

LIUNA Comments on DOD/NGB Draft Language to Eliminate Discrimination Protections for National Guard Dual-Status Technicians

HASC and SASC have confirmed that DOD/NGB has submitted the following draft language for inclusion in the FY 14 NDAA. *LIUNA strongly objects to this language for several reasons as outlined below.*

Proposed Language Submitted by DOD:

SEC. ____. *FORUM FOR PROCESSING OF COMPLAINTS OF WRONGFUL DISCRIMINATION BY NATIONAL GUARD MILITARY TECHNICIANS (DUAL STATUS).*

(a) IN GENERAL—Section 709 of title 32, United States Code, is amended by adding at the end the following new subsection:

“(j) A complaint of wrongful discrimination by a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) shall be considered a complaint of wrongful discrimination by a member of the armed forces.”.

(b) EFFECTIVE DATE—The amendment made by subsection (a) shall apply with respect to a complaint of wrongful discrimination initiated on or after the date of the enactment of this Act.

1. This proposed language would take away critical discrimination protections from National Guard employees. Currently, National Guard dual-status technicians have the right to file both military and civilian discrimination complaints. *Devine v. Air National Guard*, EEOC Case No. 531-2011-0321X (January 11, 2012). However, military discrimination claims are limited to only filing under Title VI; members of the military therefore do not have the right to file the broader discrimination protections to which National Guard technicians and most other employees in the U.S. are entitled. *Muse v. Army*, EEOC Appeal No. 0120083293 (September 26, 2008). Title VI covers race, religion, color, gender, national origin, and reprisal (see, NGR-600-22/ANGI 36-3, 30 March 2001, page 1). However, Title VI does not include Title VII protections including the right to sue with a neutral decision-maker (judge or EEOC) deciding the case, nor does it include the protections against age discrimination (ADEA) disability discrimination (the Rehabilitation Act), or genetic discrimination (GINA) as provided by other statutes
2. The National Guard lost two sexual harassment-based EEO cases last year filed by female National Guard technicians – *Devine* and *Rouleau v. McKinley/NGB*, EEOC No. 531-2012-00204X (September 25, 2012). In both cases, the Guard failed to even follow current law regarding notification to the technician of their rights how to file an EEO case. It is possible that those losses are the impetus for this proposed legislation limiting discrimination rights for technicians at this time. If this proposed legislation were to pass, it would severely limit female technicians’ rights to have adequate remedies for sexual harassment and other gender-based discrimination in the workplace. Title VI covers gender discrimination, but it does not allow a neutral third-party (judge, EEOC) to decide the case. Title VI also prevents workers from being able to sue for gender-based

discrimination (and the other types of discrimination in Title VII that they currently have). Considering the attention that is rightfully being paid at this time by Congress and the Administration to sexual assaults in the military, taking away rights from National Guard technicians to file a discrimination or sexual harassment claim is very misguided.

3. Currently, a technician who faces discrimination in the workplace can rightly file it in the same chain of supervision that the problems are occurring. In many cases, the military chain of command and civilian chain of supervision are completely different. Therefore, filing a claim in the military channels would force people who have no knowledge of the situation to oversee these workplace discrimination cases filed by technicians.
4. With regard to disability discrimination protections, currently, if a technician loses his/her military position for medical reasons, they also consequently lose their technician position due to a loss of military membership, not for the disability. Therefore they cannot file a disability claim because the action was a military action. However, if that same Soldier/Airman loses a limb in a combat environment and can still be retained in the military then it does not affect their civilian position. If Title VII rights are removed, this same technician could be removed from their civilian position because the employer could not be forced to make reasonable accommodations. Without Title VII this could happen *even if* the member was still allowed to serve in the military and they would have no avenue of redress.
5. If technicians were only allowed military (Title VI) protections, they would also lose rights under the Age Discrimination in Employment Act (ADEA), meaning that a civilian technician could be removed from their technician position due to age without a real avenue of redress even if they were still allowed to stay in the military.
6. This proposed language appears to be an attempt by NGB to take full time military control of the technician force without the added benefits that come with full-time military duty. The Section 519 from study from the FY 12 NDAA on the future of the National Guard technician program is due to be released in September 2013. Therefore, HASC and SASC should hold off making any determinations that would make these workers more “military,” with fewer rights, until the study comes out.