



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

[REDACTED]  
Alene S.,<sup>1</sup>  
Complainant,

v.

Frank Kendall,  
Secretary,  
Department of the Air Force  
(National Guard Bureau),  
Agency.

Appeal No. 2022002205

Agency No. NCANG Case 2022-05

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision, dated March 16, 2022, dismissing her complaint alleging unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

**BACKGROUND**

During the relevant time, Complainant worked as an IT Specialist, in an Air National Guard Dual Status Technician position, at the Agency's 145th Airlift Wing installation in Charlotte, North Carolina. National Guard dual status technicians serve as both civilian employees and military personnel in a hybrid state/federal system.

On February 14, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to hostile workplace discrimination on the bases of her race (African American), sex (female), religion (Christian), and reprisal when:

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<sup>1</sup> 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.

- a. From 31 Jul 2020 to present, the Chief constantly assigned her military tasks while she was working in her capacity as a federal civilian employee.
- b. From 03 Oct 2021 to present, she communicated with the Major and Chief about asserting her rights to be free from employment discrimination and a hostile work environment after she requested an accommodation for the COVID-19 vaccine.
- c. On 05 Jan 2022, 06 Jan 2022, and 07 Jan 2022, she requested an accommodation for the COVID-19 vaccine, and when she had to perform military duties in her capacity as a federal civilian employee the Major stated, "COVID took her days."
- d. On 04 Oct 2021, 06 Oct 2021, 25 Oct 2021, 05 Jan 2022, 06 Jan 2022, and 07 Jan 2022, she communicated with the Major about asserting her rights to be free from employment discrimination including harassment by the Chief, as she was not provided compensatory time for performing military duties while working as a federal civilian employee; and when she was denied AT orders to complete military tasks but required to complete military tasks as a federal civilian employee.
- e. On 06 Oct 2021, 08 Nov 2021, 09 Nov 2021, and 24 Nov 2021 to present, the Major and Chief punished her with a Letter of Counseling (LOC) and Letter of Reprimand (LOR), after she had asserted her rights to be free from employment discrimination, including harassment from the Chief.

The Agency issued a decision dismissing the complaint for failure to state a claim, pursuant to 29 C.F.R. § 1614.103(d)(1) and 107(a). Without analysis, nor reference to dual status, the Agency concluded that "the issues involve a military complaint of discrimination" that cannot be adjudicated in the 29 C.F.R. Part 1614 EEO complaint process. Complainant filed the instant appeal.

On appeal, Complainant contends she is a federal civilian employee and the alleged incidents occurred while she was in her civilian capacity as a Dual Status Technician. Further, Complainant argues that the Agency has a "long history" of "improperly dismissing complainants' complaints and pushing civilian EEO complaints over to the military EO to dismiss these civilian EEO claims."

In response, the Agency argues that the claims are more appropriately addressed under Military Equal Opportunity (MEO) "because each one is incident to her military service, involves issues while she was in a military pay status, or involve her fitness for military service, and any investigation into her claims would intrude on the purview of the military and the NCNG TAG."

In support, the Agency submits the position description for Complainant's job, as well as organizational charts.

### ANALYSIS AND FINDINGS

Section 717 of Title VII explicitly covers personnel actions affecting employees or applicants for employment in civilian positions within military departments. 42 U.S.C. § 2000e-16(a-b).5 EEOC Regulations thus provide that while the federal sector EEO process does not apply to uniformed members of military departments, the process does apply to civilian employees in military departments. See 29 C.F.R. §§ 1614.103(b)(1), (d)(1).

The Commission has long recognized the unique "dual-status" of technicians in the National Guard, noting that those individuals are considered both uniformed military personnel as well as federal civilian employees. The Commission first addressed jurisdiction over dual-status technician in 1984, where we agreed with the general rule that uniformed military personnel, of any branch of the armed forces, are not covered under Section 717 of Title VII. Commission Decision No. 84-4, 1984 WL 23401 (May 16, 1984). However, we noted that a dual-status technician is considered both a uniformed military member as well as a federal civilian employee. As a result, we found that dual-status technicians are covered by Section 717 of Title VII when the alleged discriminatory action arises from the individual's capacity as a federal civilian employee. We held that it was necessary for us to review the facts in each case to determine whether the alleged discrimination took place in the context of the individual's capacity as a federal civilian employee or in the capacity of a uniformed member of the military.

In considering our jurisdiction over complaints from dual-status technicians, we examine whether the alleged discriminatory event arose while the technicians were in their federal civilian capacity or when they were in their military capacity, such as during the monthly drill or when called to active duty. If there is a dispute as to whether the alleged discrimination arose during the dual-status technician's military or civilian capacity, this is a factual determination that must be made on a case- by-case basis by the Commission. See Petitioner v. Dep't. of the Air Force (Nat'l. Guard Bureau), EEOC Petition No. 0420140014 (July 2, 2015).

In the instant case, the Agency's decision merely concludes, without analysis that the Commission lacks jurisdiction. The complaint file submitted on appeal, similarly, does not address or support its decision to dismiss the complaint. We find that the Agency has failed to substantiate the basis for its final decision. See Contreras v. Dep't of the Army (Nat'l Guard Bureau), EEOC Appeal No. 0120131476 (June 21, 2013); see also Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991). In its appeal brief, the Agency provides an extensive history of dual status technicians and presents Complainant's allegations. It argues, for the first time, that alleged claims concern her fitness for military service or occurred while she was in a military pay status. Therefore, we find that the Agency's decision to dismiss the complaint was improper.

### CONCLUSION

Accordingly, the Agency's decision is hereby REVERSED and the case is REMANDED to the Agency for further processing as set forth in the Order below.

### ORDER (E0610)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if 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, a 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

July 7, 2022  
Date