

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES L. WILLIS : CIVIL ACTION  
: :  
v. : :  
: :  
JAMES ROCHE, SECRETARY, : NO. 05-113  
DEPT. OF THE AIR FORCE :

**MEMORANDUM**

**Padova, J**

**August 8, 2005**

Plaintiff Charles Willis is an Air Force Reserve Technician assigned to the Willow Grove Air Reserve Station in Willow Grove, Pennsylvania. He has brought this action alleging race and gender discrimination against his employer, the United States Air Force, pursuant to Title VII, 42 U.S.C. § 2000e-16. Defendant has moved to dismiss this action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). For the reasons which follow, the Motion is granted.

**I. BACKGROUND**

The Complaint alleges the following facts. Plaintiff is a federal civilian employee of the United States Air Force assigned to the Willow Grove Air Reserve Station ("Willow Grove"). (Compl. ¶ 5.) Plaintiff has been employed at Willow Grove since January 6, 1996. (Id. ¶ 6.) Plaintiff was initially employed as an Air Reserve Technician and the Chief, Relocation, Employment and Training, a subdivision of the military personnel flight. (Id. ¶

7.) Plaintiff is required to be a member of the military reserves to retain his job. (Id. ¶ 8.) Plaintiff's supervisors are both in the active duty military. (Id. ¶¶ 9-10.) His first level supervisor is Lt. Col. Uber, his second level supervisor is Lt. Col. Kay B. Long. (Id.) As Chief, Relocation, Employment and Training, Plaintiff was a GS-11 and supervised six people. (Id. ¶ 11.) He contends that Lt. Col. Uber subjected him to racial and or race/gender discrimination and harassment as follows:

1. On April 29, 1996, Uber asked Plaintiff to give him personal information which he had no right to request and which he did not request from white employees or black/female employees. (Id. ¶ 12.)
2. Starting in September 1996, Uber undermined Plaintiff's authority by dealing directly with Plaintiff's subordinate employees, giving them work directly, and giving them work outside of their realm of responsibilities without telling Plaintiff. Uber did not do this to white or black/female supervisors. (Id. ¶ 13.)
3. In December 1996, Uber removed Plaintiff as the Test Control Officer ("TCO") for Career Development Courses in connection with an investigation into the compromising of test materials. (Id. ¶ 14.)

4. In February 1997, Uber began to pry into Plaintiff's faxing activities by asking others to help trace faxes sent by Plaintiff. Uber did not do this to anyone else. (Id. ¶ 15.)
5. On April 18, 1997, shortly after Plaintiff complained about his treatment to the NAACP, Uber questioned Plaintiff about his attainment of the 5 skill level and accused him of fraudulently obtaining that skill level. Uber told Plaintiff to take personal leave and track down co-workers and supervisors to supply evidence that he had attained that skill level. Uber did not request the same type of information from white or black/female employees. Plaintiff believes that this was a reprisal for Plaintiff's visit to the NAACP. (Id. ¶¶ 16-17.)
6. On May 7, 1997, after receiving a letter from the NAACP advising him of Plaintiff's claim of racial harassment, Uber removed Plaintiff as TCO for the personnel courses, even though there was no evidence that Plaintiff had participated in, or known about, the compromise of test materials. (Id. ¶¶ 18-19.)
7. In early May 1997, Plaintiff scheduled an EEO appointment for May 22, 1997 on base. He informed Uber that he had an appointment that day, but did not tell him where he was going. Uber telephoned the EEO office while

Plaintiff was there and asked if Plaintiff was there.  
(Id. ¶ 20.)

8. During the week of May 19, 1997, Uber required Plaintiff to attend an unnecessary course. (Id. ¶ 21.)
9. On June 7, 1997, Uber unfairly issued Plaintiff a letter of reprimand which contained distorted and inaccurate information and denied Plaintiff representation at the meeting at which he issued the letter of reprimand. (Id. ¶ 22.)
10. On June 10, 1997, Uber placed an unfavorable information file about Plaintiff in the computerized military personnel system. (Id. ¶ 23.)
11. On June 27, 1997, Uber placed a statement of counseling for improper casualty reporting procedures in Plaintiff's civilian personnel file. (Id. ¶ 24.)
12. On August 9, 1997, Uber informed Plaintiff that he was being made a working supervisor and was being removed from his office and placed with his subordinates. (Id. ¶ 25.)

On August 1, 1997, Plaintiff filed a formal discrimination complaint with his agency. (Id. ¶ 27.) Plaintiff filed a second discrimination complaint on December 12, 1997. (Id. ¶ 28.) The cases were consolidated and Plaintiff requested an administrative

hearing before an EEOC administrative judge. (Id. ¶ 29-30.) The administrative judge issued a decision of no discrimination. (Id. ¶ 31.) The agency issued a final order in which it determined that it would fully implement the decision of the administrative law judge. (Id. ¶ 32.) This action is an appeal of that order. (Id. ¶ 33.)

## **II. LEGAL STANDARD**

Defendant has moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The party asserting that jurisdiction is proper bears the burden of establishing that jurisdiction exists. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377-78 (1994); Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). Since the Government has made a factual challenge to the Court's subject matter jurisdiction over Plaintiff's Title VII claim, the Court is not "confined to the allegations in the complaint . . . and can look beyond the pleadings to decide factual matters relating to jurisdiction." Cestonara v. United States, 211 F.3d 749, 752 (3d Cir. 2000).

## **III. DISCUSSION**

Defendant contends that the Complaint must be dismissed because it is immune from suit by a person in Plaintiff's position. "It is a 'well-settled principle that the federal government is

immune from suit save as it consents to be sued.'" Antol v. Perry, 82 F.3d 1291, 1296 (3d Cir. 1996) (quoting FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 839 (3d Cir. 1994) (in banc)). Federal agencies and instrumentalities, as well as federal employees acting within their authority, are similarly immune from suit. Federal Housing Admin. v. Burr, 309 U.S. 242, 244 (1940). Congress's waiver of sovereign immunity must be explicit and unequivocally expressed in statutory text. United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992). Where a suit has not been consented to by the United States, dismissal of the action is required. See United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction.") The issue, therefore, is whether the United States has waived its sovereign immunity to be sued pursuant to Title VII by a person in Plaintiff's position.

Title VII provides that employees or applicants for employment in military departments, as defined in 5 U.S.C. § 102, "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16. Military departments are defined in 5 U.S.C. § 102 as the Department of the Army, the Department of the Air Force, and the Department of the Navy. 5 U.S.C. § 102. The EEOC has determined that this provision of Title VII does not apply to active duty members of the military

but only to suits by civilian employees of the military departments. Hodge v. Dalton, 107 F.3d 705, 707 (9th Cir. 1997) (“[T]he EEOC interprets Title VII as not applying to complaints of discrimination by active-duty service members.”).

The Courts of Appeals that have addressed the issue have determined that active duty military personnel may not file suit against their military employers pursuant to Title VII. In reaching this conclusion, these courts have applied the doctrine of intra-military immunity first articulated in Feres v. United States, 340 U.S. 135 (1950) and expanded in Chappell v. Wallace, 462 U.S. 296 (1983). In Feres, the Supreme Court held that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” Feres, 340 U.S. at 146. This holding was based upon “the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . .” United States v. Brown, 348 U.S. 110, 112 (1954) (citing Feres, 340 U.S. at 141-143).

In Chappell, the Supreme Court extended this doctrine to constitutional violations, holding that “enlisted military personnel may not maintain a suit to recover damages from a

superior officer for alleged constitutional violations." Chappell, 462 U.S. at 304. The Supreme Court based its holding on the special status of the military, which has its own system of justice; the special nature of military life, which requires "unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel[;]" and the fact that Congress had not specifically "provided a damage remedy for claims by military personnel that constitutional rights have been violated by superior officers." Id. at 303-04 (internal citations omitted).

Several Circuit Courts of Appeal have extended the reasoning of Chappell to hold that uniformed military personnel may not bring claims of employment discrimination pursuant to Title VII:

Consistent with the reasoning in Chappell, Courts of Appeals have consistently refused to extend statutory remedies available to civilians to uniformed members of the armed forces absent a clear direction from Congress to do so. Thus, uniformed members of the armed forces have no remedy under Title VII of the Civil Rights Act of 1964. See, e.g., Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987); Roper v. Department of the Army, 832 F.2d 247 (2d Cir. 1987); Gonzalez v. Department of the Army, 718 F.2d 929 (9th Cir. 1983); Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978).

Coffman v. State of Michigan, 120 F.3d 57, 59 (6th Cir. 1997); see also Baldwin v. U.S. Army, 223 F.3d 100, 101 (2d Cir. 2000) ("our own circuit has made clear that uniformed members of the armed services may not assert claims under either Title VII or the ADEA

because there is no indication that Congress intended to extend the remedies afforded by those statutes to uniformed members of the military.") (citations omitted).

The Government argues that the intra-military immunity doctrine bars Plaintiff's Title VII claim because he is an Air Reserve Technician ("ART") which is a military/civilian hybrid position having the effect of giving the employee dual status as a "military technician."<sup>1</sup> As a condition of employment, military technicians are required to be members of the reserve units in which they are employed or that they support. See 10 U.S.C. 10216(d)<sup>2</sup>. ARTs are defined as:

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<sup>1</sup>The Position "military technician" is defined in 10 U.S.C. § 10216(a):

(a) In general. - (1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who -

- (A) is employed under section 3101 of title 5 or section 709(b) of title 32;
- (B) is required as a condition of that employment to maintain membership in the Selected Reserve;
- (C) is assigned to a civilian position as a technician in the administration and training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

10 U.S.C. § 10216(a)

<sup>2</sup> Title 10, United States Code, Section 10216(d) provides as follows:

**(d) Unit Membership requirement.** - (1) Unless specifically exempted by law, each individual who is hired as a military technician (dual status) after December 1, 1995, shall be required as a condition of that employment to maintain membership in -

- (A)** the unit of the Selected Reserve by which the individual is employed as a military technician; or

Full time civilian employees who are also members of the Air Force unit in which they are employed. In addition to their civilian assignments, they are assigned to equivalent positions in the Reserve organization with a Reserve military rank or grade. ARTs must maintain active membership in their Reserve unit of assignment and satisfactory participation in order to keep their ART position.

(Def. Ex. 12 at 5.) The role of ARTs is to provide:

stable, continuous full-time management, administration, and training of the Ready Reserve and [oversee] the transition from a peacetime to a wartime or national emergency situation to ensure mobilization readiness is maintained. ARTs train reservists, provide continuity within the Reserve unit of assignment, and support the unit's gaining major command.

(Id. at 1.)

The Government contends that the military aspects of Plaintiff's position as an ART are so intertwined with the civilian aspects that the Government is immune from suit in this case. The United States Court of Appeals for the Third Circuit has not addressed this issue with regard to discrimination claims brought pursuant to Title VII. However, in Jorden v. Nat'l Guard Bureau, 799 F.2d 99 (3d Cir. 1986), the Third Circuit examined whether military technicians employed by the National Guard may assert

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(B) a unit of the Selected Reserve that the individual is employed as a military technician to support.  
10 U.S.C. § 10216(d).

claims for discrimination pursuant to 42 U.S.C. § 1983. Jorden brought claims for damages pursuant to §§ 1983, 1985, and 1986 against his military supervisor after he was dismissed from his military position for refusing an order to report for "special training." Id. at 101-02. The Third Circuit found that the Supreme Court's ruling in Chappell extends to bar constitutional claims for monetary damages brought by military technicians against military officers pursuant to § 1983. Id. at 105-07. The Third Circuit based its opinion on Chappell and Butz v. Economou, 428 U.S. 478 (1978), "the former disallows a Bivens claim against federal military officials and the latter holding that Bivens claims and § 1983 suits must be treated the same for purposes of immunity." Id. at 106 (footnote omitted). The Third Circuit also noted that, in Chappell, "the Supreme Court was laying down a general rule barring damages actions by military personnel against superior officers for constitutional violations . . . ." Id. at 108. The Third Circuit, however, specifically chose not to address the extension of this holding to the availability of a damages action brought by a military technician who has been "dismissed from his civilian employment for circumstances arising wholly in the civilian context." Id. at 108 n.12.

The Courts of Appeal that have addressed the issue have found that military/civilian technicians may not bring claims pursuant to Title VII which arise from the military aspects of their

employment. The Courts of Appeal for both the Ninth and Second Circuits have found that military technicians may not bring Title VII claims arising from the military aspects of their employment, and utilize a fact specific inquiry into the nature of the plaintiff's discrimination claims to determine whether the Government is immune from a military technician's Title VII claim. The Ninth Circuit, in Mier v. Owens, 57 F.3d 747, 749 (9th Cir. 1995) noted that "[c]ourts regularly decline to hear lawsuits involving personnel actions integrally related to the military's unique structure." Id. at 749. The Mier Court explained that Title VII lawsuits that involve personnel actions integrally related to the military's unique structure include suits by military personnel against a superior officer to recover damages for alleged constitutional violations; a Guard technician's challenge to a military transfer; a Guard technician's challenge to discharge by the Guard and termination from technician employment; suits challenging enlistment procedures; suits involving concerns regarding military hierarchy and discipline; and suits involving promotion decisions. see Mier, 57 F.3d at 750-751. However, the Ninth Circuit also recognized that military technicians could assert Title VII claims regarding personnel actions in which "concerns regarding military hierarchy and discipline may not be at issue . . . ." Id. Consequently, the Ninth Circuit found that "the Title VII coverage of civilians employed by the military

encompasses actions brought by Guard technicians *except* when the challenged conduct is integrally related to the military's unique structure." Mier, 57 F.3d at 750 (emphasis added).

The United States Court of Appeals for the Second Circuit reached the same result in Lockett v. Bure, 290 F.3d 493 (2d Cir. 2002), holding that "Title VII protections extend to discrimination actions brought by military personnel in hybrid jobs entailing both civilian and military aspects *except when the challenged conduct is integrally related to the military's unique structure.*" Lockett, 290 F.3d at 499 (emphasis added). The Second Circuit also recognized that military technicians could assert cognizable claims pursuant to Title VII where the claims arose solely from the civilian aspects of their employment. Id. at 499 ("There may be cases in which dual-status, military-civilian employees allege a justiciable Title VII complaint arising purely from their civilian employment.").

The United States Court of Appeals for the Fifth Circuit has also recognized that not all Title VII claims brought by military technicians are necessarily barred. In Brown v. United States, 227 F.3d 295 (5th Cir. 2000), the Fifth Circuit applied the EEOC's interpretation of the limited scope of Title VII. Brown, 227 F.3d at 298; see 29 C.F.R. § 1614.103(d)(1). Reasoning that dual-status ARTs are by definition "required to maintain two government positions, one civilian position, and one military position," the

Brown court held that "claims arising purely from an ART's civilian position are provided for under Title VII; claims that originate from an ART's military status, however, are not cognizable . . . ." Id.<sup>3</sup>

Only one district court in this Circuit has applied the intramilitary immunity doctrine in the context of a military technician's Title VII claim. In Urie v. Roche, 209 F. Supp. 2d 412 (D.N.J. 2002), the district court used a fact specific inquiry to determine whether Urie's Title VII claim arose from the civilian rather than the military circumstances of her employment. In finding that Urie's Title VII claims were barred by the intramilitary immunity doctrine, the district court stated that "it cannot be said that the complained-of circumstances have arisen wholly in the civilian context of Plaintiff's civilian employment. She is challenging the conduct of a superior officer, which infringes upon the military rank relationship, as well as challenging promotion decisions central to the military hierarchy."

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<sup>3</sup>Although three of the Circuits which have considered the issue determined that military technicians may assert Title VII claims which arise solely from the civilian aspects of their positions, the United States Court of Appeals for the Sixth Circuit has interpreted Chappell as barring all claims brought pursuant to Title VII by military technicians because their military/civilian hybrid positions are "irreducibly military in nature." Fisher v. Peters, 249 F.3d 433, 439-443 (6th Cir. 2001) (citations omitted). This Court will not adopt the view of the Sixth Circuit in light of the Third Circuit's decision not to address the extension of Chappell to bar damages actions by military technicians arising solely in the civilian context of their jobs in Jorden. See Jorden, 799 F.2d at 108 n.12.

Urie, 209 F. Supp. 2d at 417.<sup>4</sup>

Applying this authority, the Court concludes that the protections of Title VII extend to military technicians if the conduct complained of arose purely from the civilian aspects of that individual's position, and his or her causes of action are not integrally related to the military's unique structure. See Brown, 227 F.3d at 298; Mier, 57 F.3d at 750; Lockett, 290 F.3d at 499. Consequently, this Court has subject matter jurisdiction over Plaintiff's Title VII claim only if he establishes that "the complained-of circumstances arose wholly in the civilian context of [his] civilian employment." Urie, 209 F. Supp. 2d at 417. Plaintiff has offered no evidence to this regard. The Government, however, has provided the Affidavit of Master Sergeant ("Msgt") Timothy A. Martin, which supports the Government's claim that the circumstances giving rise to Plaintiff's claims did not arise

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<sup>4</sup>In Moore v. Pa. Dep't of Military & Veterans Affairs, 216 F. Supp. 2d 446 (E.D. Pa. 2002), the district court analyzed the ability of a plaintiff, who applied for an unspecified National Guard position, to bring a Title VII action against a military superior. However, because the plaintiff did not allege in her complaint the nature of the position for which she was applying, the court could not determine whether the doctrine of intramilitary immunity barred her suit and dismissed her complaint without prejudice. The Moore court did suggest, however, that if the plaintiff were applying for a hybrid position, a fact specific inquiry would be utilized to determine her ability to bring suit. See Moore, 216 F. Supp. 2d at 454 (noting that "the Court is unable to determine whether she was applying for a hybrid position, if so, whether it was military in nature, in which event the Title VII claim would be barred, or civilian in nature and allowed to proceed.")

exclusively within the civilian context of his employment.

Plaintiff asserts in his complaint that Lt. Col. Uber, his supervisor, discriminated against him on the basis of race and gender by requesting personal and privileged information which Uber had no right or purpose to request. (Compl. ¶ 12). Martin states in his Affidavit that Uber's request arose in the military context as Uber sought information regarding Plaintiff's residence which is necessary to determine Plaintiff's possible entitlement to travel pay only in his military reserve status. (See Exhibit 1 at ¶ 8.) Plaintiff also complains that Uber discriminated against him on the basis of race by unjustly removing him as the Test Control Officer from the Career Development Course. Martin states in his affidavit that the development course is a military, not a civilian, training requirement designed to provide individual service members with the skills and knowledge to perform effectively in their duty assignments. (Exhibit 1 at second ¶ 11.).

Plaintiff also alleges that Uber discriminated against him on the basis of his race regarding his attainment of a 5 skill level. Martin states that a skill level is a military, not civilian, designation which refers to the level of training an individual has attained and the level at which that military member can perform his duties in his Air Force Specialty Code or career field. (Exhibit 1 at second ¶ 13.) Plaintiff further alleges that Uber discriminated against him on the basis of race by placing a letter

of reprimand in the form of an Unfavorable Information File into the computerized military personnel system without cause. (Compl. at ¶ 23.) Martin states that an Unfavorable Information File is an official record of unfavorable information about a military member documenting censures concerning his performance. (Exhibit 1 at ¶ 14.) Civilian employees do not have Unfavorable Information Files. (Id.)

Plaintiff further alleges that he was discriminated against on the basis of race by Uber when Uber removed Plaintiff from his office and placed him with his subordinates as a working supervisor (Compl. at ¶ 25.) According to Martin, Plaintiff's removal and change of position was the result of a restructuring of the Military Personnel Flight ("MPF") at the direction of Air Force Reserve Command. This decision to reorganize is clearly a personnel decision integrally related to the military's unique structure, and as a result, claims arising from such actions are not cognizable by this Court. See Mier, 57 F.3d at 749-50.

The evidence on the record motion further supports the conclusion that Plaintiff's remaining claims of racial and gender discrimination arise from his relationship with Lt. Col. Uber who was his superior in both his civilian and military capacities. (Exhibit 1 at ¶ 7.) Given the nature of Plaintiff's interactions with Lt. Col. Uber, it would be impossible to separate his relationship with Uber into a civilian and military component. As

a result, any challenge brought by Plaintiff to the conduct of Uber would threaten to infringe upon the military rank relationship. See Urie, 209 F. Supp. 2d at 417; see also Overton v. New York State Div. of Military & Naval Affairs, 373 F.3d 83, 96 (2d Cir. 2004) (“[a]ny attempt to surgically dissect and analyze the civilian relationship between [plaintiff] and [his supervisor], with its military dimensions, moreover, would itself threaten to intrude into their military relationship.”) Maintaining a cause of action resulting from such interactions is expressly contrary to the clear reasoning behind the intramilitary immunity doctrine. See Brown, 348 U.S. at 112 (determining that the holding of Feres was based on “the peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance of such suits on discipline.”) (citing Feres, 340 U.S. at 141-143). Furthermore, Plaintiff has submitted no evidence that Plaintiff’s remaining claims arose purely in the civilian context of his employment. See Urie, 209 F. Supp. 2d at 417. Consequently, the Court finds that Plaintiff’s claims of racial and gender discrimination in violation of Title VII arise from the military aspects of his employment as a military technician and, therefore, are barred by the intramilitary immunity doctrine.

#### **IV. CONCLUSION**

For the foregoing reasons, this Court finds that Plaintiff has not met his burden of proving that his claims arose solely in the

context of the civilian aspects of his employment and, therefore, Plaintiff's Title VII employment discrimination claims are barred by the intra-military immunity doctrine as articulated in Feres and Chappell. This Court, accordingly, does not have subject matter jurisdiction over Plaintiff's Title VII claim. Defendant's Motion to Dismiss is, therefore, granted. An appropriate order follows.

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DEPT. OF THE AIR FORCE :

O R D E R

**AND NOW**, this 8th day of August, 2005, upon consideration of the Motion to Dismiss the Complaint (Docket No. 3) filed by Defendant James Roche, all briefing in response thereto, and the Hearing held on May 31, 2005, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and the Complaint is **DISMISSED** in its entirety. This case shall be marked **CLOSED** for statistical purposes. **IT IS FURTHER ORDERED** that Defendant's Motion for Leave to File a Reply Brief is **GRANTED**. The Clerk shall enter the Reply Brief attached to said Motion on the Docket.

BY THE COURT:

/s/John R. Padova

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John R. Padova, J.