EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
CITY CRESCENT BUILDING
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VIKKI ROULEAU, COMPLAINANT, V. DEFENSE NATIONAL GUARD BUREAU (AIR FORCE NATIONAL GUARD, ARMY RESERVE NATIONAL GUARD), AGENCY.	EEOC CASE NO. 531-2012-00204X AGENCY CASE NO. T-2012-011-DC-F-S

JUN 26 2012

MEMORANDUM AND ORDER RULING ON AGENCY'S APRIL 27, 2012 MOTION TO DISMISS

Before the Commission is the Agency's April 27, 2012 Motion to Dismiss (Motion) arguing that the Feres doctrine denies the Administrative Judge jurisdiction to hear Complainant's claims because they are irreducibly military and not civilian. On May 24, 2012, Complainant filed her Response to the Motion (Opposition) asserting that the Administrative Judge has jurisdiction in this case.

The issues in the above-captioned case are as follows:

1. Did the Agency discriminate against Complainant on the bases of sex (female) and reprisal for prior EEO activity by subjecting her to sexual and reprisal-based harassment from Summer 2009 to her resignation on November 5, 2010; and
2. Did the Agency discriminate against Complainant on the bases of sex (female) and reprisal for prior EEO activity when, on November 5, 2010, the Agency constructively discharged her?

The Complainant, Vikki Rouleau (female) was at all relevant times a District of Columbia Air National Guard (DCANG) dual status technician Production Control Technician, GS-1152-09, with the 113th Maintenance Squadron, DCNG until November 5, 2010. Complainant held the military rank of Technical Sergeant. Complainant's principal duties were to perform preliminary (advance) planning and long-term scheduling for the utilization and maintenance of all assigned aerospace vehicles, propulsion units/associated equipment and

related support training equipment and to perform related documentation functions. 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 wrongdoer, Master Sergeant Ronald Owens, was at all times either in a dual status technician status or performing duty on military orders. Position Description, Motion, Ex. 7; Complaint's First Aff., Complaint, Counselor's File, Ex. I 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, Opposition, Ex. 2.

Complainant testified that Owens, a co-worker, subjected her to sexual harassment and reprisal for complaining about the harassment. This harassment included Owens sitting very close to Complainant while at work and making comments about her body and perfume. He would use excuses to touch her. He convinced her to give him her cell phone number for business purposes and then he began to send her personal texts. He once followed her part of the way home and texted her that they get drinks instead of going home. He made suggestive comments about them riding elevators. While deployed in Iraq, he asked to speak with her alone after hours. Then, back stateside on June 8, 2010, while performing civilian-side duties, Owens slapped Complainant on her buttocks. Complainant did not respond to or rejected almost all of these advances. She responded to the slap by telling him never to touch her and then complained to management.[1] Management investigated, found Complainant's allegations regarding the slap credible and considered reprimanding Owens but ultimately failed to do so. Also, management initially left Complainant in the same working relationship with Owens but Owens refused to work with her. Then, later, her supervisors transferred her to performing clerical duties instead of her normal Production Control Technician duties effectively ending her career with the Agency. Complaint's First Aff., Complaint, Counselor's File, Ex. I, Enc. 3; Second Complainant's Aff., Counselor's File, Ex. K; Unsigned Letter of Reprimand, Counselor's File, Ex. G.

Further, in 2010, Complainant was aware that her co-workers, Theresa Devine, Jennifer Brooks and Crystal Cardinale suffered sexual harassment and that Devine and Cadinale resigned because of the hostile work environment for women. Second Compl. Aff., Counselor's File, Ex. K, ¶¶ 2-3; Devine Complaints, Counselor's File, Ex. I; Cardinale Aff., Counselor's File, Ex. I. This knowledge made Complainant's harassment more severe and pervasive than were Complainant the only victim in this environment.

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

[1] The Commission has ruled that a single incident physical contact case was sufficiently severe without any other objectionable conduct to establish a hostile work environment. See, e.g., McKinney v. USPS, EEOC Appeal No. 07A00049 (May 2, 2003).

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."[2] 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 function. 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).[3] Similarly, in this case, Complainant was subjected to sexual harassment during her civilian-side employment. Regardless of whether she was performing her Production Control Technician duties, the 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.

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

[3] 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).

Following the Meir, Overton, Laurent analysis, the Agency's decision to leave Complainant in the same position working with Owens was a military matter since challenging this decision challenges a military judgment about the assignment of military duties to Complainant. Also, Owens's advance while deployed in Iraq occurred while both were on active duty. Thus, this was a military matter as well. Nonetheless, both of these incidents are relevant background evidence in support of Complainant's harassment claim.

Complainant also claimed that her supervisors detailed her to perform clerical duties. 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 clerical duties.

The Commission has jurisdiction over the sexual harassment, the Agency's failure to take action to control Owens's behavior[4] and the decision to transfer Complainant to clerical duties in reprisal for her internal complaint about the sexual harassment. These incidents together are enough to constitute an unlawful continuing pattern of sexual harassment and reprisal.

Based on the foregoing, the Motion is hereby denied regarding the sexual harassment and transfer to clerical duties.

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.

It is so ORDERED.

For The Commission:

David Norken
Administrative Judge

[4] The decision on whether to reprimand Owens was not a matter committed exclusively to the judgment of the Adjutant General since it did not involve a suspension, loss of pay, reduction in rank or removal. See 32 U.S.C. §§ 709(f)(3) and (f)(4).