EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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THERESA DEVINE, COMPLAINANT, V. DEFENSE NATIONAL GUARD BUREAU (AIR FORCE NATIONAL GUARD, ARMY RESERVE NATIONAL GUARD), AGENCY.	EEOC CASE NO. 531-2011-00321X AGENCY CASE NO. (NONE) May 14, 2012

MEMORANDUM AND ORDER RULING ON MARCH 14, 2012 ORDER TO SHOW CAUSE

Before the Commission is the Agency's March 21, 2012 Response to the March 14, 2012 Order to Show Cause (Response) for the Agency's failure to attend the March 12, 2012 Prehearing Conference concerning damages and to file a witness list. The Agency again challenges jurisdiction, claiming that the Feres doctrine denies the Administrative Judge jurisdiction to hear Complainant's claims because they are irreducibly military and not civilian. On April 26, 2012, Complainant filed her Reply to the Response (Reply) asserting that the Administrative Judge has jurisdiction in this case. On May 2, 2012, the Agency filed its Reply to the Reply (Response Reply) even though the April 6, 2012 Order provided for no such reply. On May 11, 2012, Complainant filed her Surreply (Surreply). The Administrative Judge has decided to consider all of the above-noted submissions, including the Response Reply and Surreply.

On January 11, 2012, the Administrative Judge issued the Memorandum and Order Ruing on the Agency's Motion to Dismiss granting in part and denying in part that Motion. On the same date, a Default Judgment and Liability Decision After Default Judgment was issued finding in favor of Complainant regarding her sexual harassment and pregnancy and reprisal-based harassment claims. On February 10, 2012, the Liability Decision on Constructive Discharge Issue After Default Judgment was issued, finding in favor of Complainant on the issue of constructive discharge. On that same date, a Prehearing Conference regarding damages was scheduled for March 12, 2012 at 3:00 p.m. The parties were also required to submit witness lists no later than 15 days before the Prehearing Conference. The Agency did not file a witness list and refused to attend the Prehearing Conference. On March 14, 2012, an Order to Show Cause was issued requiring the Agency to show cause why the Agency should not be excluded from the upcoming damages hearing for its failure to attend the Prehearing Conference and to file a

witness list. In response, on March 21, 2012, the Agency renewed its July 28, 2011 Motion to Dismiss with additional evidence and additional cases and argument. The surviving issues in the above-captioned case are as follows:

> Did the Agency discriminate against Complainant on the bases of sex (female) and reprisal for prior EEO activity by:
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> 1. Subjecting her to sexual harassment and pregnancy and reprisal-based harassment from Summer 2008 to the effective date of her resignation on February 2, 2010; and
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> 2. On February 2, 2010, constructively discharging her?

The Complainant, Theresa M. Devine (female) was at all relevant times a District of Columbia Air National Guard (DCANG) dual status technician Aircraft Mechanic, WG-8852-10, with the 113th Maintenance Squadron, DCNG until February 2, 2010. Complainant held the military rank of Senior Airman. Complainant's principal duty was to perform inspection and repair in the agency's Phase Inspection Shop of National Guard F-16 fighter aircraft. Complainant performed the same duties on active duty training one weekend per month and two weeks during the summer and during her full-time job as a civilian. Complainant had the same supervisors while on active duty and as a civilian, and was required to wear a military uniform and observe military courtesies at all times. The alleged wrongdoers, Master Sergeant Mark Dailey and Senior Master Sergeant Greg Bucholz, were at all times either in a dual status technician status or performing duty on military orders. Position Description, Response, Ex. 9; Dwight Martin Aff., Response Ex. 8; Lt. Col. Marshall Scott Glasser Aff., Response, Ex. 8. However, while performing civilian-side duties, the DCANG Technicians have their own recognized bargaining unit under the Federal Labor Relations Authority (FLRA) and are covered by a Collective Bargaining Agreement (CBA). CBA, Reply, Ex. 2.

Complainant testified that her supervisors subjected her to sexual harassment and that the Agency did nothing to stop the harassment when she complained about it on numerous occasions. Complainant stated that her supervisors then took reprisal action against her by transferring her from the Phase Inspection Shop to Quality Assurance while pregnant where they subjected her to intense scrutiny to build a case to fire her. This included intense scrutiny of her performance, attendance and leave when she went to doctor's appointments and also included requiring her to perform secretarial duties for her supervisors even though she was an Aircraft Mechanic. All of these action occurred during civilian-side employment as opposed to during active duty. Liability Decision After Default Judgment, FOF Nos. 1-8.

The dual status of Technicians is governed by the National Guard Technician Act (NGTA), adopted in 1968 and codified as 32 U.S.C. § 709. At the same time, Title VII applies to "all personnel actions affecting employees or applicants for employment . . . in military departments a defined in section 102 of Title 5 [which includes the Air Force]. 42 U.S.C. § 2000e-16. Under 32 U.S.C. § 709(a), persons may be employed for specific purposes set forth in the subsection. The dual status of Technicians is defined as follows:

> A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

32 U.S.C. § 709(e). A technician must meet the following requirements:

> (1) Be a military technician (dual status) as defined in section 10216(a) of title 10.
> (2) Be a member of the National Guard.
> (3) Hold the military grade specified by the Secretary concerned for that position.
> (4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

32 U.S.C. § 709(b).

Technicians can only retain their civilian-side positions if they remain members of the National Guard and they are subject to control by the Adjutant General of each state National Guard:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—
> (1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who—
> A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and
> (B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;
> (2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;
> (3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough

> without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned; (4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned.

32 U.S.C. § 709(f). It is important to note that, except for possibly the alleged constructive discharge, none of the actions at issue in this case concern itself with "a reduction in force, removal or adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation" and, thus, are not the sole jurisdiction of the adjutant general as set forth in 32 U.S.C. §§ 709(f)(3) and (f)(4). Complainant does not challenge any suspension, furlough or removal (except the alleged constructive discharge). Thus, by itself, 32 U.S.C. § 709(f) does not remove this case from the Commission's jurisdiction.

The Commission recognizes that "unlike civilian employees, military personnel of any branch of the armed forces, including military personnel within the reserve components, are not covered under Title VII." See Muse v. Army, EEOC Appeal No. 0120083293 (September 26, 2008). However, the Commission also recognized that federal technicians, like Complainant, are "considered both uniformed military personnel, as well as civilian employees," and the Commission noted that:

> Federal technicians are covered by federal nondiscrimination law only when the discriminatory action arises from their capacity as civilian employees, and not when personnel decisions affect their capacity as uniformed military personnel.

Id. at *3 (reprisal claim; "necessary to review the facts of each case to determine whether the alleged discrimination took place in the context of the individual's capacity as a Federal Civilian employee or her capacity as a uniformed member of the military unit in question"; Commission held that the agency properly dismissed three charges of discrimination arising from military side actions; decision did not reach the issue of jurisdiction when dismissing nine other charges arising from civilian side service because read individually or together the charges "lack sufficient severity or pervasiveness to constitute a claim of hostile work environment"). See also Snyder v. Air Force, EEOC Appeal No. 01A23583 (March 26, 2003) (when discrimination or reprisal occurred while an employee is in civilian status, the Commission had jurisdiction to review charges of discrimination and reprisal; Commission had jurisdiction over claims that, while in civil service status, complainant was denied promotions and assignment of janitorial duty and subjected to harassing remarks and physical threats); Coombs v. Air Force, EEOC Request No. 05860067 (June 8, 1987) (no jurisdiction to review military side personnel actions but the Commission had jurisdiction to review two civilian side competitive non-selections with the Georgia National Guard); Brazill v. National Guard Bureau, EEOC Appeal No. 01891698, *5 (June 22, 1989) ("federal technicians are covered by Title VII when the alleged discriminatory action arises from their capacity as federal civilian employees and are not covered by Title VII when personnel decisions affect their capacity as uniformed military personnel"; Commission found that direct commissioning was military and not within Commission's

jurisdiction but found that allegations concerning the performance rating, the termination, the bonus and the nonselections, were within the Commission's purview); and Dooley v. Air Force, EEOC Appeal No. 01952566 (August 3, 1995) (jurisdiction found where supervisor sexually harassed Complainant at a Christmas party which the agency alleged was a military-side event). In McInvale v. Air Force, EEOC Appeal No. 01A51484 (March 24, 2005), the Commission remanded the case to the agency to determine whether harassment allegations and the denial of certain promotions and assignments arose from McInvale's capacity as a military or civilian employee.

The thrust of the Commission cases is that they focus upon the challenged action to determine whether it is military-based or civilian-based or derives from something essentially military in nature. Thus, in Brazill and Snyder, the Commission found jurisdiction when essentially civilian-type actions were challenged but when such things as a military commission was at issue, the Commission found the action to be military and, thus, not within the Agency's jurisdiction. That was the whole point of the remand in McInvale, to determine whether the actions he challenged were military or civilian. As in Snyder and Dooley, the Commission found that harassing comments and actions, including sexual harassment, were non-military and exercised jurisdiction. As in Coombs and Snyder, civilian-side non-selections and assignments to non-military-type duties, such as janitorial duties were found to be civilian and, thus, the Commission asserted jurisdiction. Thus, the focus is not on the military nature of the civilian position but on the action challenged and whether that action is civilian or military-based.

The agency argues that Complainant's claims are barred on jurisdictional grounds based on the Feres doctrine of intra-military immunity articulated in Feres v. U.S., 340 U.S. 135, 138, 146 (1950). The Feres doctrine bars civil claims which relate to military activity or a military decision. However, the reach of the Feres doctrine is uncertain in the case of dual status Guard technicians since in some cases the technicians are civilians. This is especially the case with respect to fringe benefits and retirement issues. Overton v. New York State Div. of Military and Naval Affairs, 373 F.3d 83, 92 (2nd Cir. 2004).

The standard used in several Circuits does not ask whether what guard technicians do is irreducibly military in nature. Instead, the standard is that Title VII encompasses actions brought by guard technicians except where the challenged conduct is integrally related to the military's unique structure. See Meir v. Owens, 57 F.3d 747, 749 (9th Cir. 1995); Luckett v. Bure, 290 F.3d 493, 499 (2nd Cir. 2002) (same); and Willis v. Roche, 256 Fed. Appx. 534, 537 (3rd Cir. 2007) (same). See also Brown v. U.S., 227 F.3d 295, 299 (5th Cir. 2000) (adopting EEOC approach); and Wetherill v. Geren, 616 F.3d 789, 798 (8th Cir. 2010) (rejecting categorical rule against jurisdiction over dual status technicians and found the "operative test is whether the injury arose out of activity incident to military service").

The Administrative Judge finds Judge Pooler's concurrence in Overton persuasive. He criticized the panel majority in that case stating that it made the mistake of focusing on the nature of Overton's employment relationship rather than the conduct about which he complained. Overton, 373 F.3d at 97. Overton was an Aircraft Electrician. Following Luckett, Poole stated that the standard was that Title VII applied regarding dual status technicians except when "the

challenged conduct is integrally related to the military's unique structure."[1] Id. Applying this standard, Poole agreed that there was no jurisdiction over decisions to promote Overton's alleged harasser to shop supervisor, refusal to remove the harasser, reassign Overton to an Aerospace Ground Equipment shop and then give him less desirable tasks than non-African American technicians. Poole found no jurisdiction over these actions because they related to conduct which was integrally related to specific military matters because they involved personnel decisions surrounding the staffing needs of a particular shop, the quality of workplace supervision and the employees' job responsibilities for inspecting and maintaining aircrafts. 373 F.3d at 99. However, Poole disagreed and found the Feres doctrine did not apply regarding Overton's claim of racial harassment supported by several racially biased comments. Poole found jurisdiction in that case because "they involve conduct not integrally related to any military function." Id. In other words, pure racial harassment is not a part of any military fuction. Accordingly, Poole determined that the panel should have found jurisdiction over Overton's racial harassment claim. Similarly, the case of Laurent v. Geren, Civ. No. 2004-0024, 2008 WL 4587290 (D.V.I. Oct. 10, 2008) (unpublished) is persuasive. In that case, a sexual harassment case, the District Court stated:

> Laurent alleges that all of the conduct of which she complains occurred in the course of her civilian duties. Any failure of the Defendants to address such conduct affected Laurent in her capacity as a civilian. Creating a sexually hostile environment is not integrally related to the military's mission. Overton v. New York State Div. of Military and Naval Affairs, 373 F.3d 83, 99 (2d Cir.2004) (J. Poole, concurring). The Court would not be treading in an area that it does not belong by allowing Laurent to pursue a civil remedy for such sexual harassment.

2008 WL 4587290, *3. Thus, the court found jurisdiction. See also Snyder v. Air Force, EEOC Appeal No. 01A23583 (March 26, 2003) (Commission found jurisdiction regarding civilian-side harassment claim); and Dooley v. Air Force, EEOC Appeal No. 01952566 (August 3, 1995) (jurisdiction found regarding sexual harassment claim).[2] Similarly, in this case, Complainant was subjected to egregious sexual harassment during her civilian-side employment. Regardless of whether she was performing her Aircraft Mechanic duties, her supervisor's sexual harassment of her had nothing to do with and was not integrally related to the military's mission. No military action is accomplished by subjecting Complainant to sexual harassment. Accordingly, it is found that the Commission has jurisdiction over Complainant's sexual harassment claims.

Following the Meir, Overton, Laurent analysis, the retaliatory decisions to transfer

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[1] This is similar to the EEOC's approach of focusing on the challenged conduct and not on the technician's employment relationship.

[2] It is important to note that until Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694 (Jan. 11, 2012) expanded the ministerial exception to Title VII on constitutional grounds, sexual harassment against a minister was one of the few recognized exceptions to ministerial immunity under Title VII. EEOC Compliance Manual, § 12-I.C.2, and cases at n. 52 (July 22, 2008).

Complainant from the Phase Inspection Shop to Quality Assurance during her pregnancy was a military matter since challenging the reassignment challenges a military judgment of where best to place Complainant. It is even possible that Complainant's supervisors' intense retaliatory scrutiny of her performance in Quality Assurance were military matters. However, their intense retaliatory scrutiny of her leave to go to doctor's appointments while pregnant and possibly her attendance were not military matters since fringe benefits such as civilian-side sick leave and attendance policies are more clearly civilian than military-related performance. This is true because even the broadest applications of the Feres doctrine in dual-status technician cases concede that the technicians are civilian with regard to fringe benefits and retirement. Overton, 373 F.3d at 92 (majority opinion); and AFGE v. FLRA, 730 F.2d 1534, 1545 (D.C. Cir. 1984). Moreover, the CBA governs civilian-side hours of work and sick leave. CBA, Arts. VII and X., Reply, Ex. 2, pp. 11, 13. Sick leave and attendance polices are fit subjects for bargaining pursuant FLRA jurisdiction to the same extent as in several other matters. See Assn. of Civilian Techs., Penn State Council and the Adjutant General, Dept. of Military Affairs, Comm. Of Penn., 3 FLRA 8 (1980) (union can bargain over range of points for each level of a technician's civilian performance; FLRA allowed it was acceptable to bargain over the weight of a civilian evaluation), approved in AFGE v. FLRA, 730 F.2d at 1545, 1548 (finding that refusal to bargain over union proposal that military performance not be considered in civilian-side technician layoffs was military and not an unfair labor practice; but allowing that bargaining over the weight of a civilian evaluation was permissible); Mississippi Army National Guard and ACT, 57 FLRA 337 (2001) and Lipscomb v. FLRA, 333 F.3d 611 (5th Cir. 2003) (upholding FLRA jurisdiction over National Guard Technicians while in civilian status); and Department of Defense, National Guard Bureau Louisiana Army and Air National, and Council of Louisiana National Guard Locals, National Federation of Federal Employees, 85 FSIP No. 92 (FLRA May 12, 1992) (imposing contractual duty on agency for payment toward cost of military uniforms work by civilian technicians). If the FLRA has jurisdiction over such personnel matters, there is no reason to doubt that the Commission has jurisdiction over such fringe benefits as civilian-side sick leave and attendance policies.

Complainant also claimed that while in Quality Assurance her supervisors required her to perform secretarial duties for them. These duties had nothing to do with Complainant's military service or regarding any military actions. See Snyder v. Air Force, EEOC Appeal No. 01A23583 (March 26, 2003) (jurisdiction found regarding civilian-side assignment of janitorial duties). Accordingly, the Commission has jurisdiction when Complainant's supervisors assigned her secretarial duties.

The Commission has jurisdiction over the sexual harassment, the retaliatory scrutiny over Complainant's leave and attendance and her supervisors assigning her secretarial duties. These incidents together are enough to constitute an unlawful continuing pattern of harassment. Accordingly, the Default Judgment and the finding of discrimination regarding the harassment stand.

On the other hand, the Commission has no jurisdiction over the constructive discharge. Removal, constructive or otherwise, is a military decision. The Technician's act makes it clear that a discharge decision is solely within the jurisdiction of the Adjutant General. 32 U.S.C. §§ 709(f)(3) and (f)(4). The theory of constructive discharge is that Complainant's supervisors

made her conditions so intolerable even after she complained to upper management that she felt compelled to resign. He supervisors were acting on behalf of the Adjutant General. The constructive removal is no different than if, for example, she had complained about sexual harassment and the Adjutant General then removed her from her civilian technician position in retaliation for complaining. Such a decision would not be reviewable and is not analytically different from being constructively removed. Thus, there is no jurisdiction over the constructive discharge and it is hereby dismissed.

In the February 10, 2012 Liability Decision on Constructive Discharge Issue After Default Judgment, the Administrative Judge ordered backpay, prejudgment interest, front pay and reinstatement. Since there is no jurisdiction over the constructive discharge, those sections in the relief section are hereby withdrawn. The Posting and Discipline sections remain in effect. Should Complainant reenlist the Commission is without the power to order that the Agency transfer Dailey and Bucholz to another base or away from supervising Complainant since these are military decisions. However, the Administrative Judge recommends that they be transferred out of Complainant's chain-of-command and that Complainant remain an Aircraft Mechanic.

The Agency has failed to show good cause for failing to participate in the prehearing conference and filing a witness list since the Agency could have attended to these matters in a timely manner and renewed its motion to dismiss. Since the Agency has prevailed on some matters, it would not be appropriate to exclude the Agency from the upcoming damages hearing at this time. However, a sanction is appropriate.

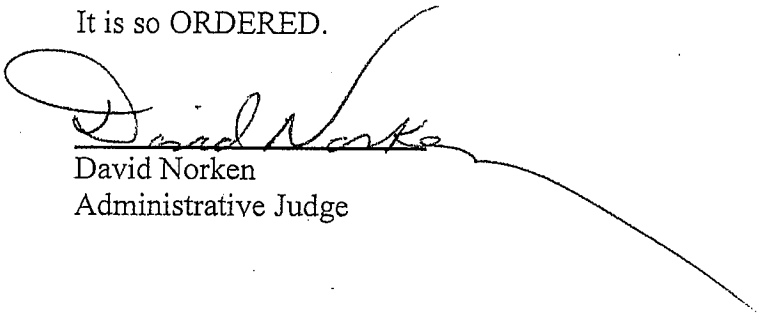
The Commission has specifically allowed the award of monetary sanctions, to include attorney's fees and costs, "necessary and appropriate to carry out its responsibilities." See Waller v. Transportation, EEOC Appeal No. 0720030069 (May 25, 2007); see also Management Directive-110, Chapter 11, Section VIII (C), citing 29 C.F.R. § 1614.109(f)(3)(v). Specifically, in Waller, the Commission noted that it has long utilized monetary sanctions as a tool to ensure full compliance with Administrative Judges' orders, observing that "awarding attorney's fees and costs as a sanction ensures the integrity and efficiency of the administrative process." In Waller, the Commission expressly confirmed that "Administrative Judges possess the authority to order a party to pay attorney's fees and costs [as a sanction] to prevent a party's misconduct in the future...."

In this case, the Agency unnecessarily wasted the time of Complainant's counsel by refusing to participate in the prehearing conference when he was preparing for and available and waiting to participate. Accordingly, attorney's fees are hereby awarded for the time Complainant's counsel spent preparing for and attempting to participate in the prehearing conference. This does not include Complainant's prehearing statement on damages or her

damages witness list since she would have filed these items anyway. Complainant shall file a petition for the awarded fees no later than 15 days after receipt of this Order. Upon receipt, the Agency shall have 15 days to file an opposition.

It is so ORDERED.

For The Commission:



David Norken
Administrative Judge