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A Case for Federal Oversight of Military Sexual Harassment

By Rachel Natelson

> [O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.
>
> —Chief Justice Earl Warren[1]

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Imagine being persistently and relentlessly harassed at work by either a colleague or your superior. Every day brings a fresh barrage of insulting language, off-color jokes, and unsolicited advances. You report the incidents internally, and an investigation confirms your allegations and identifies a perpetrator. Your employer ignores these findings altogether and ultimately promotes the offender instead of punishing him. Now imagine that your employer's conduct is not only entirely consistent with the law but also immune from any external review.

In almost any workplace in the country, your opportunities for redress would extend beyond this internal report. Under Title VII of the Civil Rights Act of 1964, employees are protected against workplace discrimination based on such traits as race, religion, sex, and national origin. In 1980 the Equal Employment Opportunity Commission (EEOC), which enforces Title VII, extended the definition of sex discrimination to include sexual harassment and issued guidelines to this effect. Within a few years the U.S. Supreme Court followed suit, holding that an employer may be held liable in federal court if it knew or should have known about sexual harassment and failed to correct it.[2]

While not all employees are covered by Title VII, the absence of its protection in no way corresponds to a lack of need. In fact, among the employees most notably exempt from such protection is a group that experiences harassment at staggering rates: military personnel.

I. Background

Sexual persecution of servicewomen, long a fact of military life, has reached epidemic proportions within recent years.[3] In surveys nearly a third of female veterans report having been sexually assaulted or raped while in the military, while 70 percent to 90

[1]Earl Warren, *The Bill of Rights and the Military*, 37 New York University Law Review 181, 188 (1962).

[2]*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

[3]While sexual harassment and assault are not exclusively perpetrated by males against females, for purposes of this article I refer to servicemembers as "she" because most military harassment victims are women. See U.S. Department of Defense, FY08 Report on Sexual Assault in the Military (March 2009), http://bit.ly/1ejHfS.

percent report having been sexually harassed.[4] Within the growing population of homeless female veterans, 40 percent of survey respondents noted that they were sexually abused while in the service.[5] These experiences are closely associated with posttraumatic stress disorder (PTSD) in studies; in fact, military sexual assault is a stronger predictor of PTSD among women veterans than combat history.[6] Likewise, studies indicate that sexual harassment causes the same rates of PTSD in women as combat does in men.[7]

II. Military Regulations on Harassment and Assault

Under current law, sexual assault and harassment are ultimately matters of internal military concern. According to the U.S. Department of Defense, discriminatory practices should be dealt with through the chain of command, and "attempts should always be made to solve the problem at the lowest possible level…."[8]

As a rule servicemembers who have been harassed may file an internal grievance in one of two ways. A complainant may initiate an "informal procedure" by reporting the harassment to her superior, an equal opportunity officer, the chaplain, or a legal or medical officer. While the individual receiving the report may investigate the charges or refer the case to the unit commander, the latter makes the ultimate decision. Although commanders are encouraged to prepare a memorandum of record describing the resolution of the case, the complaint itself is not filed in writing.[9]

Alternatively a complainant may file a sworn written statement, thereby triggering a formal investigation. While formal complaints are subject to a strict timeline and must be reviewed for legal sufficiency by an equal opportunity advisor and a staff judge advocate, once the complaint is substantiated the commander alone decides on corrective action—whether administrative or punitive—and the severity.[10] Although offenders must at a minimum undergo counseling, any additional corrective action is purely discretionary.

This system has been widely criticized as presenting an inherent conflict of interest due to the relationship between the decision maker and the offender.[11] If the commander finds the offender to be a good soldier or to represent a substantial monetary investment, the commander can simply decide against serious punishment. Even when a complainant prevails in a sexual harassment case, military remedies focus only on disciplining the perpetrator and do not compensate the victim. Similarly, while the system aims to hold individual behavior to account, it fails to meet the responsibility of the organization as a whole.[12]

III. Title VII and Civilian Workplace Harassment

When Congress passed the Civil Rights Act in 1964 to prohibit employment dis-

[4]See Helen Benedict, *For Women Warriors, Deep Wounds, Little Care*, New York Times, May 26, 2008, http://bit.ly/9JiiN; Deborah J. Bostock & James G. Daley, *Lifetime and Current Sexual Assault and Harassment Victimization Rates of Active-Duty United States Air Force Women*, 13 Violence Against Women 927 (2007); Colleen Dalton, *The Sexual Assault Crisis in the United States Air Force Academy*, 11 Cardozo Women's Law Journal 177 (2004); Maureen Murdoch et al., *Prevalence of In-Service and Post-Service Sexual Assault among Combat and Non-Combat Veterans Applying for Department of Veterans Affairs Posttraumatic Stress Disorder Disability Benefits*, 169 Military Medicine 392 (2004).

[5]Erik Eckholm, *Surge Seen in Number of Homeless Veterans*, New York Times, Nov. 8, 2007, http://bit.ly/MjdN3.

[6]Maureen Murdoch, et al., *Gender Differences in Service Connection for PTSD*, 41 Medical Care 950 (2003).

[7]Maureen Murdoch, et al., *The Association Between In-Service Sexual Harassment and Posttraumatic Stress Disorder Among Compensation-Seeking Veterans*, 171 Military Medicine 166 (2006).

[8]EO/Sexual Harassment Complaint Processing System, Army Regulation 600–20, 92 (2008).

[9]*Id.*

[10]*Id.* at 95; see also 10 U.S.C. § 1561 (1997).

[11]Amy Herdy & Miles Moffeit, *Military's Response to Rapes, Domestic Abuse Falls Short*, Denver Post, Nov. 18, 2003, at A1.

[12]Shirley Sagawa & Nancy Duff Campbell, National Women's Law Center, Sexual Harassment of Women in the Military (Women in the Military Issue Paper, Oct. 30, 1992), at 6, www.nwlc.org/pdf/Military%20Harassment.pdf.

crimination on the basis of such protected characteristics as sex, the law made no mention of sexual harassment. As the language of the Act and its legislative history indicate, Congress did not initially contemplate the issue of harassment; rather, the issue surfaced during the decades to follow, first in EEOC regulations and later in case law.[13]

EEOC's guidelines define two types of sexual harassment: "quid pro quo" and "hostile environment."[14] Under 29 C.F.R. § 1604.11, unwelcome sexual advances and other conduct of a sexual nature constitute sexual harassment when either "submission to or rejection of such conduct … is used as the basis for employment decisions" or "such conduct has the purpose or effect of … creating an intimidating, hostile, or offensive working environment."[15]

Six years after EEOC issued its regulations, the Supreme Court addressed the issue of sexual harassment for the first time in *Meritor Savings Bank v. Vinson*.[16] According to the Court's ruling, "hostile environment" sexual harassment claims are actionable under Title VII, and the inquiry in such cases should not be whether an employee voluntarily submitted to an employer's alleged sexual advances but rather whether such advances were unwelcome. Specifically plaintiffs with hostile environment claims must prove that the challenged conduct was severe or pervasive, created a hostile or abusive working environment, was unwelcome, and was based on the plaintiff's gender.[17]

More recently, in *Burlington Industries v. Ellerth*, the Court determined that an employer was liable for a hostile work environment created by a victimized employee's supervisor when such conduct resulted in a tangible employment action or a denial of promotion.[18] The Court distinguished such "quid pro quo" cases from those involving sexually offensive conduct without any tangible employment action. While the latter conduct does not constitute activity within the scope of employment, it can still trigger liability if an employer fails to take reasonable care to prevent and correct it.[19]

IV. Title VII and Military Personnel

While Title VII's applicability to military personnel has yet to reach the Supreme Court, a consensus has emerged among federal appellate courts that the law does not apply to uniformed members of the armed services.[20] This determination is based primarily on two factors: the language and legislative history of Section 717(a) of the Civil Rights Act and the doctrine of intramilitary immunity first introduced in *Feres v. United States*.[21]

Beginning with *Johnson v. Alexander*, a series of federal appellate decisions interpreted Title VII to suggest a distinction between the rights of civilian employees of military departments and uniformed members of the armed forces.[22] Under Section 717(a), the terms of Title VII apply to "employees or applicants for employment … in military departments as defined in section 102 of title 5."[23] By

[13]See 29 C.F.R. § 1604.11 (2008).

[14]Equal Employment Opportunity Commission, Policy Guidance on Current Issues of Sexual Harassment, N-915-050 (1990), www.eeoc.gov/policy/docs/currentissues.html.

[15]29 C.F.R. § 1604.11.

[16]*Meritor Savings Bank*, 777 U.S. at 57.

[17]*Id*. at 67.

[18]*Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

[19]*Id*. at 765.

[20]See, e.g., *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987); *Spain v. Ball*, 928 F.2d 61 (2d Cir. 1991); *Randall v. United States*, 95 F.3d 339 (4th Cir. 1996); *Hodge v. Dalton*, 107 F.3d 705 (9th Cir. 1997).

[21]Section 717(a) of the Civil Rights Act is codified at 42 U.S.C. § 2000e-16(a); *Feres v. United States*, 340 U.S. 135 (1950).

[22]*Johnson*, 572 F.2d 1219.

[23]*Id*. at 1224.

referring exclusively to "military departments" as defined in 5 U.S.C. § 102 and not to the "armed forces" as defined in 10 U.S.C. § 101, the *Johnson* court held, Congress showed an intent to protect only civilian employees of the military from discrimination.

The appellate courts have also pointed to the legislative history of Section 717(a) and argued that it was introduced to improve the federal government's record of nondiscrimination by transferring enforcement authority from the Civil Service Commission to EEOC. Because the Civil Service Commission was never authorized to review or police discrimination within the armed forces, the courts determined that EEOC should be subject to the same limitations.[24]

The courts have also turned for guidance in their Title VII decisions to Supreme Court jurisprudence concerning the rights of servicemembers to seek remedies from the military for tort claims and constitutional violations. In both matters, the Court has declined to recognize a right of action, first in *Feres v. United States* and later in *Chappell v. Wallace*.[25]

Under the *Feres* doctrine of intramilitary immunity, 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."[26] Lower courts have applied this doctrine not only in tort cases but also "whenever a legal action 'would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States.'"[27]

Decades later in *Chappell*, the Supreme Court applied the concept of intramilitary immunity to claims alleging various constitutional violations against government agents. As in *Feres*, the Court based its determination on the "peculiar and special relationship of the soldier to his superiors," which "would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command."[28] In other words, military personnel decisions require a professional expertise foreign to civilian judges.

V. Distinguishing Harassment from Disparate-Treatment Discrimination

As strong a consensus as the above decisions present with respect to federal judicial review of discrimination in the military, one should note that their underlying claims concerned not sexual harassment but disparate treatment in hiring and promotion. While EEOC recognizes harassment as a form of gender discrimination, both case law and statutory language and history clearly distinguish between the two categories.

First, disparate-treatment cases and harassment cases are governed by separate judicial doctrines, one implicating job performance and the other concerning conduct outside of the scope of employment. Under the doctrine introduced in *McDonnell Douglas Corporation v. Green*, when a plaintiff alleges an employer's failure to hire or promote the plaintiff due to race or gender, the employer may rebut the claim with evidence of a legitimate job-related basis for the decision.[29] Focusing on substantive job requirements as defined by an employer, this doctrine is consistent with the Supreme Court's deference to employer expertise in military discrimination cases.

The *Burlington* Court, by contrast, introduced a clear distinction between sexual harassment, which "is not conduct within the scope of employment," and discrimi-

[24]See, e.g., *Gonzalez*, 718 F.2d at 928.

[25]*Feres*, 340 U.S. at 135; *Chappell v. Wallace*, 462 U.S. 296 (1983) (barring Navy member's Fourteenth Amendment claim of racial discrimination in evaluations and promotion).

[26]*Feres*, 340 U.S. at 144.

[27]*Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997).

[28]*Chappell,* 462 U.S. at 304.

[29]*McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

nation involving a "tangible employment action," which "could not have been inflicted absent the agency relation."[30] The latter conduct, the Court explained, would result in "a significant change in employment status, such as hiring, firing, [or] failing to promote."[31] Since sexual harassment is unrelated to legitimate job responsibilities, its oversight should not require the professional expertise of the military. Similarly designating sexual harassment as outside the scope of employment suggests a distinction between these claims and those deemed by the *Feres* Court to arise out of "activity incident to service."[32]

Another distinction between sexual harassment cases and the discrimination claims underlying *Chappell* and its progeny lies in the remedies available to claimants. In *Chappell* the Court based its support of intramilitary immunity in part on the potential for claimants to submit allegations concerning performance evaluations and promotions to the Board for Correction of Military Records, a civilian administrative body empowered to order retroactive back pay and promotion in cases of discriminatory conduct.[33] This remedy, however, presupposes a tangible employment action and would not allow for the correction of a hostile work environment or the compensation of those who do not experience an official change in employment status.

Equally notable is the statutory language and history that the appellate courts have cited in refusing to apply Title VII to military personnel. When Section 717(a) was added to Title VII in 1979, EEOC had long-standing oversight of such discriminatory practices as the failure to hire or promote individuals on the basis of race, color, religion, sex, or national origin. Not until the following year, however, did the agency begin to interpret the law to forbid sexual harassment.[34] As a result, Congress could not have made a calculated decision at the time to deny EEOC the authority to monitor harassment in the military.

The *Feres* doctrine itself has been widely condemned and may well be a target for reform in the near future. In *Johnson v. United States* Justice Scalia notably dismissed the concept of intramilitary immunity as unrelated to the text and history of the Federal Tort Claims Act; he declared *Feres* to be "wrongly decided, and heartily deserv[ing] the 'widespread, almost universal criticism' it has received."[35] More recently, the Cox Commission, an independent panel convened to review the Uniform Code of Military Justice on its fiftieth anniversary, noted the constraints that the doctrine places on servicemembers' "ability to pursue apparently legitimate claims against the armed forces, many of which bear little if any relation to the performance of military duties or obedience to orders on their merits."[36]

■ ■ ■

Unlike their civilian counterparts, military harassment victims have virtually no avenue for relief when their employer fails to take appropriate corrective action in response to their complaints. The result is an institutional immunity from precisely the sort of outside judicial review that could operate as a real deterrent. As the harassment of servicewomen reaches a point of crisis, the time is ripe for a military justice system that will "take into account the special importance of defending our Nation without completely abandoning the freedoms that make it worth defending."[37]

COMMENTS?

We invite you to fill out the comment form at www.povertylaw.org/reviewsurvey. Thank you.

—The Editors

[30] *Burlington Industries*, 524 U.S. at 762.

[31] *Id.* at 761.

[32] See *supra* note 25.

[33] *Chappell*, 462 U.S. at 303.

[34] See 29 C.F.R. § 1604.11.

[35] *Johnson v. United States*, 481 U.S. 681, 700 (1987).

[36] Walter T. Cox III, National Institute of Military Justice, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (2001), at 14.

[37] *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986).

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