Edward Scott, II,

No. CV-10-1541-PHX-FJM

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Plaintiff,

ORDER

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vs.

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United States Army,

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Defendant.

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The court has before it defendant's motion to dismiss (doc. 18), plaintiff's response (doc. 19), and defendant's reply (doc. 20).

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On July 21, 2010 plaintiff filed this action asking that we upgrade his military service discharge characterization from "Other than Honorable" to "Honorable." Plaintiff apologizes for his "immaturity" while in the Army and states that his "behavior is better" now. Complaint at 2, 3. Plaintiff asserts that he needs an Honorable characterization of service so that he "can get good employment and [his] record will look good" when he applies for admission to law school. Complaint at 4. Defendants move to dismiss plaintiff's complaint under Rule 12(b)(1), Fed. R. Civ. P. for lack of subject matter jurisdiction and in the alternative, Rule 12(b)(6), Fed. R. Civ. P. for failure to state a claim.

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Federal jurisdiction cannot be presumed, but must be affirmatively and distinctly plead in the complaint. See Rule 8(a)(1), Fed. R. Civ. P. While pro se litigants are held to

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1 a lower pleading standing, conclusory and unsupported allegations of law are insufficient to
2 defeat a motion to dismiss. See In re DRAM Antitrust Litig., 546 F.2d 981, 984-85 (9th Cir.
3 2008) (stating that "dismissal for lack of subject matter jurisdiction is appropriate if the
4 complaint . . . fails to allege facts sufficient to establish subject matter jurisdiction). Here,
5 plaintiff fails to allege any jurisdictional basis upon which we may decide this case. Simply
6 stating "this court has jurisdiction" is insufficient. See Barkhorn v. Adlib Assocs., 345 F.2d
7 173, 174 (9th Cir. 1965) (stating that "[p]arties cannot confer jurisdiction on a federal court
8 simply by expressing confidence in it"). Furthermore, "an internal military decision is
9 unreviewable unless the plaintiff alleges (a) a violation of a recognized constitutional right,
10 a federal statute, or military regulations; and (b) exhaustion of available intraservice
11 remedies." Wenger v. Monroe, 282 F.3d 1068, 1072 (9th Cir. 2002). Plaintiff fails to allege
12 both.

13 Even construing plaintiff's complaint under the most liberal construction afforded to
14 pro se litigants, it fails to state a "short and plain statement of the claim showing that the
15 pleader is entitled to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955,
16 1964 (2007). Plaintiff does not allege that the Army violated the law, but rather, simply
17 articulates a desire for an upgraded discharge. Plaintiff already has been afforded the
18 opportunity to file a second complaint in compliance with Rule 8, Fed. R. Civ. P. after this
19 court dismissed a previous claim under Rule 8(a), Fed. R. Civ. P. without prejudice. Scott
20 v. Army Review Bd. Agency, No. 2:07-cv-00696-JWS (D. Ariz. June 1, 2007). Plaintiff's
21 second complaint again fails to meet Rule 8's standards. There is nothing in the record that
22 suggests plaintiff can provide the additional factual allegations necessary to state a plausible
23 claim for relief. Therefore, we grant defendant's motion with prejudice because leave to
24 amend the complaint would be futile. See Ventress v. Japan Airlines, 603 F.3d 676, 680 (9th
25 Cir. 2010).

26 Accordingly, **IT IS ORDERED GRANTING** defendant's motion to dismiss with
27 prejudice (doc. 18).

28 We urge plaintiff to seek the advice of a lawyer skilled in military affairs to explore

1 non-judicial remedies that may be available to him.

2 DATED this 3rd day of March, 2011.

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Frederick J. Martone

Frederick J. Martone
United States District Judge

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