

CENTRAL JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES)	
)	SPECIAL COURT MARTIAL
v.)	
)	MOTION TO DISMISS FOR SELECTIVE
MICHAEL P. NATIVIDAD)	AND VINDICTIVE PROSECUTION
ADC)	
U.S. NAVY)	
XXX XX 0365)	19 APRIL 2010
)	

I. MOTION

Comes now, Chief Michael P. Natividad, by and through undersigned counsel, Haytham Faraj, and brings the instant motion to dismiss with prejudice the charges referred on December 2, 2009, for vindictive and selective prosecution on the bases of Chief Natividad’s race or ethnicity.

II. FACTS

On December 2, 2009, the Government referred a variety of charges against the accused alleging violations of the UCMJ under Article 92 (two specifications), Article 107 (four specifications) and Article 128 (two specifications).

At the time of the alleged misconduct, Chief Natividad served in the billet of Recruit Division Chief [hereinafter “RDC”]. As the RDC, Chief Natividad is responsible for the supervision and leadership of two additional RDCs. The team of three RDCs is in-turn tasked with training a division of Navy recruits. The relationship between the recruits and their RDCs is governed by numerous regulations and orders that apply a strict code of conduct to members of the Recruit Training Command. The code of conduct is arguably far more regimented than those that apply to Sailors operating outside the command. Often, when members of the RTC commit violations of the unique regulations governing conduct within the command, the

offending servicemember is handled administratively and assigned orders outside the Recruit Training Command.

Chief Natividad is a Filipino-American Sailor. He is easily identifiable as a member of the Asian race and more specifically as Filipino. As a Filipino sailor, Chief Natividad has experienced perceptible discrimination and singling out. Throughout his career, including his time in RTC, he has had to undertake additional efforts to prove himself in an environment that constantly questioned his abilities and competence, to satisfy the demands placed upon him, not because he was failing -Chief Natividad has been promoted along or ahead of his peers- but because of the additional scrutiny applied to him simply because he is a Filipino Sailor.

In the instant case the, the bias and discrimination have led to Chief Natividad having to defend against the charges at a court-martial while other similarly situated Sailors accused of substantially the same conduct as the accused, have had their charges disposed of through Article 15 proceedings or other non-judicial avenues. Chief Natividad, through counsel, has made several attempts to have the charges disposed of at nonjudicial punishment. The command has refused to grant that request.

The defense has investigated the command's actions when similar charges were brought against other Sailors. In every case, the disposition was through NJP. Although there may be members with similar charges that have undergone a court-martial process, evidence of such cases was not readily discoverable. In any event, even if evidence exists that other members of the Recruit Training Command underwent court-martial proceeding for similar conduct, there is no way of determining whether those defendants received NJP offers that were refused.

The available evidence as set forth below clearly supports the defense' allegation of selective and vindictive prosecution based on impermissible grounds. *See Ah Sin v. Wittman*, 198 U.S. 500 (1906) (Discriminatory effect is proven by showing that similarly situated individuals were not prosecuted and discriminatory impact may be demonstrated by showing a disparate impact). And *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that disparate impact

is sufficient to show a discriminatory effect). The following is a list of individuals with similar accusations who had their charges adjudicated at nonjudicial punishment.

1. BMC(SW/AW) Welker, Sean/ E-7 - On the afternoon of graduation day, BMC Welker picked up his newly graduated female Division Yeoman who was on liberty at the Gurnee Mall and drove her to his apartment in Gurnee. When the newly graduated sailor came back from liberty that night, she revealed to her divisionmate that she just came from Chief Welker's apartment. That divisionmate promptly reported the incident to Chief Welker's partner RDC. Chief Welker was put on report and during his Captain's Mast (Open Mast attended by all available RDCs) conducted by the then Commanding Officer, CAPT Annie B. Andrews, Chief Welker alleged that all that he and the newly graduated female sailor did in his apartment was watch a movie on TV in the living room. At the conclusion of the Captain's Mast, Chief Welker was awarded the following punishment: restriction, revocation of his 9508 Navy Enlisted Classification (NEC) and red rope was pulled, reduction of pay, and ordered to negotiate for orders to the fleet. This happened sometime in February 2008.

2. FTC(SS) Green, Trent/ Newly Frocked E-7 - Chief Green admitted to bringing a female recruit to the staff shower room on the second deck of Ship Six (USS Constitution) on several occasions where he proceeded to have consensual sexual intercourse with her. This was found out when the other female recruits noticed that whenever the division had hygiene time (shower time), one particular female recruit would disappear without doing hygiene with the rest of the division but would later reappear with her hair wet and looking like she had just taken a shower. Chief Green's matter was adjudicated at Captain's Mast. At Chief Green's Captain Mast sometime in March or April of 2009 that was conducted by CAPT John W. Peterson, the following punishment was awarded: restriction, revocation of his 9508 Navy Enlisted Classification (NEC) and red rope was pulled, reduction of pay, one paygrade reduction of rank to E-5 because he was still technically an E-6 (he was just a newly frocked E-7 when the incident happened). Chief Green ended up being administratively discharged because he cannot stay as an E-5 due to high tenure.

3. EM1 Beale, Jonathan L. The defense does not have sufficient facts to present to the court. The defense does, however, have a good faith basis to allege that EM1 Beale's case was adjudicated at Captain's Mast rather than court-martial.

4. EN1 Jimenez, Mauro The defense does not have sufficient facts to present to the court. The defense does, however, have a good faith basis to allege that EN1 Jimenez' case was adjudicated at Captain's Mast rather than court-martial

III. APPLICABLE LAW AND DISCUSSION

In *United States v. Armstrong*, 517 U.S. 456, 464 (1966), the Supreme Court recognized that a claim of selective prosecution "is not a defense on the merits to the criminal charge itself,

but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” Under the equal protection component of the due process clause of the Fifth Amendment, the decision to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” *Id.* at 464-65; *see also Garden hire v. Schubert*, 205 F.3d 303, 319 (6th Cir. 2000). “A defendant may demonstrate that the administration of a criminal law is ‘directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive’ that the system of prosecution amounts to ‘a practical denial’ of equal protection of the law.” *Id.*

In a selective prosecution claim, the moving party must demonstrate, by clear and convincing evidence, that (1) the federal prosecutorial policy had a discriminatory effect and, (2) that it was motivated by a discriminatory purpose. *Armstrong*, 517 U.S. at 465; *see United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997); *see also United States v. Smith*, 231 F.3d 800, 808 (11th Cir. 2000). Discriminatory effect is proven by showing that similarly situated individuals were not prosecuted, *Ah Sin v. Wittman*, 198 U.S. 500 (1906), and discriminatory impact may be demonstrated by showing a disparate impact. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that disparate impact is sufficient to show a discriminatory effect). Discriminatory purpose examines whether the prosecution was carried out because of its adverse effects upon an identifiable group. *Wayte v. United States*, 470 U.S. 598 (1985). Inquiry into discriminatory purpose is “practical” and must necessarily usually rely on objective factors. *Arlington Heights v. Metro Housing Dev’l Corp.*, 429 U.S. 252, 266 (1977). If direct evidence of discriminatory purpose is unavailable, the alleged unconstitutional purpose must be examined in the context of (1) disparate impact; (2) historical background; (3) specific events leading up to the challenged decision; and (4) any associated legislative or administrative history. *Arlington*, 429 U.S. at 266-67.

The Court of Military Appeals refashioned the traditional two part test set forth in *Armstrong* and established in a selective prosecution claim, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government’s discriminatory

selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *United States v. Chavez*, CCA LEXIS 57, 6-8 (A.F. Ct. Crim. App. 2004)(unpublished). *United States v. Garwood*, 20 MJ 148, 154 (CMA 1985). Citing *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). See *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985); *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962); *United States v. Ross*, 719 F.2d 615 (2d Cir. 1983); *United States v. Greene*, 697 F.2d 1229 (5th Cir.), cert. denied, 463 U.S. 1210, 103 S. Ct. 3542, 77 L. Ed. 2d 1391 (1983); *United States v. Torquato*, 602 F.2d 564 (3d Cir.), cert. denied, 444 U.S. 941, 100 S. Ct. 295, 62 L. Ed. 2d 307 (1979); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972). It is noteworthy that the burden established by the highest military court is a *prima facie* showing of prosecution based on impermissible grounds. *Garwood* at 154.

In *United States v. Chavez*, the appellant challenged the trial court's denial of his motion to dismiss for selective prosecution contending that he was being prosecuted because of his Hispanic ethnicity. The court affirmed the trial judge's decision finding that the evidentiary testimony clearly distinguished the case and established that the Defendant used a knife to commit the assault. Other defendants did not use weapons. Moreover, the Government also presented evidence of prosecutions of other races and ethnicities. CCA LEXIS 57, 6-8 (A.F. Ct. Crim. App. 2004)(unpublished)(citing *United States v. Garwood*, *supra*).

In this case, the available evidence supports the defense' contention of selective prosecution. In the Chief Green Matter, the facts are more egregious: he engaged in sexual intercourse with a recruit. And although an argument may be made that his case is distinct because he was Petty Officer First Class and not a Chief Petty Officer, it does not vitiate the simple facts alleged by the defense that all similar conduct was handled through non-judicial means. Furthermore, such a position arguably advances the defense' equal protection argument because nothing in the UCMJ permits the discriminatory application of the law based on rank. Such an approach would be permissible in sentencing or in a determination to take administrative action post Article 15.

Chief Natividad is accused of kissing a recruit. In the Green matter the accusation was of intercourse with a recruit. Undoubtedly intercourse with a recruit, to an objective observer, should carry greater punitive exposure than kissing a recruit or an unduly familiar relationship. Yet, Chief Natividad stands to face a greater punishment, even if it noting more than a federal conviction. Chief Green's case is but one example of the disparate treatment.

The disparate impact of the court-martial on Chief Natividad stands in stark contrast to the non-judicial disposition of charges against other defendants. Little comfort obtains from an argument that members of other minority groups have been offered Article 15 dispositions. This motion does not allege that the command is favoring a particular race over all others. The motion alleges narrow, nuanced and subtle bias and discrimination against Chief Natividad because of his Filipino race.

The available evidence is clear. While all other RDCs accused of similar misconduct as Chief Natividad had their charges disposed of by non-judicial means, Chief Natividad must undergo trial by court-martial. And he is the only one who is Filipino.

IV. RELIEF REQUESTED

Wherefore the accused, by and through undersigned counsel, respectfully requests the dismissal of all charges with prejudice.

V. EVIDENCE

The defense request that the below witnesses and evidence be produced for the motion.

a. Witnesses

1. CMC Richard S. Dodd
2. Commanding Officer John W. Peterson
3. LCDR John E. Clady, Command Staff Judge Advocate

b. Evidence

1. Command log of disposition of charges.

VI. ARGUMENT

Respectfully requested.

 /S/
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 April 19, 2010
Date

CERTIFICATE OF SERVICE

I certify that a copy of this paper was served upon counsel for the government on April 19, 2010.

 /S/
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