



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Malinda F.,¹
Complainant,

v.

Barbara M. Barrett,
Secretary,
Department of the Air Force
(National Guard Bureau),
Agency.

Appeal No. 2020002487

Hearing Nos. 541-2013-00127X; 541-2013-00084X

Agency Nos. P2220001; P2193924

DECISION

On December 27, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.504(b), alleging that the Agency was not in compliance with implementing an EEOC Administrative Judge's orders following a finding of discrimination.

ISSUES PRESENTED

The issues presented are whether the National Defense Authorization Act of Fiscal Year 2017 (NDAA) applies retroactively to Complainant's complaint, which predates the law, and if the NDAA does not apply retroactively, whether the Commission is precluded by the Feres doctrine from exercising jurisdiction over the complaint.

BACKGROUND

In the matter before us, Complainant seeks to enforce the remedies ordered by an EEOC Administrative Judge (AJ) following the Agency's refusal to participate in the hearing process and its belated participation in the hearing held on relief. From the outset, the Agency has contended

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

that the Commission lacks jurisdiction over the matter and it will not participate in the EEO process. We note that, on appeal, the Agency has continued to refuse to submit the complaint file. In response to the Commission's most recent effort to obtain the record, the Agency reiterated its refusal to participate or submit the complaint file.²

At the time of events giving rise to this complaint, Complainant worked as a dual-status Technician at the Agency's Wyoming National Guard facility in Cheyenne, Wyoming. National Guard dual-status Technicians serve as both civilian employees and military personnel in a hybrid state/federal system. In the civilian capacity of her Technician position, Complainant worked as the Director of Personnel/Supervisory Human Resources (HR) Specialist, GS-0201-12, through October 5, 2012. In her military capacity, Complainant held the rank of Major and served as the 153d Force Support Squadron Commander. Complainant was removed from her civil position on October 5, 2012 but remained in the military in order to accrue 20 years of service. Complainant retired from the military in December 2017.

Between June 2012 and July 2012, Complainant filed two formal EEO complaints in the 29 C.F.R. Part 1614 process alleging that the Agency subjected her to sex discrimination and/or reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 (Title VII). However, on an unknown date, the Adjutant General of Wyoming asserted jurisdiction of the military over the two complaints and processed them accordingly. On December 3, 2014, the Adjutant General of Wyoming found no discrimination or reprisal and closed Complainant's complaints pursuant to 32 U.S.C. § 709(f)(4).

Nonetheless, Complainant's complaints remained active in the Part 1614 process, and Complainant requested hearings before an EEOC Administrative Judge (AJ) on March 5 and June 26, 2013. On June 18, 2019, the assigned AJ (AJ1) issued default judgment in an Order on Motion for Sanctions. On July 30, 2019, the subsequently assigned AJ (AJ2) issued an Order on Motion for Clarification of Issues.³ Therein, AJ2 determined that the issues for the damages hearing included⁴:

1. On March 4, 2012, Complainant was asked about her pregnancies, ability to be a Commander due to her status as a mother, medications taken, and a recent shoulder surgery during an investigation about the climate in her HR unit/squadron;

² Based on the Agency's failure to participate in the EEO process, the record includes scant information. We note that the information which makes up the record was submitted by the assigned AJ and/or included with Complainant's appeal request.

³ The record does not include a copy of AJ1's decision.

⁴ In its Motion for Clarification of Issues, the Agency argued that AJ1 approved issues that were military decisions. AJ2's Order on Motion for Clarification of Issues excluded all issues that were determined to be military-related.

2. On April 5, 2012, a named Colonel (C1) placed Complainant on paid administrative leave because she was an alleged offender in an ongoing investigation regarding her HR position;
3. On May 12, 2012, Complainant complained about reprisal and a hostile work environment to an EEO Counselor;
4. On May 17, 2012, Complainant was ordered to attend a mental health evaluation by a second named Colonel (C2) arising from Complainant's behavior in her HR position;
5. On May 29, 2012, C1 verbally reprimanded Complainant;
6. On June 11, 2012, Complainant was placed on indefinite leave from her HR position;
7. On June 28, 2012, Complainant was informed that a named management official instructed people not to talk to her;
8. On August 4, 2012, Complainant was issued a Letter of Reprimand by a third named Colonel (C3) for conduct relating to cancellation of CBRN training and placed on permanent leave;
9. On August 14, 2012, Complainant was given a Notice of Removal from her HR position;
10. On October 5, 2012, Complainant was terminated from her technician position at the Agency; and
11. In October 2013, Complainant was not selected for an Administrative Officer position.⁵

In a decision dated September 27, 2019, AJ2 ordered the Agency to pay \$200,000.00 in non-pecuniary compensatory damages, full back pay and benefits, and attorney's fees and costs, and to post a notice regarding a finding of discrimination in its facilities.⁶

The Agency responded on November 27, 2019 to AJ2's decision, maintaining that the matter was properly closed with findings of no discrimination or reprisal by the Adjutant General. The Agency stated that it had previously submitted justification to Complainant dated January 20, 2015, maintaining that the EEOC lacked jurisdiction pursuant to 32 U.S.C. § 709(f)(4).

⁵ In AJ2's Hearing Decision, AJ2 noted that claims 1 through 3 were based on sex discrimination while claims 5 through 8 and 11 were based on reprisal. AJ2 further noted that Complainant alleged that claim 10 was based on sex discrimination or reprisal.

⁶ AJ2's decision pertains to the issue of damages and does not discuss the finding of discrimination. While AJ2's decision indicates that it followed a hearing on damages, the record does not include a copy of the default judgment determination.

The Agency concluded that it would not comply with the orders in AJ2's decision. As such, the Agency failed to issue a final decision and appeal AJ2's decision in accordance with 29 C.F.R. § 1614.110.

On December 26, 2019, Complainant filed this appeal, stating that the Agency failed to comply with the AJ's decision.⁷

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency has failed to comply with the ordered relief and notes that the Agency explicitly asserts that it will not comply with the orders in AJ2's decision.

In response to the Commission's most recent request for the record in this matter, the Agency restates its position that the Commission lacks jurisdiction in the matter and stresses that it will not comply with any further processing or orders in this matter. Specifically, the Agency maintains that the Commission lacks jurisdiction over all pre-December 2016 allegations involving dual-status federal technicians because Congress' revision of 32 U.S.C. § 709 does not state that it is retroactive and based on the doctrine first established by the Supreme Court in Feres v. United States, 340 U.S. 135, 146 (1950).

ANALYSIS AND FINDINGS

National Defense Authorization Act of Fiscal Year 2017

Subsequent to the events giving rise to this matter, Congress enacted the National Defense Authorization Act of Fiscal Year 2017 (NDAA), Pub. L. 114-328, 130 Stat. 2000, sec. 512 (2016), which was signed into law on December 23, 2016. The NDAA prescribes rights applicable to dual-status technicians regarding adverse actions under various circumstances including: (1) separation from the National Guard Bureau (NGB), failure to hold the military grade required for the position, and failure to meet the military security standards and concurrently discharged from the National Guard; (2) separation for cause by the adjutant general of the relevant jurisdiction; and (3) a reduction in force, removal, or an adverse action involving discharge, suspension, furlough without pay, or reduction in rank or compensation. 32 U.S.C. § 709 (f)(1)-(3). For such personnel actions, the NDAA states:

⁷ We note that Complainant's attorney referred to this matter as a "Petition for Enforcement." However, a Petition for Enforcement is only available to enforce an order of the Commission issued under its appellate jurisdiction. 29 C.F.R. § 1614.503; Velda F. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120181190 (Aug. 15, 2019); Jaleesa P. v. Dep't of Defense, EEOC Appeal No. 0120162800 (May 10, 2018). Thus, we will address this matter as an appeal regarding the Agency's non-compliance with AJ2's Order dated September 27, 2019, pursuant to 29 C.F.R. § 1614.504(b).

(4) a right of appeal which may exist with to respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components;

(5) with respect to an appeal concerning any activity not covered by paragraph (4), the provisions of sections 7511, 7512, and 7513 of title 5 (5 USCS §§ 7511, 7512, and 7513), and section 717 of the Civil Rights Act of 1991 (42 U.S.C. 2000e-16) shall apply[.]

32 U.S.C. §709(f). The NDAA therefore establishes that dual- status technicians may bring claims under Title VII for conduct that does not relate to their military activity.

Here, there is no dispute between the parties regarding the applicability of the NDAA to matters arising from incidents after December 23, 2016, the effective date of the NDAA. However, the Agency argues that the law does not apply retroactively to the instant matter and that the Commission therefore lacks jurisdiction to enforce AJ2's orders. The Agency asserts that when Congress revised 32 U.S.C. § 709, the law change was not retroactive on its face and if Congress intended to make it retroactive, it would have so stated. Without citing any case in support, the Agency asserts that recent Federal District and Circuit Courts have unanimously found that the Commission lacks jurisdiction over all pre-December 2016 allegations involving dual-status Technicians.⁸

The issue of retroactivity has been addressed by the United States Supreme Court, which stated that “[r]etroactivity is not favored in the law. Thus, Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 207-209 (1988) (internal citations omitted) (further adding that “[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.”)

Later, in the Landgraf case, the Court held that the first consideration in examining whether a statute should be applied retroactively “is to determine whether Congress has expressly prescribed the statute’s proper reach.” Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994) (finding that § 102 of the Civil Rights Act of 1991 does not apply to cases arising before the law was enacted).

⁸ By contrast, there are any number of pre-NDAA amendment cases finding that claims were barred, not as a blanket prohibition, but where the matter at issue was clearly military in nature. See, e.g., Filer v. Donley, 690 F.3d 643 (5th Cir. 2010) (no argument raised as to whether Part 1614 applied, but claim was barred under Feres because the incident occurred while complainant was on active duty; Millonzi v. Adjutant General’s Dept. of Tx., 2018 WL 283754 (W.D. Tex. 2018) (dual-status technician terminated for actions clearly military in nature, i.e., falsification of leave papers).

The Court then explained that “[w]hen, however, the statute contains no such express command,” the court will “determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” Id. If so, the law is not interpreted retroactively without “clear congressional intent favoring such a result.” Id.

Here, the NDAA is silent on retroactive application, and nothing in the legislative history suggests that Congress intended retroactive application. Given the general reluctance of courts to apply laws retroactively and the lack of statutory text or express congressional intent for retroactive application, we decline to apply the NDAA retroactively to conduct that occurred prior to the its enactment.

In the appeal before us, Complainant’s allegations indisputably arise from incidents that occurred prior to the effective date of the NDAA. Accordingly, we find that the NDAA does not apply retroactively to the matters herein.

Nonetheless, we find that we have jurisdiction over the complaints at bar. While the NDAA as a statutory construct may not be retroactive, neither does it abrogate the Commission’s exercise of its jurisdiction over complaints that do not arise from military employment. Prior to the enactment of the NDAA, and subsequently, dual-status technicians could bring claims under Title VII for conduct that does not relate to their military activity. Since at least 1984, dual-status technicians have filed EEO complaints in the 29 C.F.R. Part 1614 process regarding discrimination alleged to have occurred in the course of their civilian employment. Those complaints, to the extent that they involve civilian, i.e., General Schedule, employment, have been processed under Part 1614, up to and including appeals to the Commission. As such, we maintain our jurisdiction over Title VII claims arising from *civilian* employment.

But that is not the end of our inquiry. While we have jurisdiction over complaints alleging discrimination occurring in the course of a DST’s civilian employment, we must next consider whether the particular case at bar nonetheless implicates the Feres doctrine, so as to preclude review.

Feres Doctrine

In the years prior to the adoption of the NDAA, from at least 1984, the Commission has asserted jurisdiction over General Schedule employees in the military departments, including the National Guard and National Guard Technicians. In fact, the military departments have equal employment opportunity complaint processing procedures for uniformed personnel and General Schedule employees.

The EEOC has long espoused the position that Section 717 of Title VII⁹ applies to dual-status technicians when the alleged discriminatory actions arise from the technician's capacity as a federal General Schedule employee.¹⁰ See Commission Decision No. 84-4, (May 16, 1984). Following Commission Decision No. 84-4, the Commission has taken a case-by-case approach, analyzing the particular circumstances of the alleged conduct to determine whether the conduct relates to the General Schedule or military components of a technician's position.

Here, the Agency asserts that the EEOC lacks jurisdiction over Complainant's civilian claims pursuant to the doctrine established in Feres v. United States, 340 U.S. 135, 146 (1950). However, the Commission's long-held approach is consistent with the approach established in Feres. In Feres, the plaintiffs, uniformed soldiers, brought claims of negligence due to others under the Federal Tort Claims Act while in the armed forces. The Supreme Court held that injuries that occur due to military service are not actionable under the Federal Tort Claims Act. This doctrine, which was extended to Title VII suits in the late 1970s, "prevent[s] civilian courts from interfering with military discipline and decision-making." Overton v. N.Y. State Div. of Military & Naval Affairs, 373 F.3d 83, 90 (2d Cir. 2004); see, e.g., Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978) (holding that Title VII does not apply to the uniformed military); Hunter v. Stetson, 444 F. Supp. 238 (E.D.N.Y. 1977) (declining to apply Title VII to dual-status technicians).

In Overton, *supra*, however, the court noted that the complainant did not argue that his claims were not "incident to military service" so that the determination of the nature of his duties was not before the court. The court went on to hold that a guard technician could not pursue his claim because his suit would likely intrude into and have an impact upon his military role. The court concluded that the guard technician challenged conduct "integrally related to the military's unique structure," and that the relationships and behavior that are the subject of his suit were not "purely civilian. As such, the complainant's claims were barred. Pursuant to Feres, observed the Overton court, courts may exercise jurisdiction only if the claim does not arise from the military aspect of the technician's position.

⁹ Section 717 of Title VII provides that "[a]ll personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress, shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a).

¹⁰ EEOC's regulations provide that Title VII applies to military departments but not uniformed members of the military. 29 C.F.R. § 1614.103(d)(1).

The Commission has consistently rejected the argument that it lacks jurisdiction pursuant to the Feres doctrine and has maintained that a dual-status technician may bring a Title VII claim on civilian matters arising from their General Schedule employment. Jerold Y. v. Dep't of the Army (National Guard Bureau), EEOC Appeal No. 0120170804 (Apr. 17, 2017), (finding that the Agency improperly dismissed a complaint for failure to state a claim when his movement to a different section and job, appraisal, leave, and security clearance were connected to his GS-12 job); Chau B. v. Dep't of the Army (National Guard Bureau), EEOC Appeal No. 0120161696 (Mar. 23, 2017) (finding that the discriminatory action arose from complainant's capacity as a federal civilian employee when she was terminated from her civilian technician position); Complainant v. Dep't of the Air Force (National Guard Bureau), EEOC Appeal No. 0720120031 (Oct. 20, 2015); Complainant v. Dep't of the Air Force (National Guard Bureau), EEOC Appeal No. 0120130247 (Sept. 28, 2015); Petitioner v. Dep't of the Air Force (National Guard Bureau), EEOC Petition No. 0420140014 (July 2, 2015); Complainant v. Dep't of the Air Force (National Guard Bureau), EEOC Appeal No. 0120122088 (Apr. 25, 2014).

The EEOC's case-by-case analysis of the facts at the administrative level does not always result in a finding that a dual status technician's Title VII claim may proceed under 29 C.F.R. Part 1614. For example, in some cases, the Commission has found that it had no jurisdiction. See, e.g., Brazill v. National Guard Bureau, EEOC Appeal No. 01891698 (June 22, 1989) (complainant's challenge of Agency decision to not commission him into the Colorado Army National Guard involved strictly military personnel issues and was therefore not within the purview of 29 C.F.R. 1613.201 et seq., the predecessor regulations to 29 C.F.R. Part 1614; Wilbert R. v. Dep't of the Air Force (National Guard Bureau), EEOC Appeal No. 0120171681 (Oct. 4, 2017) (affirming the Air Force's decision to dismiss a complaint of discrimination filed by a technician based on evidence adduced by the agency that complainant's "civilian responsibilities [were] intertwined with military duties," e.g., providing oversight of base-wide logistics readiness to ensure the flying missions of the base are supported and coordinating base engineering requirements with base staff regarding mission priorities).

In other circumstances, the Commission has found that it had jurisdiction. See, e.g., Coombs v. U.S. Air Force, EEOC Request No. 05860067 (June 8, 1987) (complainant's claim involved only competitive civilian positions and decisions related to those positions and was therefore within the purview of the Commission's regulations); Snyder v. Dep't of Air Force, EEOC Appeal No. 01A23583 (March 26, 2003) (alleged retaliation resulting in denied civilian promotions and assignments and harassing remarks and threats during civilian employment affected the dual-status technician in his capacity as a civilian employee and therefore was within the scope of Title VII); and Brown v. Dep't of Air Force, EEOC Petition No. 0420050011 (May 16, 2007) (challenged action fell within the purview of Commission regulations as the claim arose from the agency's decision to reassign/demote complainant from one civilian position to another).

In Complainant v. Dep't of the Air Force (National Guard Bureau), EEOC Appeal No. 0120130247 (Sept. 28, 2015), a claim involving non-selection to a dual-status technician position, the National Guard Bureau (NGB), continuing its own long-held position, contended that we lacked jurisdiction to review the appeal because the technician position was "integrally related to

the operation of the military.” *Id.* We found that a Title VII non-selection complaint was viable where (1) the vacancy announcement distinguished between the civilian position and a comparable military position, (2) there was no evidence supporting the agency’s argument that the position was “excepted service” as opposed to “competitive service,” (3) the position was on the General Schedule, which is a civilian designation, and (4) the complainant applied for the job while unemployed and in a civilian status, and in the reserves. *Id.* at 2. We found no merit in the Agency’s argument that we lacked jurisdiction due to the dual-status nature of the appointment because the Agency conceded that dual-status technicians have both military and civilian characteristics.

Most courts take a case-by-case approach to determine if the Title VII claim stems from the position as a civilian employee or as a service member, which mirrors the rationale that the EEOC uses at the administrative level to determine Title VII’s applicability. While the Circuit courts have mainly held that *Feres* bars such suits, in each case there has been some factual circumstance that led the court to conclude that claims were military, rather than civilian, in nature. *See, e.g., Overton*, 373 F.3d at 96 (noting that *Feres* barred Title VII suit because the plaintiff’s claims were not “purely civilian”); *see also Walch v. Adjutant General’s Dept. of Tex.*, 533 F.3d 289, 301-02 (5th Cir. 2008) (appellant dismissed from military for “substandard performance,” which led to loss of civilian employment); *Willis v. Roche*, 256 Fed.Appx. 534, 537 (3d Cir. 2007) (supervisor’s actions at issue included military matters such as denial of military career-development course); *Wetherill v. Green*, 616 F.3d 789, 797-99 (8th Cir. 2010) (dual status technician’s Title VII claim barred by *Feres* when such claim was premised on the agency’s withdrawal of a military retirement waiver); *Zuress v. Donley*, 606 F.3d 1249, 1255 (9th Cir. 2010) (claims included military non-promotion, refusal to extend military retirement date, “average” performance ratings).

The Federal Circuit, however, allowed a dual-status technician to bring an Equal Pay Act (EPA) claim against the National Guard. *Jentoff v. U.S.*, 450 F.3d 1342, 1348-49 (Fed. Cir. 2006). Jentoff was a civilian supervisory test pilot. The agency had offered her an approximately \$10,000 “maintenance test pilot retention allowance bonus” as an inducement to accept that position. Jentoff alleged that other test pilots, all of whom were male, did receive the bonus, but she did not. She further alleged that, after she informed her superiors of this matter, she received unwarranted negative performance evaluations and false accusations regarding her ability as a technician.

The Circuit court found that Jentoff, in her capacity as a civilian supervisory test pilot, was an “individual employed by the Government of the United States ... as a civilian in the military departments.” (Internal citations omitted.) 450 F.3d at 1348. The court further noted that 10 U.S.C. § 709(b), states that a dual-status technician:

... is ‘defined’ under [10 USC] § 10216(a) ... [which] in turn, provides that “[f]or purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee.” (Emphasis added.) Notably, there is no language in § 10216(a) limiting the circumstances in which a dual status technician can be considered a federal civilian employee.

While the Jentoff court recognized that other Circuits differed on the matter:

In our view, given the broad and unambiguous language contained in § 10216(a), Congress articulated its intention that dual status technicians be treated in the same manner as other federal civilian employees, including having rights under the Equal Pay Act. Given this clear direction from Congress, we must follow it. Moreover, given the plain language of § 10216(a), we have no discretion not to adjudicate Jentoff's rights under the Equal Pay Act, even under the Feres doctrine, which is a judicially-created doctrine. (Internal citations omitted.)

Id., at 1348-49. The Jentoff court noted that both Feres and the First and Ninth Circuit cases that applied it to exclude such claims were decided before the enactment of 10 USC § 10216(a) “and therefore did not consider the impact of the statute.” Id., at 1349. But cf. Whetherill v. Geren, 616 F.3d 289 (8th Cir. 2010) (the “any other provision of law” language relied on in Jentoff was added to the statute “to eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intra-military immunity,” such as the Feres doctrine (citations omitted.)).

In considering our jurisdiction over complaints that predate the NDAA from dual-status technicians, we therefore examine whether the alleged discriminatory event arose while the technicians were in their federal civilian capacity or when they were in their military capacity. Petitioner v. Dep't of the Air Force (National Guard Bureau), EEOC Appeal No. 0720110023 (July 2, 2015); Complainant v. Dep't of the Air Force (Nat'l Guard Bureau), EEOC Appeal No. 0120130247 (Sept. 23, 2015). This has been our position since the application of Feres first came to the Commission's attention in McCaffrey v. Dep't of Commerce, EEOC Appeal No. 01830964 (Dec. 5, 1984).

In McCaffrey, a member of the National Oceanic and Atmospheric Administration Corps (NOAA Corps) brought a complaint under the Age Discrimination in Employment Act (ADEA). In determining that the complainant could not maintain a claim under the ADEA, we found a high degree of similarity between the NOAA Corps and the armed forces, concluding that those commissioned corps of NOAA are not employees for such purposes and that the Agency's rejection of the complaint therefore was proper. McCaffrey, EEOC Appeal No. 01830964 (citing Feres and Alexander v. United States, 500 F.2d 1 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1979)).

A review of the limited record indicates that the issues considered at the hearing for relief arose while Complainant was in her federal civilian capacity. In its Motion for Clarification of Issues, the Agency identified five issues that it considered military decisions: a withdrawn promotion recommendation, Complainant's dismissal from the Force Support Squadron position, an order for Complainant to attend a mental health evaluation by C1 arising from her behavior in her HR position, restrictions upon entering the military base, and events occurring in Complainant's HR

position.¹¹ We note that the Agency requested that AJ2 reword issue 10 (the termination) to only include non-military employment, which indicates that the Agency concedes that issue 10 relates to Complainant's civilian position. The Agency did not at that time assert that the issues which remained reflected military decisions or did not relate to Complainant's General Schedule position. AJ2 clarified that the issues considered for the purpose of the damages hearing were based on a determination as to which issues related to the military aspects of Complainant's employment, and which were civilian in nature.

Those remaining issues related to Complainant's removal from her General Schedule position, non-selection involving a General Schedule position, and working conditions in her General Schedule position. AJ2 explicitly noted that issue 5 related to events occurring in Complainant's General Schedule position.

We note again that the Agency has repeatedly refused to participate in the appeals process, to the extent of denying us access to the record and failing to provide any evidence to establish that the actions cited in the complaint were, contrary to the AJ's determination, military in nature. Because the evidence before us demonstrates that the claims identified by AJ2 as non-military in nature arose out purely of Complainant's employment in her General Schedule position, we find that those claims are civilian in nature and are not barred by Feres.

Compliance

In the instant matter, the Agency refused to issue a final action, notified AJ2 that the matter should be dismissed, and stated that it considered the matter closed based on the Adjutant General's closure of the matter. When an AJ has issued a decision under 29 C.F.R. § 1614.109(b), (g) or (i), the Agency shall take final action on the complaint by issuing a final order within 40 days of the receipt of the hearing file and the AJ's decision. 29 C.F.R. § 1614.110(a). EEOC Regulation 29 C.F.R. § 1614.109(i) provides that if an agency does not issue a final order within 40 days of receipt of the AJ's decision in accordance with 29 C.F.R. § 1614.110, the decision of the AJ shall become the final action of the Agency. Therefore, in the instant matter, as the Agency refused to issue a final action, we find that AJ2's decision became the Agency's final action by operation of law. Ela O. v Nat'l Sec. Agency, EEOC Appeal No. 0720130021 (Oct. 30, 2015) (AJ's finding of discrimination became agency's final decision by operation of law where agency failed to take action during the 40-day period).

Under 29 C.F.R. 1614.504(a), if a complainant believes that an agency has failed to comply with the terms of a final action, he or she shall notify the EEO Director in writing of the alleged noncompliance within thirty days of when they knew or should have known of the alleged noncompliance. The regulation provides that the agency shall resolve the matter and respond to the complainant in writing.

¹¹ We note that the AJ declined to dismiss the events occurring in connection with Complainant's HR position.

If the agency does not respond to complainant or he or she is not satisfied with the agency's attempt to resolve the matter, he or she may appeal to the Commission's Office of Federal Operations for a determination as to whether the agency has complied with the final action. See 29 C.F.R. § 1614.504(b).

In its November 27, 2019 response to AJ2's decision, and again in the restatement of its position in response to Complainant's appeal, the Agency does not contest or address AJ2's finding of discrimination. Instead, the Agency asserts that it will not comply with AJ2's orders or any other orders pertaining to this matter because of its contention that the Commission does not have jurisdiction. We note again that the Agency has refused to participate in this process and has failed to proffer any evidence to establish that the claims encompassed in AJ2's decision were military in nature.

As we have resolved the jurisdictional issue, finding that we are not barred from adjudicating this matter by Feres, we further find that the Agency is not in compliance with AJ2's Order. Clearly, the Agency has not implemented the corrective actions ordered by AJ2 and has even emphasized an intent to remain in non-compliance. Moreover, there is no indication that the Agency issued a final Agency action or appealed the decision. As noted above, by operation of law, the decisions by AJ2 became the Agency's final action. Accordingly, we direct the Agency to comply with the Orders issued by AJ2 which are also set forth below.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER

1. Within 30 days of this award, Complainant will provide W-2 earnings statements for the tax years of 2013 through and including 2017. If Complainant fails to do so, the Agency may deduct \$30,000 per year from the backpay ordered below.
2. Within 60 days of this Order, pay Complainant backpay and benefits from October 5, 2012 to December 31, 2017, minus her interim earnings. Backpay will start at the GS-12/6 rate and will increase over the years as appropriate within grade increases are due.
3. Within 60 days of this Order, pay Complainant \$200,000 in non-pecuniary compensatory damages.
4. Within 60 days of this Order, pay Complainant attorneys' fees as follows:

Attorney 1 \$63,383.66

Attorney 2	\$1600.00
Attorney 3	\$28,232.50

5. Within 60 days of this Order, pay Complainant's costs to the individuals below:

Attorney 1	\$108.66
Attorney 3	\$704.41

6. Within 60 days of this Order, post the attached Notice to Employees in all locations where federal employees are employed. The Agency will ensure that the Notice remains posted for one year, and if the Notice becomes defaced, dirty, or illegible the Agency will repost the Notice.

POSTING ORDER (G0617)

The Agency is ordered to post at its Wyoming National Guard facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408.

A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the complainant or the agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at
<https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted together with the request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).


COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

December 29, 2020

Date