APPENDIX

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FILED: JUNE 28, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-50438

TINA NEVILLE,

Plaintiff - Appellant

v.

VICTORIA LIPNIC, Acting Chair of the U.S. Equal Employment Opportunity Commission; PATRICK M. SHANAHAN, ACTING SECRETARY, U.S. DEPARTMENT OF DEFENSE; HEATHER WILSON, Secretary of the Air Force; GENERAL JOSEPH L. LENGYEL, Chief, National Guard Bureau; JOHN F. NICHOLS, Major, Adjutant General-Texas Military,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:16-CV-1231

Before CLEMENT, GRAVES, and OLDHAM, Circuit Judges.

PER CURIAM:*

Tina Neville appeals the district court's grant of motions to dismiss and, alternatively, for summary judgment in favor of federal and state entities after the dismissal of her petition for writ of mandamus seeking military agency compliance with Equal Employment Opportunity Commission (EEOC) orders finding discrimination. For the reasons set forth below, we AFFIRM.

FACTS AND PROCEDURAL HISTORY

Tina Neville was employed as a Dual-Status National Guard Technician at Lackland Air Force Base in San Antonio. Dual-Status Technicians (DST) are by statute both employees of the Department of the Air Force and civilian employees of the United States. *See* 32 U.S.C. § 709(e). As a condition to the civilian portion of the employment, a DST must become and remain a uniformed member of the National Guard. *See* 32 U.S.C. §§ 709(b), (d)-(e). Neville was employed in a civilian capacity as a WG-12 Aircraft Mechanic and in a military capacity as an Air Force Master Sergeant in the 149th Fighter Wing at Lackland. Her status as a DST involved servicing F-16 fighter jets in both her civilian and military capacities.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

In March 2006, Neville had a hysterectomy. Subsequently, she developed complications related to endometriosis and submitted documentation from her physicians ordering her to work on light duty. Neville maintains that her supervisor, Pedro Soriano, refused to allow her "light duty" because "guys don't have hysterectomies," and, as a result, she suffered a right knee injury and lower back sprain. Neville took a medical leave of absence from June 25 or 26, 2007, to May 12, 2008. On June 26, 2007, Neville received a performance evaluation from Soriano with a rating of "Fully Successful" rather than her previous rating of "Outstanding." Neville maintains that Soriano said he would not give an "Outstanding" rating to someone he and "the guys did not respect."

As a result of her injury, Neville filed a claim with the Department of Labor's Office of Workers' Compensation Program (OWCP). Although she received her regular base salary for the requisite 45 days after she was injured, Neville maintains she did not begin to receive workers' compensation benefits until January 2008. On May 12, 2008, Neville returned to work on light duty status. However, Neville believed the modified position exceeded her physical limitations. As a result, Neville stopped reporting to work on August 26, 2008. On November 6, 2008, the OWCP terminated Neville's benefits on the grounds that she had abandoned suitable work offered by her employer without any justification. In January 2009, Neville took disability retirement and retired from both her military and civilian positions.

Meanwhile, on November 13, 2007, Neville filed an EEOC complaint alleging that the United States Air Force (USAF) and the National Guard

Bureau (NGB) discriminated against her on the bases of sex (female) and disability (complications from her hysterectomy).

On January 26, 2011, after various hearings, an EEOC Administrative Law Judge (ALJ) issued a decision finding that Neville established she had been subjected to gender discrimination when Soriano refused to assign her light duty and when he issued an annual performance rating of "Fully Successful" rather than "Outstanding." The ALJ also noted numerous incidents of various crew members calling Neville offensive names and subjecting Neville to other harassment.

As a result of the discrimination, the ALJ ordered relief in the form of (1) back pay with interest and benefits; (2) non-pecuniary compensatory damages for the emotional and physical harm Neville suffered as a result of the discrimination; (3) attorneys' fees and costs of $63,675.03; and (4) an amendment to Neville's 2006-07 performance appraisal. The ALJ also ordered NGB to provide EEO training, post a notice of discrimination for 12 months, and recommended that disciplinary action be taken against Soriano.

Thereafter, the federal and state defendants declined to implement the ruling on jurisdictional grounds, asserting the actions arose out of Neville's service as a military technician, were barred by the *Feres* doctrine, and also that the ALJ ordered relief in contravention of the Eleventh Amendment because the Texas Military Department is a state entity and did not waive its sovereign immunity. The USAF and NGB appealed the ALJ's decision and Neville

counter-appealed. On August 1, 2013, the EEOC's Office of Federal Operations (OFO) issued a final decision. The 2013 OFO decision: (1) upheld the ALJ's decision finding sex discrimination; (2) ordered an increased non- pecuniary award of $150,000 be paid to Neville within 60 days; (3) ordered the NGB to provide Neville back pay for the period between June 25, 2007, and August 26, 2008, as well as attorneys' fees and other remedial action within 60 days; (4) ordered the NGB to amend Neville's 2006-07 performance rating within 60 days; (5) ordered the NGB to provide Title VII training to all management officials at Lackland; (6) ordered the NGB to take disciplinary action against responsible management officials; and (7) ordered the NGB to post a notice of discrimination.

On December 17, 2013, Neville filed a petition for enforcement (PFE) of the order with the EEOC, claiming that the USAF, NGB and Texas Air National Guard (TXANG) had disregarded the 2013 OFO decision.

On July 2, 2015, the EEOC issued its 2015 PFE decision finding: (1) at the time of Neville's claim, she was acting as a federal civilian employee under the protection of Title VII; (2) the TXANG is a federal executive agency for the purposes of Title VII; and the TXANG discriminated against Neville based on her sex. In addition to the above-listed requirements of the 2013 OFO decision, the 2015 PFE decision ordered the TXANG to: (1) pay Neville $150,000 in non- pecuniary compensatory damages, as well as $63,675.03 in attorneys' fees and costs, within 30 days; (2) compensate Neville for all back pay, with interest and benefits between June 25, 2007 and

August 26, 2008, within 30 days; calculate and compensate Neville for any overtime; (4) amend Neville's 2006-07 performance appraisal; and (7) provide at least 16 hours of in-person training to all management officials and employees at Lackland, 149th Fighter Wing, Flight Line Section, regarding Title VII responsibilities. The 2015 PFE decision also ordered the Department of Defense, as head of the NGB and USAF, to consider taking appropriate disciplinary measures against the responsible employees and to post notice of discrimination. Additionally, the 2015 PFE decision said that, if the agencies failed to comply, then Neville had the right to file a civil action to force compliance under 29 C.F.R. §§ 1614.407, 1614.408 and 1614.503(g).

On March 18, 2016, Neville filed an Amended Petition for Writ of Mandamus in the U.S. District Court for the District of Columbia seeking to compel the EEOC to enforce the final decision on her PFE or, alternatively, to force the defendants to comply with the PFE.[1] In December 2016, Neville's amended petition was transferred to the Western District of Texas. Thereafter, the defendants filed motions to dismiss and, alternatively, for summary judgment. Neville filed a motion for summary judgment and, alternatively, for a directed verdict. On November 20, 2017, the district court granted the defendants' motions and denied Neville's. The court dismissed Neville's petition for writ of mandamus. Neville subsequently filed this appeal.

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[1] Neville filed her original petition for writ of mandamus on July 1, 2015, one day before the EEOC issued its 2015 PFE Decision.

STANDARD OF REVIEW

Under federal law, "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." See 28 U.S.C. §1361. A district court awards mandamus "in the exercise of a sound judicial discretion." *Newsome v. E.E.O.C.*, 301 F.3d 227, 231 (5th Cir. 2002) (quoting *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311 (1917)). A district court's decision not to exercise jurisdiction under the mandamus statute is reviewed for an abuse of discretion. *Newsome*, 301 F.3d at 231. Further:

> A writ of mandamus is an "extraordinary remedy." *Adams v. Georgia Gulf Corp.*, 237 F.3d 538, 542 (5th Cir.2001). "Mandamus is not available to review discretionary acts of agency officials." *Green v. Heckler*, 742 F.2d 237, 241 (5th Cir.1984). Further, in order to be granted a writ of mandamus, "[a] plaintiff must show a clear right to the relief sought, a clear duty by the defendant to do the particular act, and that no other adequate remedy is available." *U.S. v. O'Neil*, 767 F.2d 1111, 1112 (5th Cir.1985) (quoting *Green*, 742 F.2d at 241).

Id.

We review de novo a district court's dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction. *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). The district court must dismiss the action if it finds that it lacks subject matter jurisdiction. Fed. R. Civ. P.

12(h)(3). "A trial court may find that subject matter jurisdiction is lacking based on (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Wolcott*, 635 F.3d at 762 (internal marks and citations omitted).

A district court's dismissal under Rule 12(b)(6) is reviewed de novo, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff. *Id.* at 763. We likewise review questions of law de novo. *Szwak v. Earwood*, 592 F.3d 664, 668 (5th Cir. 2009). Reversal is not appropriate where the district court can be affirmed on any grounds. *Wolcott*, 635 F.3d at 763.

We review de novo a district court's grant of summary judgment, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Dediol v. Best Chevrolet*, 655 F.3d 435, 439 (5th Cir. 2011). Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir.2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

DISCUSSION

I. Whether the district court erred in finding the EEOC did not owe Tina Neville a duty to enforce its judgments against its co-defendants.

After Neville's case was transferred to the Western District of Texas, due to the complexity of the case and the multiple parties involved, the district court dismissed all then-pending motions without prejudice to re-filing in the interests of efficient case management. Subsequently, the EEOC, federal defendants, and the state defendant separately filed motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and, alternatively, for summary judgment. Neville filed a motion for summary judgment and, alternatively, for directed verdict.

The district court found that it did not have jurisdiction over Neville's mandamus claims and granted the defendants' motions to dismiss and alternative motions for summary judgment. In doing so, the district court agreed with the EEOC that it did not have a nondiscretionary duty to attempt to obtain an agency's compliance with a final EEOC order after the employee commenced a civil action in federal court.

Neville asserts that the EEOC owed her a duty to take all necessary action to enforce its order and that the district court erred. Neville also asserts that the EEOC reassumed any obligation it may have waived when it acted on her case again. The action to which Neville refers was merely a letter sent on January 25, 2017, from the EEOC to various defendants "reminding them the NDAA [National

Defense Authorization Act] of 2017 clarifies that federal employment discrimination claims arising from activities occurring when National Guard members are in civilian pay status are indeed covered by Title VII."

Under 29 C.F.R. § 1614.503, "[a] complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction" setting forth "the reasons that lead the complainant to believe that the agency is not complying with the decision." 29 C.F.R. § 1614.503(a). The EEOC is then required to undertake the necessary steps to gain compliance. 29 C.F.R. § 1614.503(b).

Further, Neville had the option of filing a civil action to enforce compliance or filing a de novo civil action on the underlying discrimination claim. *See Massingill v. Nicholson*, 496 F.3d 382, 384 (5th Cir. 2007).

The EEOC regulations state:

> A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:
>
> > (a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;

> (b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken;
> (c) Within 90 days of receipt of the Commission's final decision on an appeal; or
> (d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

29 C.F.R. § 1614.407.

Additionally, pursuant to employment by the federal government:

> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his

> complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. § 2000e-16(c).

Neville filed a petition for enforcement with the EEOC. But, when the EEOC failed to issue a decision within 180 days, Neville filed her petition for writ of mandamus. This court has said that an employee's decision to pursue Title VII claims in federal court typically mandates dismissal of the EEOC complaint and "precludes the EEOC from entertaining an appeal of that dismissal." *Walch v. Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 304 n.7 (5th Cir. 2008); *see also* 29 C.F.R. §§ 1614.107(a)(3), 1614.409.

Based on this authority, we conclude that the district court correctly granted the EEOC's motion to dismiss and, alternatively, for summary judgment.

II. Whether the district court erred in finding that the federal defendants and state defendant were immune from prosecution based on the *Feres* doctrine.

The *Feres* doctrine of intra-military immunity precludes members of the military from pursuing claims against the military or the United States for injuries that arise out of or in the course of military service. See *Feres v. United States*, 340 U.S. 135, 146 (1950). Here, the federal defendants argued, and the district court agreed, that Neville's mandamus claims arose out of or in the course of activity incident to her

military service. Thus, judicial review was precluded. Further, they assert on appeal that, even if the Title VII claims arose purely from Neville's civilian position, they would still be barred by the *Feres* doctrine.

Neville asserts that the *Feres* doctrine does not apply because her mandamus claims arose from her position as a civilian employee. Neville acknowledges that "the reach of *Feres* is uncertain in cases regarding national guard technicians." (Appellant's Brief at 27). Neville cites *Overton v. New York State Div. of Military and Naval Affairs*, 373 F.3d 83, 92 (2d Cir. 2004).

Overton states that "[t]here are at least two persuasive reasons to conclude that the *Feres* doctrine may apply to a lawsuit based on alleged actions taken while the Guard Technician is being paid as a civilian employee." *Id.* at 92. Those reasons are: (1) "a Guard Technician's employment as a civilian is usually in support of a mission that is ultimately military in nature;" and (2) "there are concerns about the intrusive nature of the inquiry that would be necessary for a federal court to disentangle a plaintiff's civilian and military duties . . . . The mere process of arriving at correct conclusions would disrupt the military regime." *Id.*, 373 F.3d at 92. (internal marks and citation omitted). The Overton court then explained that the application of the *Feres* doctrine to certain Title VII actions is not entirely straightforward, as *Feres* leaves matters incident to service to the military "in the absence of congressional direction to the contrary." *Id.* at 93.

In *Brown v. United States*, 227 F.3d 295, 299 (5th Cir. 2000), this court stated that a Guard technician's Title VII racial discrimination claim would be permissible if it involved only actions taken purely in a civilian capacity. However, this court noted that categorizing such a claim may be difficult and that a civilian claim might be military if it challenged conduct that was "integrally related to the military's unique structure." *Id.* at 299 n.5 (citing *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995)). Further, in *Brown*, the actions were considered military and the court was not required to determine which cases would be purely civilian.

In 2008, this court considered whether Feres barred the discrimination and retaliation claims of a DST. *See Walch*, 533 F.3d 289. In a situation where the classification of a claim is difficult, the court said it "might turn to factors such as whether the conduct is integrally related to the military's unique structure." *Id.* at 299 (internal marks and citations omitted). Further, the court said, "we find in the Federal Circuit's opinion a useful listing of the claims that dual-status employees could not pursue as those that relate to enlistment, transfer, promotion, suspension and discharge or that otherwise involve the military hierarchy." *Id.* at 300 (internal marks and citations omitted). This court then concluded:

> Under these precedents, a court may not reconsider what a claimant's superiors did in the name of personnel management—demotions, determining performance level, reassignments to different jobs—because such decisions are integral to the military structure. Some of those decisions might on occasion be

> infected with the kinds of discrimination that Title VII seeks to correct, but in the military context the disruption of judicially examining each claim in each case has been held to undermine other important concerns.

Walch, 533 F.3d at 301.

This court also addressed this matter in *Williams v. Wynne*, 533 F.3d 360 (5th Cir. 2008) and *Filer v. Donley*, 690 F.3d 643 (5th Cir. 2012). Specifically, in *Filer*, this court concluded:

> Filer challenges as inadequate the Air Force's response to the noose incident. The Air Force conducted two separate investigations of the incident, one of which adjudged its impact on unit cohesion, while the other resulted in decisions about military promotion, awarding military honors, and appropriate training for military personnel. Lt. Col. Kountz had to clear his decision on Roark's military discipline with the FW Commander, Col. Pottinger. A session of squadron-wide EEO training was ordered. These decisions are integrally related to the military's unique structure. Judicial re-examination of such decisions would be disruptive to the military.

Id. at 649 (internal marks and citations omitted). Further, the court said:

> [B]ecause Title VII hostile environment claims often criticize the conduct of co-workers as well as supervisors, they are at least as likely as individual discharge claims to require close review of military structure, discipline, and

> cohesion. *Feres* broadly prohibits tort suits where a service person's injuries "arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146, 71 S.Ct. at 159. It is the military environment, not the nature of the claim, that is controlling.

Id., at 649-50.

As stated by the district court, the events giving rise to Neville's claims occurred on Lackland Air Force Base. Neville performed the same mechanic tasks of servicing F-16 fighter jets in both her civilian and military capacities as a DST. The district court correctly concluded that those tasks are military in nature and integral to the military mission. Neville's petition for writ of mandamus sought to compel the defendants to, among other things, revise her performance appraisal, provide personnel training at Lackland, take disciplinary action against various military personnel, and restore benefits including in-grade steps and promotions. Based on all of that, the district court correctly concluded that adjudicating Neville's claims would require the court to review questions of military decision-making barred by the *Feres* doctrine.

III. Whether the district court erred when it did not order separate counsel for the EEOC given the alleged inherent conflict of interest.

Neville asserts that the district court abused its discretion by not ordering separate counsel for the EEOC because the EEOC and the other agencies involved had differing positions. The federal defendants, including the EECO, dispute the claim that the Department of Justice or the Attorney

General cannot represent multiple federal agencies simultaneously and assert that there is no conflict of interest.

Neville cites Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct for the proposition that an attorney cannot represent two parties whose interests are materially and directly adverse to each other. She asserts that the EEOC is seeking to enforce its judgment against defendants who argue the EEOC never had jurisdiction to decide it in the first place. However, the EEOC argues that once she filed her petition, it no longer had an obligation to attempt enforcement.

The Attorney General has "plenary power over all litigation to which the United States or one of its agencies is a party." *Marshall v. Gibson's Prod., Inc. of Plano*, 584 F.2d 668, 676 n.11 (5th Cir. 1978). Neville has failed to provide any evidence that the Texas rules somehow override this. Thus, Neville has failed to demonstrate any abuse of discretion on this issue.

Accordingly, for the reasons set out herein, we AFFIRM.

FILED: JUNE 28, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50438

D.C. Docket No. 5:16-CV-1231

TINA NEVILLE,

Plaintiff - Appellant

v.

VICTORIA LIPNIC, Acting Chair of the U.S. Equal Employment Opportunity Commision; PATRICK M. SHANAHAN, ACTING SECRETARY, U.S. DEPARTMENT OF DEFENSE; HEATHER WILSON, Secretary of the Air Force; GENERAL JOSEPH L. LENGYEL, Chief, National Guard Bureau;JOHN F. NICHOLS, Major, Adjutant General-Texas Military,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas

Before CLEMENT, GRAVES and OLDHAM, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

FILED: AUGUST 30, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50438

TINA NEVILLE,

Plaintiff – Appellant

v.

VICTORIA LIPNIC, Acting Chair of the U.S. Equal Employment Opportunity Commission; PATRICK M. SHANAHAN, ACTING SECRETARY, U.S. DEPARTMENT OF DEFENSE; HEATHER WILSON, Secretary of the Air Force; GENERAL JOSEPH L. LENGYEL, Chief, National Guard Bureau; JOHN F. NICHOLS, Major, Adjutant General-Texas Military,

Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING EN BANC

(Opinion June 28, 2019, 5 Cir.____, __F.3d _____)

Before CLEMENT, GRAVES, and OLDHAM, Circuit Judges.

PER CURIUM:

( ) Treating the Petition for Rehearing En Bane as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Bane (FED. R. APP. P. and 51 n CIR. R. 35), the Petition for Rehearing En Bane is DENIED.

( ) Treating the Petition for Rehearing En. Bane as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Bane is DENIED.

ENTERED FOR THE COURT:

/s/ James E. Graves, Jr.
UNITED STATES CIRCUIT JUDGE

FILED: MARCH 29, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TINA NEVILLE,	§	No. 5:16-CV-1213-DAE
	§	
Petitioner,	§	
	§	
vs.	§	
	§	
VICTORIA LIPNIC, in Her Official Capacity as Acting Chair of the United States Equal Employment Opportunity Commission, et al.,	§	
	§	
Respondents.	§	

ORDER: (1) GRANTING RESPONDENTS' MOTIONS TO DISMISS AND ALTERNATIVE MOTIONS FOR SUMMARY JUDGMENT (DKTS. ## 61, 63, 64); (2) DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND ALTERNATIVE MOTION FOR DIRECTED VERDICT (DKT. # 66); AND (3) INSTRUCTING THE CLERK'S OFFICE TO ENTER JUDGMENT AND TO CLOSE THIS CASE

Before the Court are four motions: (1) a Motion to Dismiss and Alternative Motion for Summary Judgment filed by Victoria Lipnic, in her official capacity as the Acting Chair of the United States Equal Employment Opportunity Commission (the

"EEOC") on March 6, 2017 (Dkt. # 64); (2) a Motion to Dismiss and Alternative Motion for Summary Judgment filed by Defendants Jim Mattis, Secretary of the United States Department of Defense (the "DoD"), Heather Wilson, Secretary of the United States Air Force (the "USAF"),[1] and General Joseph L. Lengyel, Chief of the National Guard Bureau (the "NGB") (collectively, "Federal Respondents"), on March 6, 2017 (Dkt. # 63); (3) a Motion to Dismiss and Alternative Motion for Summary Judgment filed by Defendant Major General John F. Nichols, Adjutant General of the Texas National Guard (the "TXNG" or "State Respondent"), on March 6, 2017 (Dkt. # 61); and (4) a Motion for Summary Judgment and Alternative Motion for Directed Verdict filed by Petitioner Tina Neville ("Petitioner" or "Neville") on March 7, 2017 (Dkt. # 66).

On November 20, 2017, this Court held a hearing on the parties' motions. At the hearing, Michael D.J. Eisenberg, Esq. represented Petitioner, Joseph C. Rodriguez, Esq. represented the EEOC, Joseph C. Rodriguez, Esq. represented Federal Respondents, and Matthew A. Deal, Esq. represented State Respondent. The motions are fully briefed and ripe for review.

After careful consideration of the memoranda and exhibits filed in support of and in opposition to the motions, as well as the arguments advanced at the hearing, the Court—for the reasons that follow—(1) **GRANTS** the EEOC's Motion to Dismiss and Alternative Motion for Summary Judgment (Dkt. #

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[1] Heather Wilson automatically substituted Lisa Disbrow as the respondent for the USAF pursuant to Federal Rule of Civil Procedure 25(d).

64); (2) **GRANTS** Federal Respondents' Motion to Dismiss and Alternative Motion for Summary Judgment (Dkt. # 63; (3) **GRANTS** State Respondent's Motion to Dismiss and Alternative Motion for Summary Judgment (Dkt. # 61); and (4) DENIES Neville's Motion for Summary Judgment and Alternative Motion for Directed Verdict (Dkt. # 66). The Clerk's Office is **INSTRUCTED** to **ENTER JUDGMENT** and to **CLOSE THIS CASE.**

BACKGROUND

I. Overview

Underlying these motions is an Amended Petition for Writ of Mandamus ("the Amended Writ Petition") filed by Neville on March 22, 2016, in the United States District Court for the District of Columbia. ("Am. Pet.," Dkt. # 32.) Broadly, Neville seeks a writ of mandamus compelling: (1) the EEOC to enforce a final decision on a Petition for Enforcement ("PFE") that it issued in July 2015; or (2) Federal Respondents and/or State Respondent to comply with the 2015 PFE. (Id.)

II. Factual Background

At all relevant times, Petitioner was employed as a Dual-Status National Guard Technician ("Dual-Status Technician") at Lackland Air Force Base in San Antonio, Texas. (Id. at 1–2.) Dual-Status Technicians are by statute "employee[s] of the . . . Department of the Air Force . . . and [civilian] employee[s] of the United States." 32 U.S.C. § 709(e).[2] As a condition to their civilian employment,

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[2] 2 Section 709 states in relevant part:

a Dual-Status Technician must become and remain a uniformed member of the National Guard. See 32 U.S.C. §§ 709(b), (d)–(e). According to Neville, if for any reason she lost her affiliation with the National Guard, within 30 days she would also lose her civilian position. (Am. Pet. at 2.) At the time the events giving rise to this action occurred, Neville served in a civilian capacity as a WG-12 Aircraft Mechanic and in a military capacity as an Air Force Master Sergeant ("MSgt.") in the 149th Fighter Wing at Lackland Air Force Base. (Id. at 3.)

In March 2006, Neville had a hysterectomy, at which point endometrial tissue was discovered and removed from some of her internal organs. (Id. at 4.) Over the subsequent year and as a result of complications from this surgery, she submitted documentation to her supervisor from her physicians that ordered her to work on light duty. (Id.) Despite

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> (a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection(b) of this section persons may be employed as technicians[.]
>
> (b) A technician employed under subsection (a) shall, while so employed . . . (1) be a member of the National Guard[.]
> (c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.
> (d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force[.]
> (e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned[.]

32 U.S.C. §§ 709(a)–(e).

being on "light duty," Neville alleges that her new supervisor continued to assign her to full duty work because "guys don't have hysterectomies." (Id.; see also "2013 OFO Decision," Dkt. # 65-7, Ex. F at 2.)

On June 25, 2007, despite her continued "light duty" status, Neville's supervisor—Master Sergeant ("MSgt") Pedro Soriano ("Soriano")—purportedly assigned her the full duty task of airplane recovery and tank reconfiguration. (Am. Pet. at 5.) While attempting to remove a 20-pound ladder leaning against an airplane, Neville maintains that she experienced a sudden sharp pain in her back and knee due to a lack of stomach muscle support from the surgery. (Id.) Afterwards, Neville took a medical leave of absence from June 25 or 26, 2007, to May 12, 2008. (Id.; see also 2013 OFO Decision at 2; "2011 ALJ Decision," Dkt. # 62-1 at 10, 33.)

On June 26, 2007, Neville received a performance evaluation from Soriano. (Am. Pet. at 5.) Neville alleges that, while the wording of this appraisal was nearly identical to her 2005-2006 evaluation where she received "Outstanding" ratings, on this appraisal she only received a rating of "Fully Successful." (Id.) Neville claims she questioned Soriano about this critique and, in response, Soriano purportedly replied that he would not give an "outstanding" rating to employees who he and "the guys did not respect." (Id.; see also 2013 OFO Decision at 2.)

Following her injury, Neville filed a claim with the Department of Labor's ("DOL") Office of Workers' Compensation Program ("OWCP") for a right knee and lower back sprain, which the DOL accepted. (2011

ALJ Decision at 10.) Neville claims that, although she received her regular base salary ("Continuation of Pay" or "COP") for the requisite 45 days after she was injured, she did not begin to receive OWCP benefits until January 2008. (Id.)

On May 12, 2008, Neville returned to work in a light duty status. (Id. at 33.) Although Neville received a light duty position upon returning to work, she believed the modified position exceeded her physical limitations. (Id.) Neville claims that, as a result, she stopped reporting to work on August 26, 2008. (Id.) On November 6, 2008, the OWCP terminated Neville's benefits on the grounds that she had abandoned suitable work offered by her employer without any justification. (Id.) In January 2009, Neville took disability retirement and retired from her military and civilian positions at the TXANG. (2011 ALJ Decision at 34.)

III. Administrative Procedural Background

A. 2011 ALJ Decision

On November 13, 2007, Neville filed an EEOC complaint alleging that the USAF and the NGB discriminated against her on the basis of sex (female) and disability (complications from hysterectomy surgery). (Am. Pet. at 5; see also "Discrim. Compl.," Dkt. # 62-3, Ex. 3.) On January 26, 2011, after several hearings, an EEOC Administrative Law Judge ("ALJ") issued a decision ("2011 ALJ Decision")[3] finding that Neville had established that she had been subjected to gender discrimination when: (1) on June 25, 2007, Soriano refused to honor her request for

[3] (Dkt. # 62-1, Ex. 1.)

light duty, resulting in knee and back injuries; and (2) on June 26, 2007, Soriano issued an annual performance appraisal rating of "Fully Successful" instead of "Outstanding" to Neville. (Am. Pet. at 5; see also 2011 ALJ Decision at 32.) Further, the ALJ found that Neville failed to establish that she had been subjected to disability discrimination. (2011 ALJ Decision at 24.) As a point of clarification, the ALJ noted that its finding that Neville failed to establish "disability [discrimination] was irrelevant to the issue of whether the [TXANG] discriminated against her when it failed to accommodate her request for light duty." (Id. at 24 n.14.)

In the 2011 ALJ Decision, as a result of the gender-based discrimination, the ALJ ordered relief in the form of: (1) back pay with interest and benefits; (2) non-pecuniary compensatory damages for the emotional and physical harm she suffered as a result of the gender discrimination; and (3) attorneys' fees and costs in the amount of $63,675.03. (Am. Pet. at 6.) The ALJ also ordered the NGB to amend Neville's 2006-2007 performance appraisal. (Id.) Finally, the ALJ ordered the NGB to provide EEO training, post a notice of discrimination for 12 months, and recommended that the NGB take disciplinary action against Soriano. (Id.)

B. 2013 OFO Decision

On August 1, 2013, the EEOC's Office of Federal Operations ("OFO") issued a final decision (the "2013 OFO Decision") regarding the appeal. (See generally 2013 OFO Decision; Scott v. Johanns, 409 F.3d 466, 468 (D.C. Cir. 2005) (noting that "OFO's decision amounts to a final disposition, triggering the

right to sue"); see also 29 C.F.R. § 1614.405. The 2013 OFO Decision, *inter alia*: (1) upheld the ALJ's decision finding of gender discrimination; (2) ordered an increased non-pecuniary award of $150,000 be paid to Neville within 60 days; (3) ordered the NGB to provide Neville back pay for the period between June 25, 2007, and August 26, 2008, as well as attorneys' fees and other remedial actions within 60 days; (4) ordered the NGB to amend Neville's 2006-2007 performance within 60 days; (5) ordered the NGB to provide Title VII training to all management officials at Lackland Air Force Base; (6) ordered the NGB to take disciplinary action against responsible management officials; and (7) ordered the NGB to post a notice of discrimination. (Am. Pet. at 3, 6, 8; see also 2013 OFO Decision at 11–14.)

The 2013 OFO Decision outlined Title VII jurisdiction regarding Dual-Status Technicians under both the EEOC's previous decisions and federal court decisions. (Am. Pet. at 6.) Specifically, the 2013 OFO Decision noted that the case-by-case determination of whether a personnel action arose during a Dual-Status Technician's military or civilian capacity "is a factual determination that must be made by the Commission for the purpose of deciding whether the Commission has jurisdiction in a particular case." (Id. at 6–7; see also 2013 OFO Decision at 5.) Per Neville, the 2013 OFO Decision then found that the record clearly established that gender discrimination occurred while she was in her federal civilian capacity during the workweek in her Aircraft Mechanic position, not during her weekend drill capacity in the National Guard. (Am. Pet. at 7.) Of relevance, the 2013 OFO Decision affirmed that Neville was on "light duty" for her civilian work and that she was

injured while maintaining aircraft in her civilian position. (Id.) According to the 2013 OFO Decision, both the discriminatory performance appraisal and the gender-based harassment occurred while she was working as a civilian mechanic, and her supervisor and co-workers committed the discrimination in their civilian capacities. (Id. at 8.) The 2013 OFO Decision states that "compliance with the Commission's corrective action is mandatory." (Id.; see also 2013 OFO Decision at 11.) The 2013 OFO Decision instructed the NGB that it had 60 days to comply with the decision.

On October 21, 2013, after the 60-day compliance deadline imposed by the 2013 OFO Decision, Major General John F. Nichols, Adjutant General of the Texas National Guard, sent Neville a letter indicating that, under his authority pursuant to 32 U.S.C. § 709, the EEOC does not have jurisdiction over Neville's complaint. (Am. Pet. at 8; see also "Maj. Gen. Letter," Dkt. # 62-7, Ex. 7.) His letter stated that the ALJ's and the OFO's determinations of jurisdiction were improper. (Am. Pet. at 8.) The letter stated that he would order a military investigation and render a decision as to Neville's complaint, as well as allow Neville an opportunity to respond, before he made "a final decision from which no further appeal is authorized." (Id. at 9.)

C. 2015 PFE Decision

Neville claims that, due to the USAF's, NGB's, and TXANG's "blatant disregard" of the 2013 OFO Decision, she filed a petition for enforcement ("PFE") of the order with the EEOC on December 17, 2013. (Id. (citing 29 C.F.R. § 1614.503(a)).) On July 2, 2015,

one day after Neville filed her original petition for writ of mandamus in federal court, the EEOC issued its 2015 PFE Decision, and for the third time, found that: (1) at the time of the events underlying Neville's claims, she was acting as a federal civilian employee under the protection of Title VII; (2) the TXANG is a federal executive agency for purposes of Title VII; and (4) the TXANG discriminated against Neville based on her gender. (Am. Pet. at 9; see also 2015 PFE Decision at 5–16.)

In addition to the requirements of the 2013 OFO Decision, the 2015 PFE Decision ordered the TXANG to: (1) pay Neville $150,000 in non-pecuniary compensatory damages, as well as $63,675.03 in attorneys' fees and costs, within 30 days; (2) compensate Neville for all back-pay, with interest and benefits, for the time between June 25, 2007 and August 26, 2008, within 30 days; (3) calculate and compensate Neville for any overtime; (4) amend Neville's 2006-2007 performance appraisal; and (7) provide at least 16 hours of in-person training to all management officials and employees at Lackland Air Force Base, 149th Fighter Wing, Flight Line Section, regarding Title VII responsibilities. (Am. Pet. at 9–10; see also 2015 PFE Decision at 13–14.) Further, the 2015 PFE Decision ordered the DoD, as head of the NGB and the USAF, to: (1) consider taking appropriate disciplinary measures against the responsible management officials and coworkers involved in harassing Neville; and (2) to post a notice of discrimination. (Id. at 9–10; see also 2015 PFE Decision at 13–14.)

Finally, the 2015 PFE Decision stated that, if the agencies failed to comply, then Neville "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." (2015 PFE Decision at 15 (citing 29 C.F.R. §§ 1614.407, 1614.408, 1614.503(g).) It is undisputed that there has been no compliance with the 2011 ALJ Decision, the 2013 OFO Decision, or the 2015 PFE Decision. (See generally Dkt. # 32.)

D. Respondents' Positions

The parties generally do not dispute Neville's characterization of the factual and procedural posture of the case. For example, State Respondent states, *inter alia*, that it "declined to implement" the 2013 OFO Decision on jurisdictional grounds based on its belief that Neville's writ petitions arise from her service as a Dual-Status Technician. (Dkt. # 61 at 8.) State Respondent notes that, while the OFO rejected these jurisdictional arguments and issued a decision ordering relief in favor of Neville, Maj. Gen. Nichols properly determined that, under his military authority, the allegations in Neville's Title VII complaint arose from military aspects of her daily duties as an F-16 crew chief. (Id.) Accordingly, State Respondent ordered a military investigation within the National Guard's Military Discrimination Complaint System, which was not appealable beyond that office and which found that Neville's discrimination claims were unsubstantiated. (Id. at 9.) State Respondent maintains that it also declined to comply with the subsequent 2015 PFE Decision for the same jurisdictional reasons. (Id.) Finally, State Respondent indicates that it notified the EEOC that it would not be enforcing the Decisions. (See, e.g., "TX-TAG Letter to EEOC," Dkt. # 62-8, Ex. 8).)

Similarly, Federal Respondents—the DoD, the USAF, and the NGB—indicate that they too declined to enforce the 2013 OFO Decision because Maj. Gen. Nichols of the Texas National Guard informed the agencies that he would not implement the Decisions. ("Fact App'x," Dkt. # 63-1 at 10–13; see also generally Maj. Gen. Letter; TX-TAG Letter to EEOC.) Federal Respondents state that they appealed the 2011 ALJ Decision to the EEOC on jurisdictional grounds, arguing that Neville's claims arose from her military position. (Fact App'x at 11.) Additionally, Federal Respondents argued that the relief ordered in the 2015 ALJ decision violated the Eleventh Amendment because the TXANG is an entity of the State of Texas protected by sovereign immunity. (Id.) Similarly, Federal Respondents indicate that they declined to enforce the 2015 PFE Decision for the same jurisdictional reasons, and because, in March 2015, Maj. Gen. Nichols' military investigation determined that Neville's allegations were "unsubstantiated" or were "[b]eyond the scope of the Air National Guard Discrimination Complaint System." (Id. at 13.)

In a slightly different vein, the EEOC argues in part that—although Neville had a clear right to file her Original Writ Petition in federal court because the EEOC undisputedly took more than 180 days to rule on her PFE—initiating the civil action for mandamus relief before the 2015 PFE Decision issue effectively terminated the EEOC administrative process. (Dkt. # 64 at 3.) While the EEOC issued the 2015 PFE Decision on July 2, 2015, one day after Neville filed the instant action, the EEOC maintains that "any alleged right [Neville] had to require that the EEOC enforce its orders ceased when she filed her lawsuit,"

and therefore, a writ of mandamus against the EEOC should not issue. (Id. at 3–6.)

IV. The Instant Action

A. Neville's Amended Writ Petition

On March 22, 2016, Neville filed an Amended Writ Petition in the United States District Court for the District of Columbia to enforce compliance with the directives in the 2013 OFO Decision and subsequent 2015 PFE Decision. (Dkt. # 32.) Neville seeks a writ of mandamus against the EEOC or, alternatively, Federal Respondents and State Respondent. (Id.)

Neville seeks a writ of mandamus against the EEOC, compelling the EEOC to: (1) enforce the 2013 OFO Decision and 2015 PFE Decision against Federal Respondents and State Respondent; (2) recalculate Neville's back pay, attorney's fees, costs, benefits, and pecuniary award with accrued interest (for Federal Respondents' and State Respondent's purported unreasonable delay); and (3) pay Neville's attorneys' fees and costs related to the instant action. (Am. Pet. at 17–18.)

In the alternative, Neville seeks a writ of mandamus against Federal Respondents and/or State Respondent, compelling them to: (1) respond to the 2015 PFE Decision, specifying how Federal Respondents and State Respondent will comply with the 2013 OFO Decision and 2015 PFE Decision; (2) recalculate Neville's back pay and benefits with accrued interest for their unreasonable delay; and (3) pay Neville's attorneys' fees and costs related to the instant action. (Id. at 18.)

B. Transfer from the District of Columbia

On November 23, 2016, the Honorable Ketanji Brown Jackson found that venue was improper in the District of Columbia. (Dkt. # 50.) Thus, on December 5, 2016, the entire case was transferred to this Court, where venue is proper and undisputed. (Dkt. # 51.) Due to the complexity of the case and the multiple parties in the action, on December 6, 2016, the Court dismissed all then-pending motions without prejudice to re-filing in the interests of efficient case management. (Dkt. # 53.)

C. Pending Motions

On March 6, 2017, the EEOC, Federal Respondents, and State Respondent (collectively, "Respondents") separately filed Motions to Dismiss Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and Alternative Motions for Summary Judgment. (Dkts. ## 61, 63, 64.) That same day, Neville filed a Motion for Summary Judgment and Alternative Motion for Directed Verdict. (Dkt. # 66.)

LEGAL STANDARD

I. Dismissal Under Rule 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure authorizes dismissal of a complaint for lack of subject matter jurisdiction. Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss., 143 F.3d 1006, 1010 (5th Cir. 1998); see Fed. R. Civ. P. 12(b)(1). Under Rule 12(b)(1), a Court may dismiss a suit "for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the

record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Freeman v. United States, 556 F.3d 326, 334 (5th Cir. 2009) (quoting Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981)). "Once a defendant files a motion to dismiss under Rule 12(b)(1) and challenges jurisdiction, the party invoking jurisdiction has the burden to establish subject matter jurisdiction." Arnold v. McHugh, No. 5:15-CV-210, 2016 WL 5661641, at *2 (E.D. Tex. Sept. 30, 2016) (citing Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980)). "Courts only grant motions to dismiss when it is clear the claimant can prove no set of facts in support of its claims that would entitle it to relief." Arnold, 2016 WL 5661641, at *2.

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001) (quoting Hitt v. City of Pasadena, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam)). Under Rule 12(b)(1), the party asserting jurisdiction has the burden of proof. Id.

II. Dismissal Under Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes dismissal of a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In determining whether a complaint should be dismissed under Rule 12(b)(6), the court limits its review to the contents of the complaint, documents incorporated into the complaint by reference, and matters properly subject

to judicial notice. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). When evaluating the complaint, "[t]he court accept[s] 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). The inquiry is whether all facts alleged, taken collectively instead of viewed in isolation, state a plausible claim for relief. Tellabs, 551 U.S. at 325.

DISCUSSION

For the reasons stated below, the Court does not have jurisdiction over Neville's mandamus claims against the EEOC, Federal Respondents, and State Respondent. The Court therefore grants the EEOC's, Federal Respondents', and State Respondent's Motions to Dismiss and Alternative Motions for Summary Judgment (Dkts. ## 61, 63, 64), and denies Neville's Motion for Summary Judgment and Alternative Motion for Directed Verdict (Dkt. # 66).

I. The EEOC's Motion to Dismiss and Alternative Motion for Summary Judgment (Dkt. # 64)

A. Mandamus Claim Against the EEOC

The Court first addresses the mandamus claim against the EEOC. As the writ is one of "the most potent weapons in the judicial arsenal," Will v. United States, 389 U.S. 90, 107 (1967), "[m]andamus may only issue when (1) the plaintiff has a clear right to relief, (2) the defendant has a clear duty to act, and (3) no other adequate remedy exists." Randall D. Wolcott, M.D., P.A. v. Sebelius, 635 F.3d 757, 768 (5th Cir. 2011). "Even when a court finds that all three elements are satisfied, the decision to grant or deny the writ remains within the court's discretion because of the extraordinary nature of the remedy." Id.

The EEOC argues, *inter alia*, that mandamus should not issue because the EEOC does not have a clear nondiscretionary duty to attempt to obtain an agency's compliance with a final EEOC decision after the employee has filed a civil action for enforcement in federal court. (Dkt. # 64.) The EEOC claims that when Neville filed this mandamus action, she effectively terminated the administrative process. (Id. at 3.) The EEOC asserts that, since any obligation the EEOC had to enforce its decision ceased when Neville filed the instant suit for mandamus, it does not have a clear duty to act. Thus, the EEOC contends that mandamus should not issue and Neville's mandamus claim against the EEOC should be dismissed. (Id. at 3–6.) The Court agrees.

A plaintiff who prevails at the EEOC level "may petition the [EEOC] for enforcement" of its decision, if the plaintiff believes "that the agency is not complying

with the decision." 29 C.F.R. § 1614.503. If the EEOC finds that the agency is not complying with the decision, the EEOC must attempt to obtain compliance. Id. Additionally, a plaintiff may either: (1) file a civil action in federal court to enforce compliance with the order before or after an administrative petition for enforcement, or (2) file a de novo civil action on the underlying discrimination claim. See 42 U.S.C. § 2000e-16(c); Massingill v. Nicholson, 496 F.3d 382, 384 (5th Cir. 2007); see also 29 C.F.R. §§ 1614.407, 1614.503(g).

The EEOC's obligation to "attempt to obtain compliance" with the 2013 OFO Decision and 2015 PFE Decision ceased when Neville filed this suit for mandamus. As noted *supra*, Plaintiff filed a petition for enforcement with the EEOC, but after the EEOC failed to issue a decision within 180 days of the date of the petition, Neville filed the instant suit for mandamus. (See Dkt. # 1.) The filing of a civil action, either for enforcement or on the underlying discrimination claim, terminates all EEOC action on the complaint, including any petition for enforcement. See 29 C.F.R. §§ 1614.107(a)(3), 1614.409, 1614.410; Walch v. Adjutant Gens. Dep't of Tex., 533 F.3d 289, 304 n.7 (5th Cir. 2008) ("A federal employee's election to pursue Title VII claims in federal court after the passage of 180 days with no final agency action usually mandates the dismissal of his EEO complaint, and precludes the EEOC from entertaining an appeal of that dismissal.").

Because the EEOC does not have a duty to obtain compliance with the 2013 OFO Decision or 2015 PFE Decision, Neville's mandamus claim against the EEOC fails. Thus, the Court GRANTS the

EEOC's Motion to Dismiss and Alternative Motion for Summary Judgment. (Dkt. # 64.) Since Plaintiff has failed to state a claim of mandamus against the EEOC, the Court need not address the EEOC's other arguments as to this claim.

B. Title VII Claim

Neville asserts for the first time in her response in opposition to the EEOC's motion that the EEOC deprived her of her rights under Title VII.[4] (Dkt.# 83 at 7–8.) To the extent that Neville is attempting to invoke Title VII as a jurisdictional basis for suing the EEOC, she cannot do so. The Fifth Circuit has repeatedly held that Title VII does not confer on a charging party a right of action against the EEOC. See, e.g., Newsome v. E.E.O.C., 301 F.3d 227, 232 (5th Cir. 2002); Gibson v. Miss. Pac. R.R., 579 F.2d 890, 891 (5th Cir.1978) ("Title VII . . .confers no right of action against the enforcement agency. Nothing done or omitted by EEOC affected [plaintiff's] rights. Their adverse determination could not have precluded, and in fact did not preclude, the present suit by [plaintiff]. The relief sought of further investigation or action by the agency would be meaningless."). To the extent Neville moves to amend her Amended Writ Petition to add a Title VII claim against the EEOC, her motion is DENIED. See Patterson v. Def. POW/MIA Accounting Agency, No. 5:17-CV-467-XR, 2017 WL 5586962, at *4 (W.D. Tex. Nov. 20, 2017) (finding plaintiff did not state a valid claim against defendants for an alleged violation of the Fifth Amendment where plaintiff

[4] 4 It is unclear whether Neville is attempting to proceed under Title VII or the Administrative Procedures Act (the "APA"). (See Dkt. # 83 at 7–9.) In applying a broad interpretation to the motion, this memo addresses the merits of both claims.

raised the new claim for the first time in their response to defendants' motion to dismiss); see also Davis v. DRRF Tr. 2015–1, No. 5:15-CV-880-RP, 2016 WL 8257126, at *3 (W.D. Tex. Jan. 6, 2016) (declining to consider plaintiff's claim not raised in original petition, but raised for first time in response to motion to dismiss); Hearn v. Deutsche Bank Nat'l Trust Co., No. 3:13-CV-2417-B, 2014 WL 4055473, at*4 (N.D. Tex. Aug. 15, 2014) ("[W]hen considering a motion to dismiss, the Court generally only relies on the allegations made in the pleadings, and does not base its decision on allegations raised for the first time in . . . the plaintiff's response."); Schieroni v. Deutsche Bank Nat'l Trust Co., No. H-10-CV-663, 2011 WL 3652194, at *6 (S.D. Tex. Aug. 18, 2011) ("[N]ew allegations cannot be raised in response to a motion to dismiss.").

C. APA Claim

In addition to the Title VII claim, Neville seeks to assert for the first time a claim under the APA. (See at Dkt. # 83 at 7–8 n.3.) In a footnote, Neville requests leave to filed a Second Amended Writ Petition, stating:

> [i]f necessary, [Neville], through Counsel, would ask for leave to amend her complaint to include a violation of the APA. The Respondents have been given ample notice pursuant to the [Federal Rules of Civil Procedure] in her [Original and Amended Writ Petition] that the undue delay is a violation of the APA. Moreover, all pleadings should be liberally construed.

(Id. at 8 n.3.)

Neville's request for leave to amend is denied for two reasons. First, Neville's request does not comply with Local Rule CV-7(b) ("Rule CV-7(b)"). Rule CV-7(b) provides:

> **(b) Leave to File.** When a motion for leave to file a pleading, motion, or other submission is required, an executed copy of the proposed pleading, motion, or other submission shall be filed as an exhibit to the motion for leave. Unless otherwise ordered, if the motion for leave is granted, the clerk shall promptly file the pleading, motion, or other submission. After leave is granted, any applicable time limits triggered by the pleading, motion, or other submission shall run from the filing of the pleading, motion, or other submission by the clerk or otherwise.

Local Rule CV-7. A request for leave to amend, embodied in a footnote, clearly does not comply with the mandates set forth in Local Rule CV-7.

In any event, Plaintiff did not demonstrate "good cause" to amend the scheduling order so that she could file an amended petition for writ of mandamus after the deadline for filing amended pleadings expired. The deadline to amend the pleadings was February 1, 2017. (Dkt. # 60.) Because the deadline for the parties to file amended pleadings has passed, Neville must file a motion for leave to file a Second Amended Writ Petition and show "good cause" for modifying the scheduling order under Federal Rule of Civil Procedure Rule 16. See Fed. R. Civ. P. 16(b)(4) (stating that a petitioner must show "good cause" to modify a scheduling order); S&W

Enter., L.L.C. v. S. Trust Bank of Ala., NA, 315 F.3d 533, 536 (5th Cir. 2003) ("Rule 16(b) governs amendment of pleadings after a scheduling order deadline has expired.

Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave."). "[T]he four factors relevant to good cause are: (1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." Rios v. City of Conroe, 674 F. App'x 366, 368 (5th Cir. 2016). Neville has failed to satisfy any of the four factors. Neville does not explain why she failed to timely move for leave to amend, the importance of the amendment, or even consider the potential prejudice in allowing the amendment. (See Dkt. # 60.) Accordingly, Neville's request for leave to file a Second Amended Writ Petition is **DENIED**.

II. Federal Respondents' and State Respondent's Motions to Dismiss and Alternative Motions for Summary Judgment (Dkts. ## 63, 61)

The Court now turns to the mandamus claims against Federal Respondents and State Respondent. Federal Respondents move to dismiss the mandamus claims under the Feres doctrine of intra-military immunity. (Dkt. # 63 at 14–18.) The Feres doctrine of intra-military immunity precludes members of the armed forces of the United States from pursuing claims against the military or United States for injuries that arose out of or in the course of activity

incident to military service. Feres v. United States, 340 U.S. 135, 146 (1950). Federal Respondents claim that the mandamus claims are barred under the Feres doctrine because Neville's claims arose out of or in the course of activity incident to her military service. (See Dkt. # 63 at 6.) Neville, of course, disagrees. Neville claims that the Feres doctrine is not applicable because the Title VII claims arose from her position as a federal civilian employee. (Dkt. # 66.) In support, Neville notes that, in the 2013 OFO Decision, the ALJ found:

> nothing in the record that . . . indicate[d] any of the discrimination occurred during [Neville's] weekend work in her military capacity. [Neville] was assigned full duty assignments instead of light duty assignments while she was on the flight line attending to returning aircraft in her civilian [Dual-Status Technician] position, and she was injured while attending to returning aircraft in her civil [Dual-Status Technician] position. The discriminatory performance evaluation was based on her civilian [Dual-Status Technician] duties. Further, the gender-based offensive and discriminatory comments and demeaning practical jokes occurred while [Neville] work[ed] as a civilian [Dual-Status Technician]. Finally, [Neville's] supervisor and co-workers committed the discrimination while . . . in their civilian capacities.

(Id. at 14–15; see 2013 OFO Decision at 4–5.)

For the reasons stated below, the Court finds that the Feres doctrine of intra-military immunity

bars Neville's claims against Federal Respondents. While State Respondent did not raise the Feres doctrine as an independent basis for dismissal, the Court also finds that the mandamus claim against State Respondent is barred under Feres. See Millonzi v. Adjutant Gens. Dep't of Tex., No. 1:17-CV-488-LY, 2018 WL 283754, at *4 n.5 (W.D. Tex. Jan. 2, 2018) (finding Title VII claim brought against the Adjutant General's Department of Texas non-justiciable under the Feres doctrine); see also Oliver v. Wong, 158 F. Supp. 3d 1036, 1042 (D. Haw. 2016) ("The Feres doctrine is equally applicable to the [Texas] Air National Guard and its Adjutant General." (citing Crout v. Washington, 149 F. App'x 601, 603 (9th Cir. 2005)); Uhl v. Swanstrom, 79 F.3d 751 (8th Cir. 1996) (applying Feres bar to suit by National Guardsman against his commanding state officer, the Adjutant General of the Iowa Air National Guard, and the Iowa Air National Guard). Because the Feres doctrine operates as a restraint on the Court's subject matter jurisdiction, Neville's claims against Federal Respondents and State Respondent are dismissed. See Morris v. Thompson, 852 F.3d 416, 419 (5th Cir. 2017) (finding that the district court should have dismissed plaintiff's Title VII for lack of subject matter jurisdiction because the claim was "non-justiciable under Feres and this court's precedents").

The Feres doctrine has been broadly "construed to immunize the United States and members of the military from any suit that might intrude upon military affairs, second-guess military decisions, or impair military discipline." Davidson v. United States, 647 F. App'x 289, 291 (5th Cir. 2016); see Walch, 533 F.3d at 296 (explaining that the Feres doctrine is "premised on the disruptive nature of

judicial second-guessing of military decisions"). The Supreme Court has explained that, "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters." Chappell v. Wallace, 462 U.S. 296, 302 (1983) (quoting Orloff v. Willouqhby, 345 U.S. 83, 93–94 (1953)). In that regard, the Supreme Court has counseled that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between . . . military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment." Chappell, 462 U.S.at 302. "This basic principle inheres in both Supreme Court and Fifth Circuit decisions involving suits by members of the military." Cantu v. Nichols, No. H-12-CV-0302, 2012 WL 4962115, at *2 (S.D. Tex. Oct. 16, 2012).

Although Feres dealt with suits under the Federal Torts Claims Act (the "FTCA"), the Feres doctrine has been extended to encompass suits brought by military members under Title VII. See Brown v. United States, 227 F.3d 295, 299 (5th Cir. 2000). In the Fifth Circuit, the Feres doctrine is broadly construed to include to Title VII claims brought by Dual-Status Technicians for injuries arising out of or in the course of activity incident to their service in the National Guard. See Schoemer v. United States, 59 F.3d 26, 29 (5th Cir. 1995) (noting that "Feres applies both to reservists and National Guardsmen."); see also Filer v. Donley, 690 F.3d 643, 648 (5th Cir. 2012) (finding that the Feres doctrine barred Air Reserve Technician's Title VII hostile work

environment claim); Millonzi, 2018 WL 283754, at *4 (recommending that Dual-Status Technician's Title VII claims be dismissed under Feres).

Generally, the Feres doctrine applies if: (1) the person was a member of the armed forces of the United States at the time he or she sustained the injury; and (2) the injury arose out of or in the course of an activity incident to military service. Feres, 340 U.S. at 146. The primary issue in this case is whether Neville's claims "arose out of or in the course of an activity incident to military service." (Dkts. ## 63, 66.) "The Supreme Court has said that an injury occurs 'incident to military service' when it occurs because of a plaintiff's 'military relationship with the Government.'" Fileccia v. Caddo Par. Sch. Bd., No. 15-CV-2333, 2017 WL 2350451, at *3 (W.D. La. May 30, 2017) (quoting United States v. Johnson, 481 U.S. 681, 689 (1987)).

Neville claims that the Feres doctrine is not applicable because the Title VII claims arose from her position as a federal civilian employee. (Dkt.# 66.) Federal Respondents dispute that the Title VII claims arose purely from Neville's civilian position but argue that, even if they did, the Feres doctrine bars her mandamus claims. The Court agrees.

The fact that the incidents occurred while Neville was nominally serving as a federal civilian employee does not preclude application of the Feres doctrine. "[A] claim may be barred under the intramilitary immunity doctrine if the action brings into question command or personnel decisions by military personnel, notwithstanding the fact that the plaintiff is a civilian." McGowan v. Scoggins, 890 F.2d

128, 138 (9th Cir. 1989); see Millonzi, 2018 WL 283754, at *4 ("even actions taken during the work week, seemingly in the civilian sphere, may still be decisions that affect the military hierarchy such that they are subject to Feres.").

As a general rule, the Feres doctrine applies when a legal action would require a civilian court to examine internal military decisions regarding management, discipline, supervision, and control of members of the armed forces. United States v. Shearer, 473 U.S. 52, 57 (1985); see Cantu, 2012 WL 4962115, at *2 (explaining that the Feres doctrine is designed in large measure prevent civilian courts from interfering with military discipline and decision-making). Under Feres, "a court may not reconsider what a claimant's superiors did in the name of personnel management—demotions, determining performance level, reassignments to different jobs—because such decisions are integral to the military structure." Filer, 690 F.3d at 648. If it is too difficult to determine whether a claim arise "incident to service," the Fifth Circuit considers: (1) the serviceman's duty status; (2) the site of his or her injury; and (3) the activity he or she was performing. Walch, 533 F.3d at 297; Schoemer, 59 F.3d at 28; see also Cantu, 2012 WL 4962115, at *3. In determining whether the Feres doctrine applies, "[i]t is the military environment, not the nature of the claim, that is controlling." Filer, 690 F.3d at 649.

The events giving rise to Neville's claims occurred on Lackland Air Force Base while she worked as a Dual-Status Technician. (See 2013 OFO Decision; 2015 PFE Decision.) While working in both her civilian and military capacities as a Dual-Status

Technician, Neville performed the same mechanic tasks—servicing F-16 fighter jets—which is military in nature and integral to the military mission. (Dkt. # 63 at 12.) The parties dispute whether Neville's duty status and activities are alone sufficient to demonstrate that the discrimination occurred "incident to military service." The Court, however, finds that neither of those two factors override the most important consideration in the Feres analysis, which is that courts should not interfere into matters affecting military affairs and personnel management decisions. See Filer v. Donley, 690 F.3d 643, 649 (5th Cir. 2012).

The Feres doctrine bars Neville's claims against Federal Respondents and State Respondent because adjudicating Neville's claims would require the Court to delve into questions of military decision-making. As noted *supra*, Neville seeks, *inter alia*, an order from this Court requiring Federal Respondents and/or State Respondent to comply with the 2015 PFE Decision. (Dkt. # 32.) If Neville's mandamus claims against Federal Respondents and State Respondent are successful, this Court would have to issue an order compelling Federal Respondents or State Respondent to: (1) revise Neville's 2006-2007 performance appraisal; (2) provide at least 16 hours of in-person training to all management officials and employees in the 149th Fighter Wing at Lackland Air Force Base, regarding their responsibilities with respect to Title VII with special emphasis on preventing and responding to harassment and their responsibilities under the federal sector EEO process; (3) take appropriate disciplinary action against the responsible management officials and coworkers involved in the harassment of Neville; (4) post a notice

of discrimination; and (5) restore Neville's benefits, including Neville's seniority, sick and annual leave, health and life insurance, any in-grade step(s) and/or promotion(s) to which she would have been entitled. (Dkt. # 65-7, Ex. F; Dkt. # 82 at 15.)

Based on the relief Neville seeks, it is clear that a decision in Neville's favor would implicate an intrusion into the very questions of military hierarchy that Feres was designed to avoid—namely, inappropriate judicial encroachment and continuing judicial surveillance over the management, discipline, supervision, and control of members of the armed forces. See Gilligan v. Morgan, 413 U.S. 1, 7–8 (1973) (finding controversy non-justiciable because the relief sought required initial judicial review and continuing judicial surveillance over the training, weaponry, and orders of the National Guard); Shearer, 473 U.S. at 59 (characterizing plaintiff's claims as "the type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness").

Because the relief Neville seeks would require the Court to conduct a highly intrusive inquiry into military affairs and personnel decisions that are integral to the military structure, it is clear that a decision in this case in favor of Neville would clearly implicate "the admonition in Walch that courts should not interfere with the military's decisions about personnel management." Filer, 690 F.3d at 649 (5th Cir. 2012) (finding plaintiff's Title VII hostile work environment claim barred under Feres because judicial examination into personnel decisions would be disruptive to the military); see Millonzi, 2018 WL 283754, at*4 n.5 (finding Title VII claim non-

justiciable, in part, because the court would be forced to reinstate the plaintiff to her civilian position and military position in the National Guard); see also Farmer v. Mabus, 940 F.2d 921, 924 (5th Cir. 1991)("Suits for injunctive relief, like those for monetary damages, must be carefully regulated in order to prevent intrusion of the courts into the military structure.").

Based on the policies underlying Feres, the Court is unable to conclude that military affairs will be any less affected by a mandamus suit than by a claim for damages. Because Neville seeks relief that would constitute inappropriate judicial intrusion into matters affecting military affairs and personnel management decisions, the Court concludes that Neville's mandamus claims against Federal Respondents are non-justiciable. See Gilligan v. Morgan, 413 U.S. 1, 7–8 (1973) (finding controversy nonjusticiable because the relief sought required initial judicial review and continuing judicial surveillance over the training, weaponry, and orders of the National Guard); Shearer, 473 U.S. at 59 (characterizing plaintiff's claims as "the type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness"); Millonzi, 2018 WL 283754, at *3; see also Wa tson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1009 (8th Cir.1989) (finding Feres doctrine barred claims for injunctive relief where the plaintiff sought to enjoin the putatively unlawful personnel decisions made by superior officers and the Secretary of Defense); Daniel v. Hagel, 17 F. Supp. 3d 680, 689 (E.D. Mich. 2014) ("As the EEOC's order here was tied to one discrete personnel matter and was collateral to monetary

relief, like Plaintiff's claim for damages, Plaintiff's claim for injunctive relief is non-justiciable.").

CONCLUSION

For the reasons stated, the Court GRANTS the EEOC's, Federal Respondents', and State Respondent's Motions to Dismiss and Alternative Motions for Summary Judgment. (Dkts. ## 61, 63, 64.) In light of the foregoing, the Court DENIES Neville's Motion for Summary Judgment and Alternative Motion for Directed Verdict. (Dkt. # 66.) The Clerk's office is **INSTRUCTED** to **ENTER JUDGMENT** and to **CLOSE THIS CASE**.

IT IS SO ORDERED.

DATED: San Antonio, Texas, March 29, 2018.

/s/ David Alan Ezra
David Alan Ezra
Senior United States
District Judge

29 CFR 1614.103

This document is current through the November 20, 2019 issue of the Federal Register. Title 3 is current through October 8, 2019

Code of Federal Regulations > TITLE 29 – LABOR > SUBTITLE B – REGULATIONS RELATING TO LABOR > CHAPTER XIV – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION > PART 1614 – FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY > SUBPART A – AGENCY PROGRAM TO PROMOTE EQUAL EMPLOYMENT OPPORTUNITY

§ 1614.103 Complaints of discrimination covered by this part.

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of disability), the Equal Pay Act (sex-based wage discrimination), or GINA (discrimination on the basis of genetic information) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102;

(2) Executive agencies as defined in 5 U.S.C. 105;

(3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority;

(4) All units of the judicial branch of the Federal government having positions in the competitive service, except for complaints under the Rehabilitation Act;

(5) The National Oceanic and Atmospheric Administration Commissioned Corps;

(6) The Government Printing Office except for complaints under the Rehabilitation Act; and

(7) The Smithsonian Institution.

(c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

(d) This part does not apply to:

(1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section:

(2) Employees of the General Accounting Office;

(3) Employees of the Library of Congress;

(4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or

(5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).

29 CFR 1614.107

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§ 1614.107 Dismissals of complaints.

(a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:

(1) That fails to state a claim under § 1614.103 or
§ 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(2) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(4) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or §1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory, unless the complaint alleges that the proposal or preliminary step is retaliatory;

(6) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(7) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not

address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available;

(8) That alleges dissatisfaction with the processing of a previously filed complaint; or

(9) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination. A clear pattern of misuse of the EEO process requires:

(i) Evidence of multiple complaint filings; and

(ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or

(iii) Evidence of circumventing other administrative processes, retaliating against the agency's inhouse administrative processes or overburdening the EEO complaint system.

(b) Where the agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in paragraphs (a)(1) through (9) of this section, the agency shall notify the complainant in writing of its determination, the rationale for that

determination and that those claims will not be investigated, and shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

29 CFR 1614.405

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§ 1614.405 Decisions on appeals.

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§ 1614.107, 1614.403(c) and 1614.409. The decision on an appeal from an agency's final action shall be based on a de novo review, except that the review of the factual findings in a decision by an administrative judge issued pursuant to § 1614.109(i) shall be based on a substantial evidence standard of review. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her or her civil action rights, and be transmitted to the complainant and the agency by first class mail.

(b) The Office of Federal Operations, on behalf of the Commission, shall issue decisions on appeals of decisions to accept or dismiss a class complaint issued pursuant to § 1614.204(d)(7) within 90 days of receipt of the appeal.

(c)A decision issued under paragraph (a) of this section is final within the meaning of § 1614.407 unless a timely request for reconsideration is filed by a party to the case. A party may request reconsideration within 30 days of receipt of a decision of the Commission, which the Commission in its discretion may grant, if the party demonstrates that:

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

29 CFR 1614.408

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§ 1614.408 Civil action: Equal Pay Act.

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

29 CFR 1614.503

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§ 1614.503 Enforcement of final Commission decisions.

(a) Petition for enforcement. A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) Compliance. On behalf of the Commission, the Office of Federal Operations shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) Clarification. On behalf of the Commission, the Office of Federal Operations may, on its own motion

or in response to a petition for enforcement or in connection with a timely request for reconsideration, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) Referral to the Commission. Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

(e) Commission notice to show cause. The Commission may issue a notice to the head of any federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(f) Certification to the Office of Special Counsel. Where appropriate and pursuant to the terms of a memorandum of understanding, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(g) Notification to complainant of completion of administrative efforts. Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the

decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 et seq., and the mandamus statute, 28 U.S.C. 1361, or to commence de novo proceedings pursuant to the appropriate statutes.

32 USCS § 709

Current through Public Law 116-68, approved November 8, 2019.

United States Code Service > TITLE 32. NATIONAL GUARD (§§ 101 — 908) > CHAPTER 7. Service, Supply, and Procurement (§§ 701 — 717)

§ 709. Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in—

(1)the organizing, administering, instructing, or training of the National Guard;

(2)the maintenance and repair of supplies issued to the National Guard or the armed forces; and

(3)the performance of the following additional duties to the extent that the performance of those duties does not interfere with the performance of the duties described by paragraphs (1) and (2):

(A) Support of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense.

(B) Support of Federal training operations or Federal training missions assigned in whole or in part to the technician's unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of—

(i)active-duty members of the armed forces;

(ii)members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10 [10 USCS § 10216(a)].

(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.

(c)

(1)A person may be employed under subsection (a) as a non-dual status technician (as defined by

section 10217 of title 10 [10 USCS § 10217]) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10 [10 USCS § 10217(c)(2)].

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title [32 USCS § 314] to employ and administer the technicians authorized by this section.

42 USCS § 2000e-16

Current through Public Law 116-68, approved November 8, 2019.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 161) > CHAPTER 21. CIVIL RIGHTS (§§ 1981 — 2000h-6) > EQUAL EMPLOYMENT OPPORTUNITIES (§§2000e — 2000e-17)

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage. All 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, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office [Government Publishing Office], the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free

from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

> **(1)**be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2)be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3)consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1)provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2)a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit

to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant. Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 [42 USCS § 2000e note] or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS § 2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions. The provisions of

section 706(f) through (k) [42 USCS §§ 2000e-5(f)–(k)], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[.]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 [42 USCS § 2000e note] relating to equal employment opportunity in the Federal Government.

(f) Application of Lilly Ledbetter Fair Pay Act. Section 706(e)(3) [42 USCS § 2000e-5(e)(3)] shall apply to complaints of discrimination in compensation under this section.

29 CFR 1614.405

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§ 1614.405 Decisions on appeals.

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(b) The Office of Federal Operations, on behalf of the Commission, shall issue decisions on appeals of decisions to accept or dismiss a class complaint issued pursuant to § 1614.204(d)(7) within 90 days of receipt of the appeal.

(c)A decision issued under paragraph (a) of this section is final within the meaning of § 1614.407 unless a timely request for reconsideration is filed by a party to the case. A party may request reconsideration within 30 days of receipt of a decision of the Commission, which the Commission in its discretion may grant, if the party demonstrates that:

(1) The appellate decision involved a clearly erroneous interpretation of material fact or law; or

(2) The decision will have a substantial impact on the policies, practices or operations of the agency.