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SP4 JOHN DOE, Plaintiff, v. HON. JOHN O. MARSH, Secretary of
the Army, Defendant

Civil Action No. 89-1383-OG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1990 U.S. Dist. LEXIS 1442

February 8, 1990, Decided and Filed

COUNSEL: [*1]

Greg Wolinski, Columbus, Georgia, James R. Klimaski, Klimaski & Miller, P.C.,
Washington, D.C., for plaintiff.

Vincent M. Garvey, Carole Jeandheur, United States Department of Justice,
Washington, D.C., for defendant.

OPINIONBY: GASCH

OPINION: MEMORANDUM

OLIVER GASCH, UNITED STATES DISTRICT JUDGE

Plaintiff is an Army enlistee who in 1986 tested positive for the Human Immunodeficiency Virus ("HIV"). HIV causes Acquired Immune Deficiency Syndrome ("AIDS"). In this lawsuit plaintiff challenges, on various statutory and constitutional grounds, the Secretary of the Army's policy that disallows soldiers who are infected with HIV from being assigned to or attending formal schooling that would result in the award of a military occupational specialty ("MOS") different from the MOS currently held by the enlistee. Plaintiff seeks declaratory relief that would void this Army policy. Plaintiff also challenges the Army Board for Correction of Military Records' decision not to change plaintiff's service records to indicate that he acquired the HIV infection from a blood transfusion rather than from a casual sexual encounter with a woman. He seeks injunctive relief that would require the correction of his service [*2] record to show that he acquired the virus in a service connected activity.

Before the Court is defendant's motion to dismiss under Rules 12(b)(1) and 12(b)(6) or, in the alternative, for summary judgment under Rule 56. Defendant argues that the Court lacks jurisdiction because plaintiff's claims are nonjusticiable. Alternatively, defendant argues that plaintiff has failed to state a claim. Finally, defendant argues that even if the Court assumes that plaintiff's claims are justiciable, defendant should prevail as a matter of law. Although the Court finds that plaintiff's claims are justiciable under Rule 12(b)(1), plaintiff's statutory and constitutional challenges fail under Rules 12(b)(6) and 56. The Court therefore grants defendant's motion and dismisses the Complaint.

I. THE FACTS

Plaintiff is in his early twenties and in good health. He enlisted in the Army in 1984 and successfully completed a formal training course in the MOS of

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Ammunition Specialist, which is his present MOS. The Complaint alleges that he was told by his recruiter that upon his reenlistment he could change his MOS to something he really wanted to do, namely, "some form of construction work to learn a skill [*3] he could use if he ever left the service." This is the MOS plaintiff was denied upon reenlistment and is the subject of this lawsuit. Complaint paras. 6-7.

In 1985, plaintiff was sent overseas to Germany with his ordnance unit. While overseas he acquired the HIV "either through a sexual encounter in the Spring of 1985 or as a result of a blood transfusion on December 15, 1985, following surgery at an Army Hospital in Germany to correct a condition that caused him to snore too loudly in the barracks." Complaint para. 8. On January 17, 1986, one month after his surgery, his blood was tested by a private clinic in Nuremberg and determined to be positive for the HIV. Complaint para. 9.

In the Summer of 1986 plaintiff was transferred back to the United States after having been processed as an HIV positive soldier. The Army concluded that plaintiff acquired the virus as a result of a casual sexual encounter with a German woman in the Spring of 1985. Complaint para. 10. Other Army doctors told plaintiff that they suspected that the blood transfusion was actually the source of his HIV infection. Complaint para. 11. One of the blood donors has not been seen at the clinic since 1985, and the [*4] clinic's recent correspondence terms this donor's blood "suspect." Complaint para. 9.

Upon returning to the United States, plaintiff performed his assigned duties and awaited his chance to reenlist. When that time came, plaintiff desired to change his MOS from ammunitions to construction. Due to the Army's policy, however, plaintiff was allowed to reenlist only in his original MOS. Complaint paras. 13-15. Prior to signing his reenlistment papers, plaintiff petitioned a formal complaint to the Army Board for the Correction of Military Records ("ABCMR" or "Board") and filed a complaint with his commanding officer under 10 U.S.C. @ 938. Plaintiff then reenlisted in his original MOS. Complaint para. 16.

Army Regulation 600-110 ("AR 600-110") prescribes the policy, procedures, responsibilities and standards concerning the identification, surveillance, and administration of personnel infected with the HIV. While HIV positive individuals with no military connections are not eligible for enlistment, AR 600-110 at para. 1-14a, enlisted personnel who are HIV positive but otherwise healthy "will not be involuntarily separated solely on the basis of having been confirmed HIV positive." Id. [*5] at para. 1-14d. Rather, they "will continue to be eligible for military professional development schooling . . . and may be assigned to positions consistent with career progression requirements." Id. at para. 4-4. However, HIV positive soldiers will not be programmed to attend nor assigned to formal schooling that will result in the award of MOS or other area of concentration. Id. HIV positive soldiers may reenlist only for their current MOS or for regular Army reenlistment. Id. at para. 4-5.

In its formal proceedings, the Board rejected plaintiff's statutory and constitutional challenges to the Army's policy and denied plaintiff's application for correction of his military records. The Board's decision noted as evidence of record that on April 5, 1985, plaintiff was seen at the dispensary for a venereal disease infection following a sexual encounter. The decision also noted as evidence of record that a sample of plaintiff's blood drawn prior to his transfusion had tested positive for the HIV, and that plaintiff had no medical records to show that prior to his surgery he tested

*exhausting
admin
remedies*

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negative for the HIV. The Board concluded that neither plaintiff nor his counsel had "submitted [*6] any evidence sufficiently convincing which would warrant correcting his medical records to show that the source of his HIV infection was from a blood transfusion given on 16 December 1986." ABCMR Memorandum of Consideration, Mar. 15, 1989 (hereinafter "Board Memorandum"), at 5, attached at Exhibit C to Complaint. The Board further noted:

The Board is empathetic with the applicant's desire to determine the source of the HIV infection. However, regulations provide that the source of the infection may not be used in making any line of duty or misconduct determination in physical disability evaluation proceedings. Therefore, if he is found unfit for further service, his physical disability will be considered service connected.

Id. at 5-6; see also Exhibit 4 to Defendant's Motion to Dismiss (true copy of plaintiff's Military Personnel File filed under seal).

Plaintiff alleges that the Board's refusal to change his service records was arbitrary and capricious under 10 U.S.C. @ 1552. The balance of plaintiff's Complaint, however, challenges defendant's policy of not permitting HIV positive soldiers to change their MOS specialty upon reenlistment. Plaintiff alleges that this policy [*7] is illegal and in violation of the following: (1) 10 U.S.C. @ 1074; (2) the Rehabilitation Act, 29 U.S.C. @ 791; (3) Executive Orders intended to protect handicapped individuals in the federal government; (4) the "spirit" of Title VII of the Civil Rights Act of 1964; and (5) the equal protection guarantee of the fifth amendment.

II. DISCUSSION

A. Plaintiff's Claims Regarding MOS

By Army regulations, "[m]ilitary occupational specialty (MOS) is a term used to identify a group of duty positions that require closely related skills." AR 611-201 at para. 1-5, attached at Exhibit 2 to Defendant's Motion to Dismiss. The MOS structure is an "integral part of the enlisted personnel management system (EPMS). EPMS has a fundamental impact on accession, training, classification, evaluation, distribution, and promotion." Id. at para. 1-1b. "The primary goal of the Enlisted Personnel Assignment System is to satisfy the personnel requirements of the Army." AR 614-200 at para. 2-1, attached at Exhibit 3 to Defendant's Motion to Dismiss. Thus, although the soldier's MOS preference is "one of many" factors to be taken into account, the needs and priorities of the Army will be the overriding [*8] factor in all classification decisions. Id. at para. 1-6.1.

1. The Issue of Justiciability

Plaintiff is an Ammunition Specialist who is suing because the Army refuses to teach him about "driving a bulldozer, a ditch witch, a shovel or doing manual labor or whatever duties may be assigned to him." Complaint para. 1. Plaintiff claims that the Army's reason for refusing to teach him these things -- because he is HIV positive -- is unlawful.

In *Orloff v. Willoughby*, 345 U.S. 83 (1953), the Supreme Court established the principle that "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." Id. at 94. In *Orloff*, a

medical doctor lawfully inducted in the Army sought to secure his discharge, through habeas corpus, because he had not been assigned duties commensurate with his medical expertise. The Supreme Court held that this claim was nonjusticiable, stating: "While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case [*9] where this Court has assumed to revise duty orders as to one lawfully in the service." *Id.*; see also *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (the Constitution vests decisions "as to the composition, training, equipping, and control of a military force" exclusively in the political branches).

The principle established in *Orloff* was recently reaffirmed by the Court of Appeals in *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989). In *Kreis*, an Air Force Major claimed that he was wrongfully passed over for a military promotion, and he challenged the corrective relief taken by the Air Force Board for the Correction of Military Records in connection with his efforts to secure a promotion. The Court of Appeals held that the Major's request for a retroactive promotion "falls squarely within the realm of nonjusticiable military personnel decisions." *Id.* at 1511. The Court further explained that the justiciability of claims to a military promotion or for the correction of military records "is limited by the fundamental and highly salutary principle that . . . judges are not given the task of running the Army." *Id.* (quoting *Orloff*, 345 U.S. at 93). [*10]

In the Court's view, this case is distinguishable from *Orloff* and *Kreis*. Plaintiff here does not ask the Court simply to review the Army's placement decision and substitute its own judgment for that of the Army. That is, plaintiff does not ask the Court to review an individual command decision. Instead, plaintiff contends that he was denied a construction MOS based on an Army policy that unlawfully considers a soldier's HIV status in deciding where the soldier should be placed. He argues that this Army policy contravenes both constitutional and statutory provisions.

Clearly, military personnel policies are reviewable by the courts when constitutional infirmities are alleged. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (Air Force regulation that forbade wearing of yarmulke alleged to violate plaintiff's first amendment freedoms); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (federal statutory scheme that favored promotion of women officers over men alleged to violate equal protection); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (review of disparate treatment between male and female members of uniformed services regarding entitlements to housing and medical [*11] benefits held to violate equal protection). As stated by the Second Circuit, "the military is subject to the Bill of Rights and its constitutional implications." *Crawford v. Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976).

The Constitution and federal statutes stand as familiar guideposts for the Court's review, and do not entail a "second-guessing" of the Secretary of the Army's decision. See *Kreis*, 866 F.2d at 1511. For this reason, the Court finds that plaintiff's claims are justiciable and that this Court has subject matter jurisdiction under Rule 12(b)(1).

2. The Statutory Challenges

Plaintiff looks to various statutes in arguing that the Secretary's policy is illegal. Plaintiff first looks to 10 U.S.C. @ 1074, as amended in November

1986, which states:

Information obtained by the Department of Defense during or as a result of an epidemiologic-assessment interview with a [HIV] serum-positive member of the Armed Forces may not be used to support any adverse personnel action against the member.

10 U.S.C. @ 1074(1). The statute defines "adverse personnel action" to include "(i) a court-martial; (ii) non-judicial punishment; (iii) involuntary separation (other than for [*12] medical reasons); (iv) administrative or punitive reduction in grade; (v) denial of promotion; (vi) an unfavorable entry in a personnel record; (vii) a bar to reenlistment; and (viii) any other action considered by the Secretary concerned to be an adverse personnel action." Id. @ 1074(2)(C).

By its terms, plaintiff fails to state a claim under @ 1074. This statute prohibits the Army from taking "adverse personnel action" against a soldier who tests HIV positive. That term is defined to include a "bar to reenlistment." It is not defined to include the placing of restrictions on the reenlistment options open to HIV positive soldiers. In both his brief and during oral argument plaintiff has insisted that @ 1074 guarantees to HIV positive soldiers a "meaningful army career" and a "meaningful reenlistment." But even if such an entitlement could somehow be defined, plaintiff's attempt to enforce the right to a "meaningful reenlistment" would lead this Court squarely to the realm of the nonjusticiable so clearly proscribed by Orloff and Kreis. Section 1074 prohibits the Army from using a soldier's HIV status as a "bar to reenlistment." That simply did not occur in this case. [*13] It is undisputed that plaintiff was allowed to, and did in fact, reenlist. n1

n1 Moreover, the Court detects some irony in plaintiff's position. Although he claims he is entitled to a "meaningful army career" and that the MOS restriction is therefore invalid, he also claims that he wants the construction MOS so that he can learn a skill that will be useful once he leaves the service. See Complaint para. 7.

The Secretary of the Army does not consider the MOS restriction at issue to be an "adverse personnel action" within the meaning of @ 1074. See Board Memorandum, at 6. The statute by its terms allows the Secretary to make this determination. Since the MOS restriction at issue does not constitute an adverse personnel action as defined by Congress in @ 1074(2)(C), and does not constitute an adverse personnel action as defined by the Secretary under @ 1074(2)(C)(viii), plaintiff fails to state a claim under this statute.

In arguing that the Army's policy is unlawful, plaintiff next looks to the Rehabilitation Act, 29 U.S.C. @ 791 et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. @ 2000e-16 et seq. Plaintiff's claims under these statutes are inherently [*14] flawed. First, as the Court of Appeals recently explained, section 791 of the Rehabilitation Act does not, in itself, grant a right of action to aggrieved individuals. Rather, the Act incorporates the scope and procedures of Title VII. Plaintiff's right to bring a cause of action, if any, must lie there. Judd v. Billington, 863 F.2d 103, 105 (D.C. Cir. 1988).

Courts have consistently held that military service members -- as distinguished from civilian employees of the military -- are not "employees" within the meaning of Title VII and cannot pursue claims under that statute.

Roper v. Department of the Army, 832 F.2d 247 (2d Cir. 1987); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987); Gonzales v. Department of the Army, 718 F.2d 926 (9th Cir. 1983). Moreover, Title VII prohibits discrimination based on race, color, religion, sex, or national origin. See 42 U.S.C. @ 2000e-16a. None of these attributes is alleged to be at issue in this case. Because plaintiff fails to state a claim under Title VII, his claims under both Title VII and the Rehabilitation Act must be dismissed.

Finally, plaintiff argues that the Army's policy violates "executive orders issued by the [*15] President to protect handicapped individuals in the federal government." Complaint para. 18. It is unclear from the Complaint as to which executive orders plaintiff is referring. Presumably he is referring to Executive Order No. 12,106 (1978), which implemented a non-discriminatory policy applicable to executive agencies. See Plaintiff's Response to Defendant's Motion to Dismiss, at 8. But plaintiff nowhere explains how this presidential directive affords him a cause of action independent of his statutory claims.

For these reasons, plaintiff fails to state a claim for relief under federal statutory law.

3. The Equal Protection Challenge

Plaintiff claims that he is "being denied the right that would be granted to all other Army enlisted personnel on reenlistment -- to learn whatever he is taught as a military enlisted man in the MOS of Engineering 64E." Complaint para. 1. Plaintiff claims that he has been denied "the right to a meaningful reenlistment" in violation of the equal protection clause of the fifth amendment. Plaintiff's Response to Defendant's Motion to Dismiss, at 1.

Plaintiff does not allege that he is a member of a suspect class or that fundamental rights are [*16] involved. Indeed, there is no constitutional right to reenlist in the armed forces in the first place, let alone in a specific MOS. E.g., Holdiness v. Stroud, 808 F.2d 417, 424 (5th Cir. 1987) (stating that plaintiff had "no constitutional right to re-enlist"). In order to state a valid equal protection claim, therefore, plaintiff must show that his differential treatment on account of his HIV positive status is not rationally related to a legitimate government interest. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

The reasons for the Army's policy with respect to HIV positive service members are stated in the regulation. The Army's policy "reflects current knowledge regarding the natural history of the disease, the risks to the infected individual incident to military service, the risk of disease transmission to the non-infected, the effect of infected personnel on unit functions and readiness, and the safety of the blood supply." AR 600-110 at para. 1-1. The regulation provides for preventative counseling for HIV positive individuals and their families. Id. at para. 2-16. The regulation is designed to ensure a systematic evaluation and study of [*17] the natural progression of the disease. Id. at para. 2-18. In the Court's view these are rational and, indeed, salutary purposes.

Plaintiff argues that AR 600-110 is invalid under the rationale of Owens v. Brown, 455 F. Supp 291 (D.D.C. 1978). plaintiff's argument is misplaced. In Owens, the Court struck down a statute that prevented female personnel from being assigned duties aboard Navy vessels. The Court found that the statute

violated the equal protection guarantee of the fifth amendment because its purpose was "more related to the traditional way of thinking about women than to the demands of military preparedness." Id. at 306. But Owens is readily distinguished from this case. Owens involved an outmoded distinction based on gender; this case involves a medically documented distinction based on the status of an individual as a carrier of an infectious, transmittable virus that leads to an incurable disease. The rationale of Owens has no application to this case. n2

n2 During oral argument, plaintiff suggested that the true purpose of AR 600-110 was to discriminate against homosexuals. That allegation has no place in this case. Plaintiff sets forth no evidence of such a purpose, and there has been no suggestion that this plaintiff is a homosexual who has suffered disparate treatment on account of his homosexual status. [*18]

The regulation at issue strikes a balance between the personnel needs of the Army, the medical needs of HIV positive soldiers, and the safety needs of non-infected military personnel. In the Court's view, AR 600-110 is a narrowly tailored regulation that places reasonable restrictions on the duty assignments of HIV positive soldiers. Since plaintiff cannot show that the Army's policy has no rational purpose, the regulation withstands constitutional scrutiny. Defendant is entitled to judgment as a matter of law.

B. Plaintiff's Challenge to the Board's Decision

Plaintiff claims that the Board's decision not to amend his records to show that his HIV infection was transmitted through a blood transfusion rather than through a sexual encounter is arbitrary and capricious. The Court of Appeals has held that decisions of the Board are reviewable under the Administrative Procedure Act, "albeit by an unusually deferential application of the 'arbitrary or capricious' standard." *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989).

In this case, plaintiff himself is uncertain as to the source of his HIV infection. In his Complaint he alleges that he acquired the [*19] HIV "either through a sexual encounter in the Spring of 1985 or as a result of a blood transfusion on December 15, 1985." Complaint para. 8. As a matter of law, if not common sense, the Board's decision cannot be arbitrary and capricious where the source of plaintiff's infection is simply unclear.

A reading of the Board's Memorandum reflects that the Board examined and dispelled with plaintiff's contentions in the most reasoned manner and based on evidence in the record. Like the Board, this Court is empathetic with plaintiff's desire to determine the source of his HIV infection. But under the facts presented, the Court sees no reason for disturbing the Board's decision.

CONCLUSION

Although plaintiff's challenge to the Army's policy on statutory and constitutional grounds is justiciable, plaintiff fails to state a claim under both federal law and the equal protection guarantee of the fifth amendment. As a matter of law, the Board's decision not to amend plaintiff's service record was neither arbitrary nor capricious. Accordingly, the Court grants defendant's motion and dismisses the Complaint.

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DATED: February 8th 1990

ORDER

Upon consideration of Defendant's Motion to Dismiss [*20] or, in the Alternative, for Summary Judgment, Plaintiff's Opposition thereto, the arguments of counsel in open Court and the entire record herein, and for the reasons set forth in the accompanying Memorandum, it is by the Court this 5th day of February, 1990,

ORDERED that Defendant's Motion be, and hereby is, granted; and it is accordingly

ORDERED that this case be, and hereby is, dismissed with prejudice.

[1] But a plaintiff's Pavlovian inclusion of a RICO claim need not induce an equally Pavlovian acceptance of those claims by a district court. In this instance, for example, Complaint ¶ 29 asserts in wholly conclusory fashion that Goldman Sachs' acts "constitute a pattern of racketeering activity." Complaint ¶ 30 seeks to particularize that by referring to "at least two separate acts involving fraud in the sale of securities" and to "conduct [that] gives rise to at least two separate acts indictable" as mail or wire fraud. Those allegations are simply insufficient in "pattern" terms. See, e.g., *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir.1986) (approving and following this Court's analysis in *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 831-33 (N.D.Ill.1985); and see *Dunham v. Independence Bank of Chicago*, 629 F.Supp. 983, 989-90 (N.D.Ill. 1986) and cases cited there (picking out the line between the "pattern" and non-"pattern" situations for RICO purposes); *S.J. Advanced Technology & Manufacturing Corp. v. Junkunc*, 627 F.Supp. 572 (N.D. Ill.1986) (more of the same).¹

[2] Huss will have to do without his Consumer Act claim as well. As the "Consumer" title implies and the cases under that Act confirm, it was not intended to afford protection for your garden-variety, everyday million-share purchaser such as Huss. More precisely, the one-on-one alleged misrepresentations and omissions alleged by Huss are not the kind of conduct the Consumer Act speaks to. See *Newman-Green, Inc. v. Alfonso-Larrain R.*, 590 F.Supp. 1083, 1085-88 (N.D.Ill.1984).

Accordingly Huss' third and fifth claims, Complaint ¶¶ 27-33 and 37-40 inclusive, are stricken.² Because the Court file does not reflect an appearance on behalf of Goldman Sachs as yet, a copy of this opinion is

being sent to the same address Huss' counsel have designated for service of process.



Joan L. HILL, Plaintiff,

v.

William R. BERKMAN, Chief of the Army Reserve, John O. Marsh, Secretary of the Army, Casper W. Weinberger, Secretary of Defense, Unnamed Federal Officials, individually or in their official capacities, Defendants.

No. 85-CV-389 (JBW).

United States District Court,
E.D. New York.

May 15, 1986.

Former member of United States Army brought action alleging that she had been discriminated against on the basis of sex in that she had been excluded from position as nuclear biological and chemical specialist. On defense motion for summary judgment, the District Court, Weinstein, Chief Judge, held that: (1) uniformed military are not exception to "members of military departments" expressly covered under Title VII, so that Title VII is exclusive judicial remedy for claims of sex discrimination brought by member of uniformed military; (2) because combat risk is occupational qualification mandated by statute, it is appropriate bona fide occupational qualification exception to Title VII; (3) notwith-

1. In light of the insufficiency of Huss' claim in "pattern" terms, it is unnecessary to rule on the adequacy of all aspects of Huss' allegations under RICO §§ 1962(a) and 1962(c).

2. This Court is of course aware of the "hazardous" nature of sua sponte dispositive dismissals of lawsuits, see *Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411, 414-16 (7th Cir.1986).

But this opinion was stimulated by the obvious facial insufficiency of the two claims and, perhaps more importantly, it is not a final order disposing of the case (so Huss' counsel has every opportunity to cure any flaws, if that can be done). This Court's silence as to Huss' other claims should not of course be taken as an expression either way as to their adequacy.

standing several flaws in procedure whereby Army did not act in bad faith in so classifying nuclear biological and chemical specialist position as combat job; and (4) declaratory judgment was not available.

Summary judgment granted.

1. Civil Rights ⇐9.10

United States is not "employer" for purpose of Title VII, and thus, provisions of Title VII that deal with "employers" and "employees" apply only to nonfederal workers. Civil Rights Act of 1964, §§ 701 et seq., 701(b), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e(b).

2. Civil Rights ⇐9.10

Amendments of 1972 to Title VII to cover employees of federal government were intended to apply broadly. Civil Rights Act of 1964, §§ 701 et seq., 717(a), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-16(a).

3. Civil Rights ⇐9.10

In construing Title VII, "employee" is term that must be given its common everyday meaning. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4. Constitutional Law ⇐242.1(3)

Courts cannot sidestep their duty to examine discrimination within the military and invalidate those instances of discrimination that conflict with the constitutional guarantee of equal protection. U.S.C.A. Const.Amend. 14.

5. Constitutional Law ⇐242.1(3)

Equal protection clause of Constitution applies to military. U.S.C.A. Const.Amend. 14.

6. United States ⇐22

Under Fourteenth Amendment of Constitution, Congress has right to enforce constitutional rights. U.S.C.A. Const.Amend. 14.

7. Civil Rights ⇐38

When Title VII and equal protection clause both safeguard right of individual to

be free from discrimination, reliance on statute rather than Constitution is preferred. U.S.C.A. Const.Amend. 14; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐9.10

Title VII reflects congressional intent to redress certain grievances with rigorous administrative procedure and judicial procedures. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

9. Civil Rights ⇐9.10, 38

Uniformed military are not exception to "members of military departments" expressly covered under Title VII, so that Title VII is exclusive judicial remedy for claims of sex discrimination brought by member of uniformed military; disagreeing with *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir.); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir.); *Johnson v. Hoffman*, 424 F.Supp. 490 (E.D.Mo.), *aff'd sub nom. Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.); *Cobb v. United States Merchant Marine Academy*, 592 F.Supp. 640 (E.D.N.Y.); and *Hunter v. Stetson*, 444 F.Supp. 238 (E.D.N.Y.). Civil Rights Act of 1964, §§ 701 et seq., 717, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-16; 5 U.S.C.A. § 102.

10. Civil Rights ⇐9.14

Army's closing of nuclear biological and chemical specialist position to women made threshold showing needed to invoke bona fide occupational qualification inquiry in Title VII sex discrimination action. Civil Rights Act of 1964, §§ 701 et seq., 703(e)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(e)(1).

11. Civil Rights ⇐9.10

Congress intended bona fide occupational qualification exception from Title VII coverage to justify large range of employer decisions. Civil Rights Act of 1964, §§ 701 et seq., 703(e)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(e)(1).

12. Civil Rights ⇨9.10

Federal regulatory barrier, unlike stereotypical prejudice, may be bona fide occupational qualification excluded from coverage of Title VII. Civil Rights Act of 1964, §§ 701 et seq., 703(e)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(e)(1).

13. Civil Rights ⇨9.14

Title VII does not nullify federal statutory discrimination that prohibits women of navy and air force from combat positions. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

14. Armed Services ⇨3

Army policy on women in combat, though not codified by Congress, should be accorded weight of statute.

15. Civil Rights ⇨9.10

Because combat risk is occupational qualification mandated by statute, it is appropriate bona fide occupational qualification exception to Title VII. Civil Rights Act of 1964, §§ 701 et seq., 703(e)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(e)(1).

16. Civil Rights ⇨9.10

In exercising Title VII jurisdiction, courts must take care not to second-guess day-to-day decisions crucial to disciplinary relationships within military. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

17. Civil Rights ⇨9.10

For policy decisions, test for judicial intervention in Title VII dispute is whether military decision was clearly arbitrary and erroneous, with harmful effect present at time dispute reaches court. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

18. Civil Rights ⇨9.10

"Clearly erroneous" inquiry as to military decision challenged under Title VII allows armed forces necessary flexibility to make changes and alter policy. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

19. Civil Rights ⇨9.14

Notwithstanding several flaws in procedure whereby nuclear biological and chemical specialist position was classified as combat job, so that women were excluded from holding such position, army did not act in bad faith in so classifying that position, and army's subsequent reopening of position to women did not suggest that closure was discriminatory for purpose of Title VII scrutiny. Civil Rights Act of 1964, §§ 701 et seq., 703(e)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(e)(1).

20. Declaratory Judgment ⇨207

Declaratory judgment was not available to former member of United States Army on her claims that she had been subjected to discrimination on the basis of sex in that she had been excluded from holding position as nuclear biological and chemical specialist, where former member and the army had long since terminated their relationship, specific position had subsequently been reopened to women, former member had no desire to reenlist, and former member had received honorable discharge.

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Raymond J. Dearie, U.S. Atty., Brooklyn, N.Y. by Thomas B. Roberts, Office of the Judge Advocate Gen. by Lieutenant Colonel Marshal M. Kaplan, Major Anthony V. James, for defendants.

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MEMORANDUM and ORDER

WEINSTEIN, Chief Judge:

Plaintiff Joan Hill sues the Secretary of Defense, the Secretary of the Army, the Chief of the Army Reserve and other officials, alleging violation of her right to be free from discrimination on the basis of sex. She enlisted in the United States Army on the understanding that she would

become a chemical specialist. After her enlistment, the position that she sought was closed to women on the justification that persons with this specialty would likely be exposed to combat.

The court orally dismissed the claims against defendants in their individual capacities and denied them Rule 11 sanctions. In their official capacities, defendants now move to dismiss the complaint for failure to state a claim and, alternatively, for summary judgment. The government's motion for summary judgment must be granted.

While the matter is not free of doubt, on balance the arguments in favor of granting women in the armed services the protection of Title VII of the Civil Rights Act are persuasive. In this case plaintiff's rights under that Act were not violated.

I. FACTS

Plaintiff's and defendants' version of the facts do not substantially differ.

In May of 1982, while employed as a clerk in a New York financial firm, Joan Hill enlisted in the Army Reserve in Brooklyn. She was accepted for the position of Nuclear Biological and Chemical Specialist ("NBC Specialist") with a rank of private. An NBC Specialist examines contaminated areas after nuclear, biological or chemical attack. She agreed to attend weekend drills in New York prior to basic training; receive two months of basic training at Fort Jackson, South Carolina, followed by two months of specialized training at Fort McClellan, Alabama; and work approximately one weekend per month and attend two weeks of summer training for the next six years. Compensation was to include training in job skills; salary and bonuses with room, board, uniforms and other benefits during training; salary and medical, dental and life insurance, travel discount, commissary, pension and other benefits after training; and the opportunity to be promoted in rank and salary.

Hill qualified for the position of NBC Specialist on the basis of a written examination and her educational background. She was deemed medically qualified. The

Army Reserve set the date for her to proceed to Jackson for basic training on November 12, 1982.

Between May and November 1982, Hill attended the requisite weekend drills as part of the 407th Unit of the Army Reserve at the Reserve Center in Jamaica, Queens, for which work she received a salary. During the drills, the men in the unit often told Hill that as a woman she should not be an NBC Specialist but should change to a clerical job. In one instance a similar statement was made by a superior officer. Nevertheless, Hill prepared for her further training. She purchased the requisite special clothing and equipment at her own expense. She gave up her Manhattan apartment, stored her furniture, and took an unpaid leave of absence from her permanent full-time employment. During this period, Hill received assurances that she would be transferred for full-time training on November 12, 1982.

Meanwhile, in September 1982, defendants had closed the NBC Specialist and 22 other positions to women. The Army did not notify Hill of the closure. When Hill reported on November 12, 1982 for transfer to Fort Jackson, she was informed that she would have to gain weight. She returned with the required weight about November 22, 1982. Army personnel refused to see her. About December 3, 1982, Hill was notified that she was now medically qualified but there was no reservation for her to ship out for basic training.

Finally, about December 8, 1982, Hill was apprised by the Army that it had reclassified the NBC Specialist position as a "combat support role" and closed it to women. She also was told that she was honorably discharged from the Army Reserve and that she would receive her discharge papers promptly. In fact she did not receive the honorable discharge papers until more than a year later, on March 29, 1984. Without them, she had difficulty securing employment. Hill had no income from November 12, 1982 until February 1,

1983, when she regained her job with her former employer.

The Army had closed the NBC Specialist position to women on the recommendation of the Women in the Army Policy Review Group, an organization created within the Pentagon in 1981 to study various issues concerning women in the Army. During that year General Charles Hines devised a new method of calculating which soldiers were most likely to engage in direct combat. General Hines, who has a Ph.D. in social psychology, relied on organizational descriptions and questionnaires to identify the probability of combat in every Army position. As more particularly described in Part III, *infra*, he reported that the NBC Specialist position was one from which combat replacements were drawn, and that if more than a few women occupied the position combat readiness would be endangered. Accordingly, the policy group recommended that the position be closed to women. The Army followed this recommendation.

The decision generated adverse comment. In April 1983 the Army reassessed the NBC Specialist position and others in light of newly created personnel categories. General Hines' methodology was again followed. The 1983 results showed that positions at the combat-likelihood level of NBC Specialist could accommodate more women without a threat to combat readiness. Accordingly, in October 1983, the Army reclassified the NBC Specialist position as non-combat. Women are now working in the position Hill chose, qualified for, and could not enter.

Since the claims against the individual defendants and the request for damages pursuant to the Fifth Amendment have been dismissed, all that remains of plaintiff's action in this court are two claims: one based upon Title VII and one for a declaration that plaintiff's equal protection rights under the Constitution were violated.

II. TITLE VII

Whether Title VII applies to the uniformed members of the armed forces is not

clear. The bare language used by Congress supports plaintiff's position. Some of the history, antecedents and analogous statutory treatment argue in favor of defendants' view. The legislative history is sparse to nonexistent. If Congress gave any thought to the issue this court has found no appreciable written traces of its cogitation.

An analysis of the problem presents two issues. First, does Title VII apply, and, if it does, second, was the discrimination authorized because of a bona fide occupational qualification.

A. Applicability of Title VII to the Armed Forces

Title VII was enacted in 1964, as a part of omnibus legislation, to make it illegal for an employer to discriminate in employment on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2. It empowered both private and governmental enforcement. See 42 U.S.C. §§ 2000e-5, 2000e-6, 2000e-8, 2000-12. The Civil Rights Act of 1964 covered all private employers, except those that did not affect interstate commerce, and those with fewer than fifteen employees. See 42 U.S.C. §§ 2000e-7, 2000e(b).

In 1972, Congress amended Title VII to cover employees of the federal government:

Discrimination prohibited. 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, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government hav-

ing positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Act of March 24, 1972, Pub.L. No. 92-261, 86 Stat. 111, codified at 42 U.S.C. § 2000e-16(a) (1972) (emphasis added).

Section 102 of Title 5 states in full:

The military departments are:

The Department of the Army.

The Department of the Navy.

The Department of the Air Force.

42 U.S.C. § 2000e-16(a) provides no other definitions or explanations of these terms.

On their face these provisions include the armed forces. Plaintiff, in addition, argues that Title VII, as a broad remedial statute, should be applied to discrimination on the basis of sex within the uniformed military. Defendants take the position that history and a common sense evaluation of the special needs of the military make it absurd to read Title VII literally.

We are somewhat trepidacious about holding that Title VII applies to the military forces because case law has consistently held to the contrary. See *González v. Department of the Army*, 718 F.2d 926, 927-29 (9th Cir.1983); *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir.1981); *Johnson v. Hoffman*, 424 F.Supp. 490, 493 (E.D.1977), *aff'd sub nom. Johnson v. Alexander*, 572 F.2d 1219, 1223-24 (8th Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658 (1978); *Cobb v. United States Merchant Marine Academy*, 592 F.Supp. 640, 642 (E.D.N.Y.1984); *Hunter v. Stetson*, 444 F.Supp. 238, 239 (E.D.N.Y.1977) (dicta). With the aid of the excellent briefs of plaintiff's distinguished pro bono counsel and amicus, we have concluded that we must respectfully disagree with this unbroken line of authority.

The announced purpose of Title VII was to eradicate discrimination; the goal of the 1972 amending legislation was to accord "[a]ggrieved [federal] employees or applicants the full rights available in the courts as are granted to individuals in the private

sector under Title VII." S.Rep. No. 92-415, 92nd Cong., 1st Sess. at 16 (1971). Before passage of the enabling legislation, there was "serious doubt that court review [was] available to the aggrieved Federal employee." H.R.Rep. No. 92-238, 92d Cong., 1st Sess. at 25, reprinted in 1972 U.S.Code Cong. & Admin.News at 2137, 2160.

The Supreme Court has often emphasized the legislative design to ensure that federal employees have the same right to freedom from unlawful discrimination as do private sector employees. See, e.g., *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976); *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976); *Morton v. Mancari*, 417 U.S. 535, 547, 94 S.Ct. 2474, 2481, 41 L.Ed.2d 290 (1974).

[1] The rights of federal employees do not, however, perfectly parallel those of private sector employees. Had Congress intended an exact parallel the 1972 amendments would have been far simpler: an added section stating that the federal government is an "employer." Such a choice was expressly rejected in the definitional section of Title VII. The United States is not an "employer" for purposes of the statute. See 42 U.S.C. § 2000e(b). Similarly, a federal agency is an "executive agency" under § 2000e-16(a) and not an "employer" under § 2000e(b). See *Dorsey v. Federal Reserve Bank of St. Louis*, 451 F.Supp. 683 (E.D.Mo.1978). Section 2000e-16(a) sets forth the limited categories of personnel who are covered by Title VII as amended. The provisions of Title VII that deal with "employers" and "employees" apply only to non-federal workers.

Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), relied upon this distinction. Plaintiff was not permitted to press her suit against Congressman Passman under Title VII because she had not been hired in the "competitive service" of the federal government. See 42 U.S.C. § 2000e-16(a). "When § 717 was added to Title VII to protect federal employees from

discrimination," Justice Brennan wrote, "it failed to extend this protection to congressional employees such as petitioner who are not in the competitive service." 442 U.S. at 247 & n. 26, 99 S.Ct. at 2278 & n. 26. See also *Lawrence v. Staats*, 640 F.2d 427 (D.C.Cir.1981) ("excepted service employee" not covered by Title VII). The mandate expressed in the legislative history—to ensure that the federal government is an example to private employers—cannot be read to exceed the limiting language of § 2000e-16(a).

Because of these limiting precedents, Title VII can be applied to the military only if "military departments" in the statute includes the uniformed military. There is no jurisdictional basis other than § 2000e-16(a) to hold a federal government organization to the standards of Title VII.

Military policy presents the ultimate dilemma of § 2000e-16(a). In *Davis*, the dissenting Justices were concerned about the holding allowing plaintiff to bring her claim against a congressman under the Constitution. Yet gender bases for decisionmaking in the military run far deeper than the preference expressed in Congressman Passman's letter to Davis: "[I]t was essential that the understudy to my Administrative Assistant be a man." 442 U.S. 228, 230 n. 3, 99 S.Ct. 2264, 2269 n. 3, 60 L.Ed.2d 846 (1979). The American military has struggled for decades with the problem of whether and how to include women in its mission.

Women served in the United States armed forces with full military rank as long ago as the First World War, when about 13,000 women enlisted in the Navy, doing clerical work. See M. Binkin & S. Bach, *Women and the Military* 5 (1977). General Pershing argued unsuccessfully for the inclusion of women in the Army. *Id.* Women's auxiliary units were established during the Second World War. After the war, Congress institutionalized the role of women in the military. See *Women's Armed Services Integration Act of 1948*, Pub.L. No. 80-625, 62 Stat. 356 (not codified).

Provisions of the 1948 legislation illustrate the military policy of allowing women to participate while treating them differently from men. Women had to be older (18 rather than 17) and needed parental consent until reaching 21 (18 for men) in order to enlist. See 62 Stat. 357. Women could not serve above the rank of lieutenant colonel; this rule was changed by statute in 1967. See Pub.L. No. 90-130, 81 Stat. 374. The 1948 Act also provided separate criteria for male and female spouses to obtain military benefits: husbands had to demonstrate dependency. The Supreme Court later invalidated this disparate requirement. See *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

These erosions of a discriminatory structure occurred with no invocation of Title VII. Military policy has never collided with Title VII in reported case law. Nevertheless in devising its administrative redress for grievances, the Army has distinguished between the uniformed military and civilian employees. Compare Army Regulation 600-21, attached as Exhibit B to Defendants' Rule 3(g) Statement (procedures for uniformed military complaining of discrimination) with 29 C.F.R. § 1613 (procedures for civilian employees). Defendants argue that this acknowledged "noncompliance with Title VII and its implementing regulations," which has continued with no criticism from Congress or the federal equal employment agencies, reflects an accurate perception in the Army that Title VII does not apply to the uniformed forces.

The language and legislative history of the statute provide no basis for this conclusion. It is a statute, not a perception, that we must interpret.

[2] References in legislative materials indicate that the 1972 amendments to Title VII were intended to apply broadly. See, e.g., H.R.Rep. No. 92-238, 92nd Cong., 2d Sess., reprinted in 1972 U.S.Code & Ad. News 2137, 2141 ("The time has come to bring an end to job discrimination once and for all, [for] every citizen...."); 118 Cong.

Rec. daily ed., Mar. 6, 1972 at 7166 ("opportunities for millions of Americans").

When Congress wanted to distinguish between uniformed and civilian employees of the military, it did so explicitly. For example, the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, defines "employee" as follows:

The term employee ... means any individual employed by the Government of the United States ... as a *civilian* in the military departments (as defined in Section 102 of Title 5).

29 U.S.C. § 203(e)(2)(A)(i) (emphasis added). See also Civil Service Reform Act, 5 U.S.C. § 7103(a)(2) (" 'employee' means an individual employed in an agency ... but does not include ... a member of the uniformed services").

[3] Congress has not, however, been consistent. In other statutes it explicitly included the uniformed military in definitions of employee. See, e.g., Child Support Enforcement Act, 42 U.S.C. § 659(a). Whether this inclusion undercuts plaintiff's argument is not clear since employee is a term that must "be given its common everyday meaning." *Cobb v. Sun Papers*, 673 F.2d 337, 339 (11th Cir.), *cert. denied*, 459 U.S. 874, 103 S.Ct. 163, 74 L.Ed.2d 135 (1982) (construing Title VII).

As for the other ambiguous term in the statutes, "military departments," there is support for the view that these include the uniformed military. The first codified description of the Army, Navy, and Air Force as "military departments" was in the National Security Act Amendments of 1949, Pub.L. No. 81-216, 63 Stat. 578. That statute announced its purpose:

to provide three military departments, separately administered, for the operation of the Army, the Navy ..., and the Air Force, with their assigned *combat* and service components ...

63 Stat. 578, 579 § 2 (emphasis added).

Nevertheless, defendants' position has strong historical support. While the original Civil Rights Act did not apply to the federal government, President Johnson's

precursor to the 1972 amendments, did. Executive Order No. 11246 protected federal employees from discrimination on the basis of race, creed, color or national origin. Under the terms of the order, every federal agency head was required to "establish and maintain a positive program of equal employment opportunity for all *civilian* employees...." Executive Order No. 11246, 30 F.R. 12319 (emphasis added). An amendment to the Order added a prohibition against sex discrimination, but continued to limit coverage to civilians. See Executive Order No. 11375, 32 F.R. 14303. A superseding order, again using the restrictive term "civilian employees," explicitly stated that the Order applied to military departments. See Executive Order No. 11478, 34 F.R. 12985.

Arguably the congressional desire to merely codify Executive Order No. 11478 is reflected in the legislative history of the 1972 amendments. Because members of Congress did not discuss the impact or burden that the amendments would have on the federal government, it might be inferred that they assumed that the 1972 amendments were equivalent to Executive Order No. 11478. Assignment of enforcement responsibility to the Civil Service Commission also lends some support to the contention that Congress did not intend Title VII to apply to uniformed members of the military since the Commission has never involved itself with soldiers, sailors and airpersons.

Often repeated in the legislative history of the 1972 amendments was the fact that the new law would cover 2.6 million federal employees. 3 Legislative History of the Equal Employment Opportunities Enforcement Act of 1972 at 1760, S.Rep. No. 92-415 (118 Cong.Rec. daily ed., Feb. 22, 1972 at 4922.) At the time of the debate, there were 2.2 uniformed members of the military in excess of that number. A court in a similar case found this point persuasive. See *Johnson v. Hoffman*, 424 F.Supp. 490, 493 (E.D.Mo.1977), *aff'd sub nom. Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 579, 58

L.Ed.2d 658 (1978). The 2.6 million figure was apparently not accurate; it understated even the number of civilians covered by the 1972 amendments by disregarding Postal Service and Library of Congress workers. See Statistical Abstract of the United States, at 403-05 (U.S. Dep't of Commerce 1973).

The analysis of § 717 in the legislative history states that personnel actions within the competitive service or positions covered by the Civil Service Retirement Act are protected by the amendment. See H.R. Rep. No. 92-238, reprinted in 1972 U.S. Code Cong. & Ad. News at 2167. Although it does not say that members of the military are protected, section-by-section analysis is a brief summary of § 717 that does not purport to cover the entire language of the statute.

These arguments in both directions are undecisive, but they do demonstrate that the legislative history of 42 U.S.C. § 2000e-16 is unclear on whether Title VII applies to the uniformed military. Congress may have intended to except the uniformed military from coverage, but there is no evidence compelling this interpretation. The plainest rendering of the statute suggests that Title VII does not distinguish between uniformed employees and civilian employees.

Two decisions holding that Title VII does not apply to the uniformed military are illustrative of the prior line of cases. See *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir.1983); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658 (1978).

Gonzalez relied on a distinction "between 'military departments' [covered by § 2000e-16(a)] and 'armed forces,' the former consisting of civilian employees, the latter of uniformed military personnel." 718 F.2d at 928. It supported this distinction by following legislative references in Title 5 and Title 10 of the United States Code. In the West edition, United States Code Annotated, a "Reviser's Note" states that the definition of military departments

in 5 U.S.C. § 102 "is supplied to avoid the necessity for defining 'military departments' each time it is used in this title. See section 101(7) of Title 10." At the onset it bears mention that the "Reviser's Note" was not, so far as we can determine, seriously reviewed by Congress. Section 101(7) is located near section 101(4), which has a separate definition of "armed forces." See 718 F.2d at 928.

Somewhat more persuasive than the Reviser's Note is a statutory provision of Title 10. It seems to lump civilian and military components into the term department since it provides:

"Department," when used with respect to a military department, means the executive part of the department and all field headquarters, reserve components, installation activities and functions under the control or supervision of the Secretary of the department....

10 U.S.C. § 101(5) (emphasis added). This broader definition of military departments specifically includes uniformed reserve units and undercuts substantially the distinction *Gonzalez* drew between "military departments" and "armed forces."

In other contexts, courts, including the Ninth Circuit, have found that "military departments" in other statutes includes members of the armed forces. See, e.g., *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 104 S.Ct. 1488, 79 L.Ed.2d 814 (1984) (applying Freedom of Information Act); *Blevins v. Plummer*, 613 F.2d 767 (9th Cir.1980) (applying Privacy Act).

Johnson v. Alexander, a second appellate decision directly on point, held that a member of the uniformed military is not an "employee" for purposes of Title VII. It expressly did not use a civilian-noncivilian distinction, but offered little explanation for the holding. 572 F.2d at 1224.

Recent events have strengthened the view that membership in the armed forces is a form of employment. With the draft eliminated, and only a small fraction of personnel facing combat since the withdrawal from Vietnam, the peacetime mili-

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tary's role as an employer has increased. The armed forces offer a unique compensation package: free health care, housing, and generous retirement annuities. Enlisted personnel are provided with hundreds of training courses, delivering solid experience for the civilian job market. See Goodman, *Women, War, and Equality: An Examination of Sex Discrimination in the Military*, 5 Women's Rights Law Rep. 243, 244 n. 15 (1979). Officers can study at civilian universities and receive valuable training—such as learning to fly a plane; more than eighty percent of America's well-paid commercial pilots received their pilot training in the Navy and Air Force. *Id.* at 244 n. 18.

Apart from the statistical analyses indicating that at both the officer and enlisted level, total benefits to those in the armed forces has risen to the point of approximate equality with civilian benefits, there is a highly significant advantage to females in the military. While civilian females lag well behind civilian males in annual earnings, in the military this disparity has been virtually eliminated. See M. Binkin & S. Bach, "Comparison of Mean Annual Earnings of Civilians with College Education, by Sex and Age, and Commissioned Officers, By Age," in *Women and the Military* 32 (1977).

More important from a national policy view is the military as "college for many of the Nation's poor." See Hearings on S.J. Res. 61 and S.J. 231 before the Senate Judiciary Comm., 91st Cong., 2d Sess. 320 (1970) (Equal Rights Amendment hearings). Plaintiff and others like her regard the Army as a source of improved future employment. For them the peacetime Army is a force against the circumstances in which societal discrimination has placed many American blacks and women.

Just as the military as employer offers some disadvantaged Americans a better chance than they can generally find in the civilian job market, the armed forces have often recently been more enlightened than civilian America in responding to discrimination. Before *Brown v. Board of Edu-*

cation and in the days of Jim Crow segregation, in the early 1950's, the military instituted relatively successful integration throughout its ranks. This success helped to support national integration policies in later years. See J. Greenberg, *Race Relations and American Law* 369 (1950); J. Sloaner, *The U.S. Army and the Negro* vi (1971) ("The Army has been an active instrument of civil rights enforcement and an agent of social reform for the Negro."). This progressive and egalitarian tradition is an important and rather glorious part of our recent military history that cannot be buried under what the Second Circuit has called "unjustified presumptions of validity." *Crawford v. Cushman*, 531 F.2d 1114, 1121 (2d Cir.1976) (invalidating Marines policy of mandatory discharge of pregnant women).

[4-6] Nor can the courts sidestep their duty to examine discrimination within the military and invalidate those instances of discrimination that conflict with the constitutional guarantee of equal protection. The equal protection clause of the Constitution applies to the military. See *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Under the Fourteenth Amendment of the Constitution, Congress has the power to enforce constitutional rights. See *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 15-16, 101 S.Ct. 1531, 1538-39, 67 L.Ed.2d 694 (1981); *Parden v. Terminal R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). "There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n. 9, 96 S.Ct. 2666, 2670 n. 9, 49 L.Ed.2d 614 (1976). In the absence of a contrary decision by Congress, there is no reason for a military exception to the equal protection policies embodied in Title VII.

[7, 8] When Title VII and the equal protection clause both safeguard the right of

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an individual to be free from discrimination, reliance on the statute rather than the Constitution is preferred. The Supreme Court has held that § 2000e-16 is the exclusive remedy for claims of discrimination in federal employment; if the statutory remedy were not exclusive, it would be driven "out of currency" in the presence of "other, less demanding" remedies. *Brown v. General Services Administration*, 425 U.S. 820, 833, 96 S.Ct. 1961, 1968, 48 L.Ed.2d 402 (1976). Title VII reflects the congressional intent to redress certain grievances with rigorous administrative procedure and judicial procedures.

Defendants gain some advantage from a construction of Title VII that would apply the statute to the uniformed military. If Title VII applies to the military, then it is the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Brown v. General Services Administration*, 425 U.S. 820, 829, 96 S.Ct. 1961, 1966, 48 L.Ed.2d 402 (1976). Title VII sweeps away other remedies an aggrieved member of the military might choose. Moreover, the great body of Title VII case law would provide clear standards for deciding discrimination cases, perhaps actually improving military effectiveness.

[9] In summary, members of the armed forces are federal employees who share in all Americans' constitutional right to equal protection under the law. There is nothing in Title VII to suggest that the uniformed military are an exception to "members of military departments" expressly covered under § 2000e-16. Title VII is the exclusive judicial remedy for claims of sex discrimination brought by a member of the uniformed military.

B. *Combat Exposure Risk as a Bona Fide Occupational Qualification*

An exception to Title VII that applies to the federal government as employer is known as the "BFOQ." If religion, sex, or national origin is a bona fide occupational qualification for a particular position, the employer may discriminate on that basis:

[An employer may employ an individual] on the basis of his religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise....

42 U.S.C. § 2000e-2(e)(1).

No major country allows women in combat units in its standing armed forces. See *Rostker v. Goldberg*, 453 U.S. 57, 77 n. 12, 101 S.Ct. 2646, 2658 n. 12, 69 L.Ed.2d 478 (1981). The United States military is no exception. By federal statute, Navy "women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions...." 10 U.S.C. § 6015. Women in the Air Force "may not be assigned to duty in aircraft engaged in combat missions." 10 U.S.C. § 8549. The Army and the Marines have by longstanding policy followed the same restriction.

When combat restriction laws were passed in 1948, the Army expressed its preference not to have such an explicit barrier because "the experts advise that modern warfare makes the entire United States vulnerable as a combat area in the future." See Testimony of Colonel Mary Hallaren, Director, Women's Army Corps, Hearings Before the Senate Armed Services Committee, reprinted in M. Binkin & S. Bach, *Women and the Military* 26 (1977). Colonel Hallaren's testimony presaged the future problem, highlighted in this case, of separating combat from non-combat work in an institution dedicated to readiness for combat.

Sex discrimination in the form of combat restrictions is said to be widely supported by Americans. See S.Rep. No. 96-826, 96th Cong., 2d Sess. at 157, reprinted in 1980 U.S.Code Cong. & Admin.News at 2612, 2647 (debate over Selective Service registration of women). We have found no challenge to the exclusion statutes in reported case law.

Despite modern combat exclusions, women have served in battlefields since Biblical days, when Deborah joined Barak in lead-

ing ten thousand men to victory against the Canaanites. See Judges 4:4-24. Other legends of women in battle abound. See, e.g., M. Kingston, *The Woman Warrior* (1976) (China), N. Ireland, *Index to Women of the World* 414 (1970) (Molly Pitcher as cannoneer in Revolutionary War). The pioneer women who picked up rifles have been inscribed into our history by the cinema. Joan of Arc is as enduring a hero as any military man. For every Joan of Arc, however, there have been innumerable Joan Hills: women who would have been part of the prosaic millions of soldiers but who will not be permitted to fight, since the military establishment has excluded women from combat.

These antecedents show a fundamental conflict between modern ideas of equality and non-discrimination codified in Title VII, on the one hand, and the conviction that fighting wars is not the place of a woman, on the other. Title VII of the Civil Rights Act says that the federal government must not discriminate against females on the basis of sex; Title 10 of the United States Code, at sections 6019 and 8549, says that it must. The only reconciliation of the statutes involves an exception to Title VII.

[10] Title VII excludes from its coverage discrimination on the basis of religion, sex, or national origin where any of these criteria is a bona fide occupational qualification. The bona fide occupational qualification exception is invoked only after actual discrimination has been demonstrated. Here the Army's closing of the NBC position to women is not disputed. This discrimination makes the threshold showing needed to invoke a BFOQ inquiry.

[11] Congress intended the exception to justify a large range of employer decisions. See, e.g., House Education and Labor Committee Report, H.R.Rep. No. 718, 89th Cong., 1st Sess. 5 (1965) (BFOQ meant to apply in "common circumstances, widely accepted by contemporary standards, where a reasonable good faith and justifiable ground exists to perpetuate occupational distinctions based upon sex"). Floor debate in both the House of Representa-

tives and the Senate indicated a concern that an occupational qualification exception was needed to protect reasonable employment decisions. See Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tex.L.Rev. 1025, 1028-32 (1977).

Despite legislative support for a strong BFOQ exception, both the Equal Employment Opportunity Commission and the federal courts have interpreted the exception narrowly. The EEOC explicitly allows sex discrimination where the BFOQ is "authenticity," such as having only a male actor play a male role. There is also some endorsement of a BFOQ for "privacy" jobs such as locker room attendant. The EEOC tends to reject other proffered BFOQs, including customer preference and protective state labor laws. See 29 C.F.R. § 1604.2(a).

The courts have established several alternative tests to determine whether a particular kind of sex discrimination represents a bona fide occupational qualification. See *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir.1971). These tests, generally applied to private employers, emphasize the need for vigilance against stereotypical ideas of women's capacities.

[12,13] A federal regulatory barrier, unlike a stereotypical prejudice condemned by the *Weeks*, *Diaz*, and *Rosenfeld* courts, may be a BFOQ. It is clear that state legislation in conflict with Title VII is void under the supremacy clause. See *United States v. City of Chicago*, 549 F.2d 415, 438 (7th Cir.1977); *Rosenfeld v. Southern Pacific Telephone*, 444 F.2d 1219, 1225 (9th Cir.1971); *San Francisco Police Officers Association v. City and County of San Francisco*, 621 F.Supp. 1225, 1226 (N.D. Cal.1985). A federal statute is crucially different from a state law. Title VII does not nullify the federal statutory discrimina-

tion that prohibits women of the Navy and the Air Force from combat positions.

[14] By extension, the Army policy on women in combat, though not codified by Congress, should be accorded the weight of a statute. Like the Air Force and Navy policies, the Army rule has gone unchallenged in the courts, and has been followed with the full deference paid to federal law. To treat the Army differently from the Navy and the Air Force would be to draw a distinction that has never had any practical significance.

[15] Because combat risk is an occupational qualification mandated by statute, it is an appropriate BFOQ exception to Title VII.

C. The Role of Federal Civilian Courts in Applying Title VII to the Military

The military enjoys wide latitude in making decisions concerning combat readiness. See *Orloff v. Willoughby*, 345 U.S. 83, 93, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953) ("judges are not given the task of running the Army"). Where to place the limits of this deference has long troubled the federal judiciary.

One test was announced in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.1971), where the Fifth Circuit announced four criteria for determining whether federal courts should exercise their powers to review a military action:

- (1) the nature and strength of plaintiff's claim;
- (2) potential injury to the plaintiff if review is refused;
- (3) the type and degree of anticipated interference with military functions; and
- (4) the extent to which military expertise or discretion exists.

Id. at 201-02. Although *Mindes* was brought under the Constitution, its analysis is relevant in a Title VII context where questions of deference may affect the exercise of jurisdiction. The *Mindes* analysis has been widely employed. See, e.g., *Navas v. Gonzalez Vales*, 752 F.2d 765, 769

(1st Cir.1985); *Penagaricano v. Llenza*, 747 F.2d 55, 60 (1st Cir.1984); *Nieszner v. Mark*, 684 F.2d 562 (8th Cir.1982), *cert. denied sub. nom. Nieszner v. Orr*, 460 U.S. 1022, 103 S.Ct. 1273, 75 L.Ed.2d 494 (1983); *Lindenau v. Alexander*, 663 F.2d 68, 71 (10th Cir.1981); *Schlanger v. United States*, 586 F.2d 667, 671 (9th Cir.1978), *cert. denied*, 441 U.S. 943, 99 S.Ct. 2161, 60 L.Ed.2d 1045 (1979); *Silverman v. Middendorf*, 422 F.Supp. 471 (S.D.N.Y.1976), *aff'd*, 553 F.2d 94 (2d Cir.1977).

The Second Circuit has often expressed difficulty in determining when federal courts should review military decisions. Compare *Katcoff v. Marsh*, 755 F.2d 223-34 (2d Cir.1985), (Army action "should be treated as presumptively valid") with *Crawford v. Cushman*, 531 F.2d 1114, 1121 (2d Cir.1976) ("appellant's claims must be evaluated in relation to the specific military justifications alleged here ... without unjustified presumptions of validity ..."). Reluctance to interfere is apparent:

We do not say that a case could never arise where [an Army decision] could be invalidated by a civilian court.... But any such judicial intrusion into the area broadly confided by the Constitution to the President as commander-in-chief and his authorized subordinates must await a [strong] case....

Cortright v. Resor, 447 F.2d 245, 246 (2d Cir.1971) (Friendly, Ch.J., for a divided panel), *cert. denied sub nom. Cortright v. Froehke*, 405 U.S. 965, 92 S.Ct. 1172, 31 L.Ed.2d 240 (1972). Although the Second Circuit has never explicitly accepted the four-part *Mindes* test, its sentiments expressed in these cases comport with the philosophy of balancing expressed in *Mindes*.

The rights of individuals in the military are considered in light of the military's need for discipline, with the result that the military is not required to be as tolerant and liberal as a civilian organization. As Justice Rehnquist recently wrote for the Supreme Court, "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de

corps." *Goldman v. Weinberger*, — U.S. —, —, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986). Various liberties and freedoms accorded to civilians can be lost to members of the armed forces under the prevailing deferential standard of review. See, e.g., *id.* (upholding regulation challenged as violative of First Amendment); *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983) (uniformed military cannot sue superior officers for injuries sustained as a result of race discrimination); *Parker v. Levy*, 417 U.S. 733, 743-44, 94 S.Ct. 2547, 2555-56, 41 L.Ed.2d 439 (1974) (upholding conviction of serviceman for denouncing Vietnam war in speeches).

This line of Supreme Court cases, while developed in response to constitutional rather than statutory challenges of military decisions, sheds light on the instant case, where plaintiff has alleged unequal treatment on the basis of her sex. Whatever the jurisdictional basis of an action may be, the need for considerable deference to military requirements remains constant.

Title VII would respect the disciplinary relationships of military life if it is read as not supporting actions at law by a subordinate against a superior officer for injuries resulting from official orders. Such a reading of Title VII follows the point made in *Chappell v. Wallace*:

[Discipline] becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchial structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.

103 S.Ct. at 2365. The wrong alleged in *Chappell* was race discrimination in work assignments and job evaluations by superior officers. A similar complaint could be made alleging sex discrimination. Title VII, however, cannot intrude in this intimate and daily military relationship, which is characterized by "the subordination of the desires and interests of the individual to the needs of the service." *Orloff v.*

Willoughby, 345 U.S. 83, 92, 73 S.Ct. 534, 539, 97 L.Ed. 842 (1953).

[16] In exercising its Title VII jurisdiction, then, the courts must take care not to second-guess day-to-day decisions crucial to disciplinary relationships. Interference with the field decisionmaking authority of superior officers would undermine the military function. For this reason isolated individual allegations of discrimination are best left to intramilitary review.

A central, national policy decision, by contrast, calls for a lesser measure of deference but some deference nonetheless. The military needs the freedom to be wrong, to change its mind. Unredressed injury may warrant intervention, but policy decisions, subject to change, characterize all active organizations and must develop freely.

[17,18] For policy decisions, the test for judicial intervention in a Title VII dispute is whether the military decision was clearly arbitrary and erroneous, with a harmful effect present at the time the dispute reaches the court. A "clearly erroneous" inquiry allows the armed forces necessary flexibility to make changes and alter policy.

III. THE MERITS OF THE RECLASSIFICATION

What now remains, in the *Mindes* analysis, is an evaluation of "the nature and strength of plaintiff's claim." *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir.1971).

The critical factual question is whether the Army clearly acted in bad faith in classifying the NBC Specialist position as a combat job. The thirteen-month closure, according to plaintiff, was a bad faith aberration. She maintains that the national election returns of 1980 justified and fomented a prejudice against women in the Army, and encouraged discriminatory methods of keeping women out of promising military careers. There is no support for this contention in the record.

General Hines's study sorted Army positions into categories based on the chances

that a soldier in that category would enter into combat. An NBC Specialist is part of a unit, or force of soldiers, with combat-related duties. Defendants offered the following sample table of an infantry unit:

Infantry Unit—Table of Organization			
Line	Title	Duties	Number of Positions
(1)	Commander	Command	1
(2)	Adjuncts	Assist Command	2
(3)	NCO	Assist Command and Control Troops	6
(4)	NBC Specialist	Conduct Decontamination in Front Lines	4
(5)	Medic	Provide Medical Care in Front Lines	1
(6)	Rifleman	Close With and Kill Enemy	100
Total Unit Component			114

Within this framework, General Hines considered the mission of each unit in the entire active Army, the duties of each specialist, the battlefield location of the line within the unit, and the Army tactical doctrine applicable to the line, to determine the combat-likelihood category of each position. Seven levels of risk, labeled P1 through P7, were drawn up. The Army then considered the effect of closing various levels of combat-risk categories to women. It decided to close only the highest-risk category, P1.

The NBC Specialist position fell within all seven categories, because of the other variables considered in determining combat likelihood. At the entry level, 1429 NBC Specialists were authorized. Of these 1429 privates, 1385 were classified at P1, the highest likelihood of entering into combat. Only 44 places remained open to women, and the Army determined that 43 places had to be filled by men to ensure combat replacements. Concluding that the NBC Specialist position did not offer enough promotional opportunity because of this narrow opening, General Hines recommended that the NBC Specialist position be closed to women.

[19] Plaintiff cogently points out several flaws in this procedure. General Hines' study on the role of women in the Army might well have been requested in part because some male commanders felt un-

easy about this changing and growing role. Long-range weapons have made the concept of "front lines" somewhat obsolete. Some of the study's decisions regarding the use of statistical and other data are debatable. Women had little input in the study. These complaints are provocative and at least some were apparently considered by the Army. They do not make out a claim of unlawful discrimination.

The Army's subsequent reopening of the NBC specialist position to women does not suggest that the closure was discriminatory. Expansion in entry-level positions opened more places that could be filled by women while ensuring combat replacements. The relatively prompt reclassification to permit entry of women suggests good faith on the part of the Army.

The serious problems in changing the whole armed forces from a segregated organization, whether it is black-white or male-female, to an unsegregated one, are great. Such a radical restructuring requires education, many studies and reports and will necessarily, in the course of the change, result in errors. Here, assuming there was an error, it was promptly corrected.

IV. DECLARATORY RELIEF

Plaintiff seeks relief in the form of a declaration that defendants discriminated against her on the basis of sex. She urges that such a declaration would assist in her future search for employment, to show that the brevity of her stint in the Army Reserves did not reflect a lack of talent or diligence.

[20] Even if such a declaration would please an employer—a dubious assertion—plaintiff and defendant have long terminated their relationship, and there is no ongoing controversy amenable to declaratory relief. The NBC Specialist position is now open to women; plaintiff has shown no desire to reenlist, and she does not represent a class. Moreover, she has received an honorable discharge.

Any declaration would speak to an event that is now moot. See *Aetna Life Insurance of Hartford v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). A declaratory judgment must be denied.

V. CONCLUSION

The military must be held to the standards and goals of Title VII, but it is entitled to have its need for discipline recognized by civilian courts. It may exclude women from combat and combat support positions, because being male is a bona fide occupational qualification for a job that is by federal law and present national policy restricted to men. Under Title VII, the federal courts have jurisdiction to review the classification of a position as combat or combat supported. The classification in this case was valid.

Summary judgment is granted in favor of all defendants with no costs or disbursements.

So ordered.



Margarita WILLIAMS, Plaintiff,

v.

STATE UNIVERSITY OF NEW YORK,
and State University Health Center at
Brooklyn a/k/a S.U.N.Y. Downstate
Medical Center a/k/a State University
Hospital, Defendants.

No. 86 CV 985.

United States District Court,
E.D. New York.

May 15, 1986.

Discharged employee brought action for racially based discharge in violation of Title VII, section 1981, and section 1983 and sought preliminary injunction. The

District Court, Platt, J., held that: (1) discharged employee failed to establish irreparable harm; (2) discharged employee failed to establish likelihood of success on merits in actions under section 1981 and section 1983; and (3) discharged employee failed to establish that balance of hardships tipped in employee's favor.

Preliminary injunction denied.

1. Injunction ⇐139

District court lacks subject matter jurisdiction and is powerless to grant preliminary injunction prior to filing of complaint. Fed.Rules Civ.Proc.Rule 3, 28 U.S.C.A.

2. Civil Rights ⇐12.4

Action for intentional discrimination in violation of section 1981 and section 1983 does not require exhaustion of administrative remedies provided for Title VII action. 42 U.S.C.A. §§ 1981, 1983; Civil Rights Act of 1964, § 701, 42 U.S.C.A. § 2000e.

3. Civil Rights ⇐46(10)

Mere damage to reputation and self-esteem or hardship imposed on plaintiff's family do not merit preliminary injunction for reinstatement after allegedly discriminatory discharge. 42 U.S.C.A. §§ 1981, 1983; Civil Rights Act of 1964, § 701, 42 U.S.C.A. § 2000e.

4. Injunction ⇐138.9

Plaintiff who can calculate interim damages with sufficient accuracy to make damages an adequate substitute is not entitled to preliminary injunction.

5. Civil Rights ⇐46(10)

Discharged employee seeking preliminary injunction for reinstatement after allegedly discriminatory discharge must show extraordinary circumstances by establishing that employee has little chance of securing further employment, has no personal or family resources, lacks private unemployment insurance, is unable to obtain privately financed loan, is ineligible for any type of public support or relief, and is subject to any other compelling circumstances. 42 U.S.C.A. §§ 1981, 1983.

Aristides GONZALEZ,
Plaintiff-Appellant,

v.

DEPARTMENT OF the ARMY, Clifford
L. Alexander, individually and in his capacity as Secretary of the Army, Defendants-Appellees.

No. 82-4270.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 12, 1983.

Decided Oct. 17, 1983.

Serviceman brought suit against Army alleging race discrimination. The United States District Court for the Northern District of California, William A. Ingram, J., dismissed complaint, and serviceman appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) Title VII does not apply to uniformed members of Armed Forces, and (2) serviceman's section 1981 claims of race discrimination were nonreviewable.

Affirmed.

1. Federal Courts ⇐ 776

District court's conclusion on question of law is reviewed de novo.

2. Civil Rights ⇐ 9.10

Term "military departments" in section of Title VII extending protection against employment discrimination to "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments . . ." includes only civilian employees of Army, Navy and Air Force. Civil Rights Act of 1964, § 717(a), 42 U.S.C.A. § 2000e-16(a).

See publication Words and Phrases for other judicial constructions and definitions.

* The Honorable John W. Peck, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

3. Civil Rights ⇐ 9.10

Title VII does not apply to uniformed members of Armed Forces. Civil Rights Act of 1964, § 717(a), 42 U.S.C.A. § 2000e-16(a).

4. Civil Rights ⇐ 13.10

Serviceman's section 1981 claims of race discrimination were nonreviewable, where serviceman had already been reinstated by Army with retroactive promotion to rank of major and interference with Army if claims were reviewed would be significant. 42 U.S.C.A. § 1981.

5. Civil Rights ⇐ 13.1

Generally, section 1983 applies only to deprivations of civil rights under color of state law. 42 U.S.C.A. § 1983.

Carlos Ernesto Duque, San Francisco, Cal., for plaintiff-appellant.

Richard D. Rosen, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before PECK,* FLETCHER, and PREGERSON, Circuit Judges.

FLETCHER, Circuit Judge:

Appellant, an Army Major, appeals from the district court's dismissal of his complaint alleging race discrimination in violation of Title VII, 42 U.S.C. § 2000e et seq. (1976 & Supp. V 1981), 42 U.S.C. § 1981 (1976), and 42 U.S.C. § 1983 (Supp. V 1981). The district court dismissed the complaint because it found appellant's claims nonjusticiable and unreviewable, holding that Title VII did not apply to uniformed members of the Armed Forces, and that the section 1981

claim was barred by the doctrine of sovereign immunity. Appellant filed a timely appeal; this court's jurisdiction rests on 28 U.S.C. § 1291 (1976). We affirm the district court's judgment.

Title VII

does not apply to armed forces

call

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claim was barred by the doctrine of sovereign immunity. Appellant filed a timely appeal; this court's jurisdiction rests on 28 U.S.C. § 1291 (1976). We affirm the district court's judgment.

I

FACTS

Appellant, Aristides Gonzalez, is a native of Puerto Rico and a regular commissioned officer in the Army, holding the rank of Major. He entered on active duty in 1965 as a Second Lieutenant. He was promoted to First Lieutenant in 1966 and to Captain in 1967. From 1967 to 1980 appellant was several times considered for, but not promoted to, the rank of Major. During this period appellant alleges that he had outstanding ratings and would have been promoted but for the intentional race discrimination practiced by the Army.

In 1980, appellant was terminated from duty in the Army. At that time he began to pursue administrative remedies seeking a correction of his record and reinstatement. Through this process, several of his performance ratings were raised and he was granted reinstatement and a promotion to Major with a retroactive effective date of October 1, 1979.

Appellant contends that despite this retroactive promotion he is "at least four years behind his class-year contemporaries in the promotion process." He claims that this and other injuries were caused by the Army's intentional race discrimination. The discrimination that the Army practiced is alleged to consist of: (1) reliance on Officer Efficiency Ratings (OERs) that purport to measure the qualifications of eligible officers, but actually operate to discriminate against persons of appellant's race and national origin; (2) inadequate recruitment of minorities and failure to accept them on an equal and impartial basis; (3) reliance on arbitrary, non-job-related requirements for continued employment; and (4) other generalized complaints regarding Army recruitment and promotion programs.

Appellant filed this action against the Army in September, 1980. It was stayed pending the outcome of the Army administrative hearings which resulted in appellant's reinstatement. Following the conclusion of the administrative proceedings, the Army moved to dismiss appellant's complaint. The district court granted the motion to dismiss without giving appellant leave to amend.

II

DISCUSSION

A. Appellant's Title VII Claim.

[1] The district court dismissed appellant's claim of race discrimination in employment under Title VII, 42 U.S.C. § 2000e-16(a) (Supp. V 1981) (provisions relating to federal employees), because it concluded that the statute did "not apply to members of the armed forces." Appellant contends on appeal that the district court's conclusion on this question of law is erroneous. We review this contention de novo. See *Turner v. Prod*, 707 F.2d 1109, 1114 (9th Cir.1983).

Section 717(a) of Title VII, 42 U.S.C. § 2000e-16(a), extends the protections against employment discrimination afforded by the Civil Rights Act of 1964 to "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5 . . ." The referenced statute provides that "[t]he military departments are: The Department of the Army[;] The Department of the Navy[;] and] The Department of the Air Force." 5 U.S.C. § 102 (1982). Appellant argues that this statutory language is unambiguous and compels the conclusion that Title VII's coverage extends to both civilian employees and uniformed members of the Army, Navy, and Air Force.

[2] We are not convinced that the language of section 717(a) is capable only of the construction appellant would give it; nor are we confident that appellant's construction of the statute is the one intended by Congress. The historical and revision

note to 5 U.S.C. § 102 states that the definition of military department appearing there "is supplied to avoid the necessity for defining 'military departments' each time it is used in [Title 5]." 5 U.S.C. § 102 note (1982). The note then cites section 101(7) of Title 10, which contains a definition of military departments substantially similar to that contained in section 102 of Title 5. *Con.* 10 U.S.C. § 101(7) (1976) with 5 U.S.C. § 102 (1982). Section 101 of Title 10, however, also contains a separate definition for "armed forces": "'Armed Forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard." 10 U.S.C. § 101(4) (1976). The two differing definitions show that Congress intended a distinction between "military departments" and "armed forces," the former consisting of civilian employees, the latter of uniformed military personnel. See, e.g., 10 U.S.C. § 3031(a)(6) & (7) (1976) (defining two separate categories of Army personnel, "civilians in the Department of the Army" and "members of the Army"). We conclude, therefore, that the term "military departments" in section 717(a) of Title VII, when used in the context of the statutory definitions to which it refers, can be fairly understood to include only civilian employees of the Army, Navy, and Air Force and not both civilian employees and enlisted personnel as appellant argues.¹

Our reading of the statutory text is confirmed by the legislative history of section 717(a). This history is set forth in H.R. Rep. No. 238, 92d Cong., 1st Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137. The relevant parts of the report indicate that section 717 was primarily intended to improve the record of non-discrimination in federal employment by transferring to the Equal Employment Opportunity Commission (EEOC) much of the Title VII enforcement responsibility formerly vested in the Civil Service Commission. *Id.* at 22-26,

1. We note too that Title 5, which contains the definition of "military departments" referred to by section 717(a) of Title VII, is captioned "Government Organization and Employees," while Title 10, which contains a similar definition of "military departments" plus a definition

1972 U.S. Code Cong. & Ad. News at 2157-60. There is no indication in the legislative history that the former jurisdiction of the Civil Service Commission was to be expanded upon the transfer of functions to the EEOC. *Id.* Moreover, it is abundantly clear that the Civil Service Commission was never authorized to review or police discrimination within the armed forces. See generally S. Rep. No. 969, 95th Cong., 2d Sess. 2-13, reprinted in 1978 U.S. Code Cong. & Ad. News 723, 2724-35 (summary of Civil Service Reform Act of 1978 and need for reform). Thus the legislative history provides a strong inference that section 717 was not intended to extend Title VII coverage to enlisted and commissioned members of the armed forces in active service.

[3] This inference is consistent with the conclusion reached in those few cases to consider the question of whether section 717 makes Title VII applicable to uniformed military personnel. In the leading case of *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978), the Eighth Circuit stated:

There is no question that Congress intended for § 717(a) to afford protection against discrimination to civilian employees and applicants for civilian employment in the Departments of the Army, Navy, and Air Force. But we think that if Congress had intended for the statute to apply to the uniformed personnel of the various armed services it would have said so in unmistakable terms. We agree with the district court that neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States.

Id. at 1224 (footnote omitted); accord, *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981); *Hunter v. Stetson*, 444 F.Supp. 238, 239 (E.D.N.Y. 1979). In light of these cases, the legislative history, and the pertinent

of "armed forces" is captioned "Armed Forces." The Title VII reference to Title 5, not Title 10, supports our view that the term "military departments" in section 717(a) of Title VII was intended to include only civilian employees of the Army, Navy, and Air Force.

statutory language, we hold section 717(a) does not make Title VII of the Civil Rights Act of 1964 applicable to uniformed members of the armed forces.² Accordingly, the district court's holding that appellant has no right of action under Title VII is affirmed.

B. Appellant's Section 1981 Claim.

The district court dismissed appellant's claim of intentional race discrimination in violation of 42 U.S.C. § 1981 (1976), on the ground that the Army and the Secretary of the Army, as agents of the United States, were immune from suit. Without addressing the correctness of this ruling,³ we affirm the district court's dismissal of appellant's section 1981 claim but on a different basis.

In *Chappell v. Wallace*, — U.S. —, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), the Supreme Court remanded to this court a suit by a number of Navy enlisted men alleging race discrimination by their superior officers in order for us to determine whether the plaintiffs' claims for relief might be cognizable under 42 U.S.C. § 1985(3). See *id.* at 2368 n. 3.⁴ Implicit in the court's order of remand is the recognition that, in some situations at least, uniformed members of the Armed Services may assert that their constitutional and statutory rights have been violated by their superiors. See *id.* at 2368. We need not decide in this case, however, whether appellant Gonzalez's claims against the Army of

race discrimination in violation of section 1981 are cognizable because, even if we assume that he may assert his claims of discrimination under section 1981, the particular claims that appellant makes are non-reviewable. See *Wallace v. Chappell*, 661 F.2d 729, 732-33 (9th Cir. 1981), rev'd on other grounds, — U.S. —, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).

In *Wallace v. Chappell*, we adopted, with some modification,⁵ the approach outlined by the Fifth Circuit in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), to the question of whether a civilian court should review a serviceman's allegation of a deprivation of constitutional rights by the military. See 661 F.2d at 732-34. The *Mindes-Wallace* analysis requires two separate multi-factored inquiries. First,

an internal military decision is unreviewable unless the plaintiff alleges (a) a violation of the Constitution, a federal statute, or military regulations; and (b) exhaustion of available intraservice remedies.

Wallace, 661 F.2d at 732; *Mindes*, 453 F.2d at 201. The Army essentially concedes that appellant has met these initial requirements. It argues, however, that review of appellant's challenge to the Army's promotion decisions in this case is precluded under the second part of the *Mindes-Wallace* analysis. This second phase consists of a weighing of four factors to determine whether review should be granted:

that the district court may have taken too broad a view in this case of the bar posed by the doctrine of sovereign immunity.

4. The court reversed our decision in *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981), because it concluded that the plaintiffs, Navy enlisted men, had no right of action under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), against their superior officers. 103 S.Ct. at 2367. The Court did not, however, address the servicemen's statutory claims. *Id.* at 2368 n. 3.

5. We limited our adoption of the *Mindes* analysis to "cases in which the plaintiff has alleged [a violation of] a 'recognized' constitutional right." 661 F.2d at 733-34 & n. 5.

2. Our holding does not deprive uniformed members of the armed forces of a statutory remedy to correct racial discrimination in the military. See 10 U.S.C. § 1552 (1976 & Supp. V 1981); *Chappell v. Wallace*, — U.S. —, 103 S.Ct. 2362, 2367, 76 L.Ed.2d 586 (1983) (noting applicability of section 1552 to claims of race discrimination by enlisted men). Nor is section 1552 necessarily the exclusive statutory remedy for such discrimination. See *Chappell*, 103 S.Ct. at 2368 n. 3 (remanding for consideration of a claim of race discrimination by enlisted members of the armed forces under 42 U.S.C. § 1985(3) (1976)).

3. Although we find it unnecessary to address the district court's dismissal of appellant's section 1981 claim on immunity grounds, we note that our prior decision in *Bowers v. Campbell*, 505 F.2d 1155, 1158 (9th Cir. 1974), suggests

(1) *The nature and strength of the plaintiff's claim* [C]onstitutional claims ordinarily carry greater weight than those resting on a statutory or regulatory but . . . within the class of constitutional claims, the nature and strength of the claim can vary widely.

(2) *The potential injury to the plaintiff if review is refused.*

(3) *The extent of interference with military functions* [I]nterference per se should not preclude review because some degree of interference will always exist.

(4) *The extent to which military discretion or expertise is involved.*

Wallace, 661 F.2d at 733; see also *Mindes*, 453 F.2d at 201-02.

[4] After evaluating each of these factors, we conclude that the district court's decision not to hear appellant's claim under section 1981 should be affirmed. Even though appellant alleges "recognized" constitutional claims of the type that may be reviewed, see *Wallace*, 661 F.2d at 734, the other *Mindes-Wallace* factors strongly militate against reviewability. The second factor weighs against review, because the potential injury to appellant if review is denied is not substantial. He has already been reinstated by the Army with retroactive promotion to the rank of Major. He now seeks an earlier retroactive promotion date and guaranteed promotions in the future. Even if upon review these claims would have been upheld, the most that appellant would have gained is an earlier retroactive promotion date. As a result of the administrative action, he is eligible for promotions in the future and if these are discriminatorily denied, the decisions may be challenged through the appropriate administrative procedure. The third and fourth factors also counsel against review of appellant's claims. The interference with the Army if appellant's claims were reviewed would be significant. The officers who participated in reviewing appellant's performance would have to be examined to determine the grounds and motives for their ratings. Other evidence of appellant's performance would have to be gathered for the

10-year period in question. In short, the court would be required to scrutinize numerous personnel decisions by many individuals as they relate to appellant's claim that he was improperly denied promotion. This inquiry would involve the court in a very sensitive area of military expertise and discretion. While we would not shrink from such an assessment in a civilian setting, the same hesitation that precludes a *Bivens*-type claim in the military setting, see *Chappell v. Wallace*, 103 S.Ct. at 2364-67, compels restraint here. For these reasons, we hold that under the analysis described in *Wallace v. Chappell* and *Mindes v. Seaman*, review of appellant's section 1981 claim of discrimination in promotion must be denied.

Our assessment is consistent with the Supreme Court's decision in *Reaves v. Ainsworth*, 219 U.S. 296, 31 S.Ct. 230, 55 L.Ed. 225 (1911). There, a military officer sought review of a decision by the Army to discharge him without retirement pay. He claimed that the military board of examiners that made the decision in his case acted arbitrarily and deprived him of due process. The Court rejected his efforts to secure review of the discharge, stating that such a determination falls within the scope of the military tribunal's lawful powers and "cannot be viewed or set aside by the courts." *Id.* at 304, 31 S.Ct. at 233. As the Fifth Circuit observed in *Mindes* with regard to the decision in *Reaves*

The reason we discern for this refusal to review is that it would have entailed an analysis of the medical records and a determination of Reaves' fitness as an officer. Clearly, the Court was unwilling to venture into this area of military expertise.

453 F.2d at 200 (emphasis added). In like manner, we decline the invitation to engage in a review of appellant's fitness for promotion to higher levels of military authority or the timing of such promotions.

CONCLUSION

[5] Because a Title VII suit is unavailable to appellant and because his claims un-

der 42 U.S.C. § 1981 are unreviewable, the judgment of the district court is

AFFIRMED.⁶



UNITED STATES of America,
Plaintiff-Appellee,

v.

Kathleen Gayle STUART,
Defendant-Appellant.

No. 82-1437.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 7, 1983.

Decided Oct. 18, 1983.

Defendant was convicted in the United States District Court for the Central District of California, Consuelo Bland Marshall, J., of conspiring to misapply, and misapplying, funds of a savings and loan institution and of making false entries in the records of the savings and loan association, and she appealed. The Court of Appeals, Choy, Circuit Judge, held that: (1) actual disbursement of money is not a necessary element under the statute providing that whoever, being an officer, agent or employee of any savings and loan corporation or association, willfully misapplies money, funds, credits, securities or other things of value belonging to such institution shall be fined or imprisoned or both; (2) the error, if any, in denying the defendant access to psychiatric reports of a key government witness was harmless; and (3) it was not error to admit a prior consistent statement of the government witness where the defendant had

impeached the witness as to his motive testifying.

Affirmed.

1. Banks and Banking — 509.15

Actual disbursement of money is a necessary element to obtain conviction under statute providing that whoever, being officer, agent or employee of any savings and loan corporation or association, willfully misapplies any money, funds, credits, securities or other things of value belonging to such institution shall be fined or imprisoned or both. 18 U.S.C.A. § 657.

2. Banks and Banking — 509.25 Conspiracy — 48.1(2)

In prosecution for conspiring to misapply, and misapplying, funds of savings and loan institution and for making false entries in records of savings and loan association, district court did not err in denying defendant's motion for judgment of acquittal where there was evidence that defendant intentionally withdrew \$4,000 from account without proper authorization, defendant used those funds to prepare cashier's check and defendant gave cashier's check to another who attempted to use check to purchase gold coins. 18 U.S.C.A. § 657; Fed. Rules Cr.Proc.Rule 29(a), 18 U.S.C.A.

3. Criminal Law — 1166(1)

Error, if any, in denying defendant access to psychiatric reports of witness for purpose of demonstrating propensity of witness for untruthfulness was harmless where jury was inundated with evidence that witness had been convicted of prior similar felony, had used false name, had embezzled thousands of dollars from another lending institution, had filed fictitious application for credit card and had been promised that Government would not prosecute him regarding two other instances of embezzlement.

6. Appellant's complaint indicated an attempt to state a claim under 42 U.S.C. § 1983 (1976). Generally, however, section 1983 applies only to deprivations of civil rights under color of state law. See *Stonecipher v. Bray*, 653 F.2d

398, 401 (9th Cir.1981). There is no indication that state law is in any way involved in appellant's suit against the Army. We note this rule even though appellant does not press his section 1983 claim on appeal.

Title VII Race + Sex discrim

ROPER v. DEPARTMENT OF ARMY

Cite as 832 F.2d 247 (2nd Cir. 1987)

247

Jestine ROPER, Plaintiff-Appellant,

v.

DEPARTMENT OF the ARMY,
Defendant-Appellee.

No. 20, Docket 87-6057.

United States Court of Appeals,
Second Circuit.

Argued Sept. 8, 1987.

Decided Nov. 2, 1987.

Uniformed member of the United States Army Reserve filed complaint alleging race and sex discrimination in denial of promotion. Complaint was dismissed by the United States District Court for the Eastern District of New York, and plaintiff appealed. The Court of Appeals, Bright, Senior Circuit Judge, held that Title VII does not apply to uniformed members of the armed forces.

Affirmed.

Civil Rights §9.10

Title VII of the Civil Rights Act of 1964 does not apply to uniformed members of the armed forces; term "military departments" within section proscribing discrimination against employees of such departments includes only civilian employees. 5 U.S.C.A. § 102; 10 U.S.C.A. §§ 101, 101(7); Civil Rights Act of 1964, §§ 701 et seq., 717(a), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-16(a).

See publication Words and Phrases for other judicial constructions and definitions.

Jestine G. Roper, Brooklyn, N.Y., pro se, for plaintiff-appellant.

Robin L. Greenwald, Asst. U.S. Atty. for the E.D. of N.Y. (Andrew J. Maloney, U.S. Atty. for the E.D. of N.Y., Robert L. Begleiter, Asst. U.S. Atty., of counsel), for defendant-appellee.

1. The Honorable Edward R. Korman, United States District Judge for the Eastern District of

Before PRATT and MAHONEY, Circuit Judges, and BRIGHT, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

BRIGHT, Senior Circuit Judge:

Staff Sergeant Jestine Roper, a uniformed member of the United States Army Reserve, appeals from the district court's dismissal of her complaint alleging race and sex discrimination by the Department of the Army in violation of Title VII, 42 U.S.C. § 2000e-16 (1982). The district court¹ granted the Army's motion to dismiss on the ground that Title VII does not apply to uniformed members of the armed forces. We affirm.

I. BACKGROUND

Ms. Roper initially entered the Army Reserve in 1979 as a Private First Class and was promoted to the rank of Sergeant in 1981. In 1983, the position of warrant officer in the 99th Signal Battalion became vacant and Ms. Roper expressed interest in the office. In October of 1983, Ms. Roper appeared before the warrant officer board in regard to her application to fill the warrant officer vacancy. Ms. Roper was denied the promotion. Two months later, two warrant officers informed her that the board rejected her application because her personality was perceived as "too soft." Ms. Roper was subsequently transferred to another company within her battalion, and was promoted to the next enlisted rank in 1986, five years after her last promotion.

Ms. Roper brought suit *pro se* on June 20, 1986, alleging that she was denied promotion in the armed forces due to her race and sex. The Army moved to dismiss the complaint on the ground that Title VII does not apply to uniformed military personnel. The district court granted the motion. This appeal followed.

II. DISCUSSION

The sole issue presented in this case is whether Title VII applies to uniformed

New York.

members of the armed forces. While we are sympathetic to Ms. Roper's complaint, the cases in other circuits do not support her position. Both the Eighth and Ninth Circuits have unequivocally held Title VII applicable to uniformed members of the military. See *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir.1983); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1977), cert. denied, 439 U.S. 986, 99 S.Ct. 573, 58 L.Ed.2d 658 (1978); accord *Taylor v. Jones*, 583 F.2d 1193 (8th Cir.1981).

Title VII was designed to protect from discrimination "employees or applicants for employment . . . in military departments . . ." 42 U.S.C. § 2000e-16(a). A comparison of the language Congress uses when referring to civilian employees of the various military departments, as opposed to uniformed military personnel,² indicates that Congress intended the term "military department" to include only civilian employees, and not enlisted personnel. *Gonzalez*, 718 F.2d at 928. Further, nothing in the legislative history indicates that Congress sought to vest the Equal Employment Opportunity Commission (EEOC), responsible for Title VII enforcement, with the power to review the hiring and employment practices of the Armed Forces.

In *Hill v. Berkman*, 635 F.Supp. 1228 (E.D.N.Y.1986), cited in Ms. Roper's brief, Chief Judge Weinstein presents cogent arguments in favor of applying Title VII to uniformed military personnel. Judge Weinstein observes that the legislative history of 42 U.S.C. § 2000e-16 is hardly pellucid as to whether Title VII applies to the uniformed military and does not compel exclusion of uniformed personnel from the Act's coverage. Moreover, he notes that since the withdrawal from Vietnam, the military increasingly resembles a civilian employer in its relationship with uniformed military personnel, offering health care, housing, training courses, and the opportunity to study at civilian universities.

While these arguments carry weight, we cannot agree to the extension of Title VII

2. 5 U.S.C. § 102 referring to section 101(7) of title 10, defines military departments as "The Department(s) of the Army . . . Navy [and] . . . the Air Force." Section 101 of title 10

to uniformed members of the armed forces. Military service continues to differ materially from civilian employment in that officers and personnel are subject to military law and unable to terminate such employment at will. See *Johnson*, 572 F.2d at 1223. The relationship between the government and a uniformed member of the military remains unlike the relationship which exists between civilian employer and employee. In the absence of some express indication in the legislative history that Congress intended Title VII to apply to uniformed members of the armed forces, we refuse to extend a judicial remedy for alleged discrimination in civilian employment to the dissimilar employment context of the military, especially given the need for deference to the military in matters involving hierarchy and structure of command. See *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983) (deference to hierarchical military structure precludes claim of race discrimination in work assignments where congress has provided no such cause of action).

Accordingly, we affirm the district court judgment.



THERMICE CORPORATION, Appellee,

v.

VISTRON CORPORATION, Standard Oil Chemical Company (formerly Vistron Corporation), Appellant.

No. 86-1562.

United States Court of Appeals,
Third Circuit.

Argued May 21, 1987.

Decided Oct. 29, 1987.

Supplier sent notice of intent to cancel contract, and consuming corporation

contains a separate definition for "armed forces" meaning "the Army, Navy, Air Force, Marine Corps, and Coast Guard."

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Celotex Corp., 805 F.2d 949, 952 (11th Cir. 1986). Credit Alliance contends that Holley's version of the facts should be disregarded as a sham because of an apparent inconsistency between the deposition and affidavit of Hudson.⁶ In support of this contention, Credit Alliance cites *Vant T. Junkins and Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656, 657 (11th Cir. 1984). While we recognize the discrepancies regarding Hudson's testimony, we do not find Hudson's affidavit incredible as a matter of law. See *Tippens*, 805 F.2d at 953. The differences between the deposition and affidavit are not "blatantly inconsistent" and inherently inexplicable, and therefore "create an issue of credibility or go to the weight of the evidence." *Tippens*, 805 F.2d at 953. As this court has observed, "[i]f one or more of the essential elements [of a claim or defense] is in doubt, then summary judgment must not be granted." *Tippens*, 805 F.2d at 952. Accordingly, we reverse the portion of the district court's order granting summary judgment in favor of Credit Alliance with respect to Holley's innocent misrepresentation claim and remand this issue for further proceedings.

CONCLUSION

In sum, we find the trial court's dismissal of the matter for lack of jurisdiction is erroneous. The alternative rulings expressed by way of summary judgment are affirmed as to the claim of compensatory damages arising from a breach of contract and the claim for punitive damages. The summary judgment dealing with the claim for compensatory damages based upon alleged misrepresentations is reversed.

AFFIRMED in part, REVERSED in part and REMANDED.



6. Hudson initially testified during his deposition that he was aware of the *dation en paiement* when negotiations commenced between Holley and Credit Alliance. After Credit Alliance completed its examination of Hudson, Hudson, after

David STINSON, Plaintiff-Appellant,
v.

Major General William A. HORNSBY, individually and as the Adjutant General of the Alabama National Guard, State of Alabama; the Alabama National Guard; Major Ernest L. Shipp, individually and as an officer of the Alabama National Guard; Lt. Col. John Q. Adams, individually and as an officer of the Alabama National Guard; George F. Hulsey, individually and as an officer of the Alabama National Guard, Defendants-Appellees.

No. 86-7508.

United States Court of Appeals,
Eleventh Circuit.

July 20, 1987.

Discharged member of Alabama National Guard brought action asserting federal employment discrimination and civil rights claims. The United States District Court for the Middle District of Alabama, No. 86-V-385-N, Robert E. Varner, Senior District Judge, dismissed action, and Guard member appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) Guard member's employment discrimination claim was barred, and (2) remand was necessary for reconsideration of Guard member's civil rights claims under appropriate standards.

Affirmed in part, reversed in part, and remanded.

Henderson, Senior Circuit Judge, filed specially concurring opinion.

Hill, Circuit Judge, filed dissenting opinion.

1. Civil Rights §9.10

Discharged member of Alabama National Guard was member of "military per-

conferring with counsel for Holley, "corrected" his testimony and stated that he was told about the *dation en paiement* at a later date. Hudson's affidavit was consistent with his corrected testimony.

sonnel," rather than state employee, within meaning of Title VII employment discrimination provisions and, therefore, Title VII was inapplicable to him, where he was uniformed member of, and on full-time military duty with, National Guard. 10 U.S.C.A. §§ 101, 3062(c)(1); 32 U.S.C.A. § 502(f); Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

2. Federal Courts ¶937

Remand was necessary for district court to determine whether Alabama National Guard member's federal civil rights claims, asserted as result of discharge, were barred because of military personnel exemption, employing test set forth in *Mindes v. Seaman*; factors to be weighed were nature and strength of guard member's challenge to military determination, potential injury to guard member if reviewed would be refused, type and degree of interference with military function, and extent to which exercise of military expertise or discretion was involved. 42 U.S.C.A. §§ 1981, 1983.

Julian McPhillips, McPhillips, DeBardelaben & Hawthorne, Kenneth Shinbaum, Montgomery, Ala., for plaintiff-appellant.

Don Siegelman, Atty. Gen., Richard N. Meadows, Asst. Atty. Gen., Montgomery, Ala., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before HILL and HATCHETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

On October 1, 1982, the Alabama National Guard employed David Stinson, a black resident citizen of Montgomery County, Alabama, on a full time basis, as Training NCO/System Supervisor. It terminated him on September 29, 1985. Stinson alleged that the Alabama National Guard prohibited and refused to allow him the opportunity to gain a supervisory position, allowed white employees, with equal or

fewer qualifications and experience, to gain supervisory positions, and allowed a less qualified white employee to act as supervisor over him. Stinson contends that his termination was due to racial discrimination.

Facts

On September 5, 1985, Stinson filed a complaint alleging racial discrimination with the Department of the Army. On September 5, 1985, the complaint was received by Nelson V. Wood, Chief, The Army, National Guard Bureau, Washington, D.C. On November 5, 1985, Lt. Col. George Beck was directed to conduct a factual investigation of Stinson's complaint. On May 13, 1986, Maj. Gen. William A. Hornsby, Adjutant General, Alabama, submitted a final agency decision finding no discrimination.

Proceedings in the District Court

On April 19, 1986, Stinson filed a complaint in the United States District Court for the Middle District of Alabama, alleging discrimination and seeking relief under 42 U.S.C. §§ 1981, 1983, and 2000e-2000e-17. Stinson's complaint alleged that the Alabama National Guard engaged in racially discriminatory employment practices which had a disparate impact on him. Stinson contends that such discriminatory acts and practices violated his rights to due process and equal protection under the fourteenth amendment and his federal rights under Title VII, 42 U.S.C. §§ 2000e-2000e-17.

On April 30, 1986, General Hornsby moved to dismiss Stinson's complaint, asserting that the district court was without jurisdiction under Title VII because Stinson had failed to exhaust administrative remedies; the military decision not to renew Stinson's tour of duty was non-reviewable; and the court was without subject matter jurisdiction to review Stinson's claim of racial discrimination against his military superiors.

In dismissing the complaint, the district court held that because Stinson was a full-

time uniformed member of the Alabama National Guard, he had no claim under the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17. The court held that because Stinson was a full-time member of the Alabama National Guard, he was not a "person" within the meaning of Title VII, 42 U.S.C. §§ 2000e-2000e-17.

Stinson moved to set aside the district court's decision, claiming that the district court's decision was an abuse of discretion. On appeal, the Ninth Circuit affirmed the district court's decision, holding that the district court's decision was not an abuse of discretion.

On appeal, the Ninth Circuit affirmed the district court's decision, holding that the district court's decision was not an abuse of discretion. The court held that the district court's decision was not an abuse of discretion.

A. Title VII

[1] In *Stinson v. Alabama National Guard*, 808 F.2d 1111 (9th Cir. 1986), the Ninth Circuit affirmed the district court's decision, holding that the district court's decision was not an abuse of discretion. The court held that the district court's decision was not an abuse of discretion.

In *Taylor v. Alabama National Guard*, 808 F.2d 1111 (9th Cir. 1986), the Ninth Circuit affirmed the district court's decision, holding that the district court's decision was not an abuse of discretion. The court held that the district court's decision was not an abuse of discretion.

We have previously held that Title VII does not apply to persons who are members of the military in any capacity.

1. The purpose of Title VII is to protect persons who are employed by federal agencies, including the military, from discrimination on the basis of race, color, religion, sex, or national origin. In addition to the protection afforded by Title VII, persons who are employed by the military are also protected by the Uniformed Services Uniformed Services University of the Health Sciences (USUHS) Act, 38 U.S.C. § 8101, which provides that persons who are employed by the USUHS are entitled to the same benefits and protections as persons who are employed by the federal government.

time uniformed employee on military duty with the Alabama National Guard, Stinson had no claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-2000e-17. The district court also held that based upon *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), Stinson had no claim for relief pursuant to 42 U.S.C. §§ 1981 and 1983.

Discussion

Stinson claims that the district court erred in finding that both causes of action alleged in his complaint failed to state a claim upon which relief could be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), and subsequently in dismissing the complaint.

On appeal, we accept as true the allegations in Stinson's complaint in order to determine whether Stinson sufficiently stated a cause of action under Title VII or sections 1981 and 1983. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

A. Title VII Claim

[1] In 1964, Congress enacted legislation that authorized members of the National Guard to perform additional training and duty beyond their regularly scheduled drills and periods of active duty. Title 32 U.S.C. § 502(f); Pub.L. No. 88-621, § 502(f), 78 Stat. 999, 1136 (1964).¹ Stinson was on full-time military duty with the Alabama National Guard pursuant to section 502(f) during the period of the misconduct alleged in this case.

In *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir.1981), the court, in declaring Title VII inapplicable to persons enlisted in the Armed Forces of the United States, including the National Guard, stated:

We have previously held that 'neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the Armed Forces of the

1. The purpose of the enactment is to "provide protection for members of the National Guard who incur disability while they are (1) performing training or other authorized duty that is in addition to the regularly scheduled drills of

United States.' [Citation omitted.] We do not see any significant distinction, for Title VII purposes, between a member of the Army or Air Force and a member of the reserve component of those forces, the National Guard. In neither case is the relationship between the government and the member that of employer-employee; military service differs materially from civilian employment, whether public or private, and is not appropriately governed by Title VII. [Citation omitted.]

In *Gonzalez v. Dept. of the Army*, 718 F.2d 926 (9th Cir.1983), the court noted that the "military departments" consist of civilian employees, whereas the "armed forces" include uniformed military personnel, a distinction intended by Congress.

Stinson contends that because the Alabama Army National Guard is a state agency, it follows that an employer/employee relationship is created with the state. Stinson, however, was a uniformed member of, and on full-time military duty with, the Alabama National Guard. Title 10 U.S.C. § 101 defines "armed forces" to include the Army, Navy, Air Force, Marine Corps, and Coast Guard. Under 10 U.S.C. § 3062(c)(1), the Army consists of:

1. The Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserves.

Other factors support the district court's determination that Stinson, for purposes of Title VII, should be considered military personnel, rather than an employee of the state of Alabama: (1) Stinson wore a military uniform during periods of active duty and/or training; (2) he served on full-time military duty; (3) he was paid by the federal government and not by the state of Alabama; and (4) he was subject to military discipline on a daily basis. Thus, we conclude that Stinson, a member of the National Guard, is not an employee of the

their units, or the annual periods of 15 days of active duty for training...." S.Rep. No. 1584, 88th Cong., 2d Sess. 110 (1964), reprinted in 1964 U.S.Code Cong. & Admin.News 3800.

state of Alabama for purposes of Title VII. Compare *Calhoun v. Doster*, 324 F.Supp. 736 (M.D.Ala.1971) (district court found the distinction between defendant's state and federal positions blurred and artificial).²

We recognize that the finding that Stinson is more military personnel than state employee is a close one. Such a finding, however, does afford Stinson the same treatment and remedies as those with whom he worked full time.

2. Sections 1981 and 1983 Claims

[2] The Supreme Court in *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), held that enlisted military personnel are precluded from maintaining suits against superior officers to recover damages for injuries resulting from violations of constitutional rights in the course of military service. The Supreme Court in *Chappell* continued by noting that

'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.' [Citation omitted.] This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.

Chappell, 462 U.S. at 304, 103 S.Ct. at 2367. The court in *Gonzalez*, in noting the Supreme Court's decision in *Chappell*, stated that "[i]mplicit in the court's order of remand is the recognition that, in some situations at least, uniformed members of the armed services may assert that their constitutional and statutory rights have been violated by their superiors." *Gonzalez*, 718 F.2d at 929.

The Fifth Circuit in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.1971), employed a factoring analysis to determine whether a particular constitutional claim asserted by members of the armed forces against their

superiors are barred from suit. The *Mindes* analysis requires an independent two-step evaluation. First, an internal military decision should not be reviewed unless the plaintiff asserts:

- (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and
- (b) exhaustion of available intraservice corrective measures.

Mindes, 453 F.2d at 201. Second, the reviewability of the claim must be examined by weighing the following four factors:

1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values....

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted....

4. The extent to which the exercise of military expertise or discretion is involved.

Mindes, 453 F.2d at 201.

We find the approach adopted in *Mindes* binding in this action. The record does not indicate that the district court employed the *Mindes* test to determine whether Stinson's sections 1981 and 1983 claims were barred because of the military personnel exemption. Therefore, we reverse and remand to the district court with instructions to employ the *Mindes* test in determining whether Stinson's sections 1981 and 1983 claims are barred. Noting that the *Mindes* test provides for an evaluation regarding

civilian authority over him as to render any distinction between 'federal' and 'state' one of form, not substance." *Calhoun*, 324 F.Supp. at 740. Unlike Stinson, Calhoun held two separate and identifiable positions: one as a civilian employee and the other as military personnel.

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exhaustion of available administrative remedies, we decline to address that issue now.

Our holding today is that members of the National Guard are generally employees of the state; but where the facts indicate that the person is on full-time military duty and other factors indicate that the person is more military than civilian, no Title VII action may be brought. As to other types of actions brought under statutes addressing discrimination, we hold only that the National Guard full-time member plaintiff must have the allegations of the complaint tested by the *Mindes* standard. Accordingly, we affirm in part, reverse in part, and remand.

AFFIRMED in part, REVERSED in part, and REMANDED.

HENDERSON, Senior Circuit Judge, specially concurring:

I write separately to suggest that remand of the plaintiff's constitutional claims based on 42 U.S.C. §§ 1981 and 1983 for analysis under *Mindes v. Seamen*, 453 F.2d 197 (5th Cir.1971) may be unnecessary in light of the Supreme Court's rationale in *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). I concur in the decision of the panel, however, in deference to the precedential weight of *Mindes*. I take this opportunity to call attention to the recent interpretation of *Chappell* by the Fifth Circuit Court of Appeals, finding claims such as these non-justiciable without resort to the cumbersome *Mindes* analysis, in the hope that this matter might be reexamined en banc and the utility of the *Mindes* test reconsidered in light of more recent Supreme Court decisions.

In *Chappell*, enlisted military men brought an action against their superior officers seeking damages, declaratory judgment, and injunctive relief for alleged racial discrimination in assignments and performance evaluations. The Supreme Court of the United States analyzed the direct constitutional challenges in terms of whether they stated a cause of action under *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619

(1971). Analogizing to the doctrine established in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), which held that the United States is not liable, under the Federal Tort Claims Act, for injuries to military personnel which "arise out of or are in the course of activity incident to service," *Id.* at 146, 71 S.Ct. at 159, 95 L.Ed. at 161, the Court concluded that the unique disciplinary structure of the military establishment and Congress' activity in the field of military justice made it inappropriate to provide a *Bivens*-type remedy in this context. The Court stated:

[J]udges are not given the task of running the Army. The responsibility for setting up channels through which ... grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.

Chappell, 426 U.S. at 301, 103 S.Ct. at 2366, 76 L.Ed.2d at 591 [quoting *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953)]. The Court further found that:

Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents.

Id. at 302, 103 S.Ct. at 2367, 76 L.Ed.2d at 592.

The Court echoed these concerns in *United States v. Shearer*, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985), while defending the *Feres* doctrine, concluding:

To permit this type of suit would mean that commanding officers would have to

stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions, for example, whether to overlook a particular incident or episode, whether to discharge a serviceman and whether and how to place restraints on a soldier's off-base conduct.

Id. at 58, 105 S.Ct. at 3044, 87 L.Ed.2d at 45.

The Fifth Circuit Court of Appeals, without relying on the two-part *Mindes* analysis, recently determined that *Chappell* and *Shearer* preclude judicial cognizance of constitutional claims brought by national guardsmen. In *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986), two members of the Texas Army National Guard brought suit against the Guard, the governor of Texas and twelve military personnel alleging violations of their rights under the Constitution and 42 U.S.C. §§ 1983 and 1985(2). The plaintiffs asserted that, in retaliation for reporting criminal activity and racial discrimination by the Guard, they were dismissed or removed from active duty. The Fifth Circuit Court of Appeals affirmed the district court's dismissal of the action pursuant to Fed.R.Civ.P. 12(b)(6), finding no significant difference between such claims and those held impermissible in *Chappell*. The *Crawford* court reasoned that the constitutional due process and section 1983 causes of action advanced by the plaintiffs required "judicial second-guessing of military actions" and interfered with the military system of justice established within each service to the same extent as the *Bivens* claims rejected in *Chappell*. The section 1985(2) allegations were dismissed under the same rationale. *Id.* at 1036. The appellate court declined to except the plain-

tiffs' prayers for injunctive relief from the reach of *Chappell*, finding that such an exception would "swallow" *Chappell*'s rule of deference. Therefore, the court held that suits for injunctive relief, like those for money damages, must be carefully regulated to prevent intrusion into the military structure. *Id.* at 1037.

Conspicuously absent in *Crawford* is any application of the *Mindes* test for adjudicating charges of civil rights violations.¹ Clearly, the court must have found that the Supreme Court's opinions in this area are controlling. The instant facts present the same kind of case found nonjusticiable in *Crawford* and *Chappell*. Stinson's claims for reinstatement, back pay and injunctive relief under 42 U.S.C. §§ 1981 and 1983,² are challenges to military personnel decisions which would require a court to review his commanding officers' decisions concerning the promotion and dismissal of his men, determinations particularly dependent on the exercise of military discretion. Furthermore, Stinson had an opportunity to assert his grievances within the military system of justice, an opportunity which the defendants assert he has yet to exhaust. The military concerns found compelling in *Chappell* are equally present here. Therefore, *Chappell* can be read to support of the district court's dismissal of these claims on their face.

Although the *Chappell* decision expressly left open the right of military personnel to bring constitutional grievances to court, there can be little doubt that such access does not extend to "discrete personnel matters." *Crawford*, 794 F.2d at 1036. Boldly stating this conclusion, as the Fifth Circuit Court of Appeals has done, without requiring the district courts to address the *Mindes* test would bring this circuit closer

1. The *Crawford* court, in noting that several other circuits have found § 1983 causes of action by national guardsmen nonjusticiable, specifically refers to the First Circuit's reliance on the *Mindes* test in addressing this question in *Penagaricano v. Llenza*, 747 F.2d 55, 59 (1st Cir.1984). Therefore, the Fifth Circuit knowingly rejected the *Mindes* analysis in the context of §§ 1983 and 1985(2) claims for money damages. Nor is there any indication that the *Crawford* court applied *Mindes* to the guardsmen's request for injunctive relief.

2. Although Stinson is an employee of the federal government for purposes of Title VII, his charges of due process violations under § 1983 against the Alabama National Guard, the Adjutant General, and other officers of the Guard appear to satisfy the state action requirement of § 1983 since the Guard is a hybrid state-federal venture. See generally, *New Jersey Air Nat'l Guard v. Fed. Labor Rel. Auth.*, 677 F.2d 276, 278-79 (3d Cir.1982); Ala.Code §§ 31-2-1 through 31-2-3 (1975).

in line with the issue and would be a decision is a benefit to the public in our courts.

HILL, Circuit

The opinion of Judge Henderson and the interplay of nothing of value.

I conclude that U.S. 296, 103 S. (1983) directs the of this case and FIRM.



UNITED STATES
Plaintiff

Charles
Defendant

No

United States
Eleven

July

Rehearing and
Denied

Defendant was
two counts of bank

3. A more recent decision of the Court of Appeals in *Holdiness v. Strickland* (1987), the court affirmed the plaintiff's action under § 1985 for failure to provide relief which could be brought by a former member of the Guard who sought relief for officers for violation of statutory rights in reenlisting and termination as a civil technician. The § 1983 claims of the officers named in the complaint were dismissed because there was no state action. In addressing the

in line with the Supreme Court on this issue and would perhaps be fairer to potential litigants. In my opinion, the *Crawford* decision is a better approach for determining the propriety of hearing military disputes in our courts.³

HILL, Circuit Judge, dissenting.

The opinion for the panel by Judge Hatchett and the special concurring opinion of Judge Henderson illuminate this issue and the interplay of precedent. I can add nothing of value to the discussion.

I conclude that *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed. 586 (1983) directs the district court's dismissal of this case and I would, therefore, AFFIRM.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Charles A. RAWLINGS,
Defendant-Appellant.

No. 86-8475.

United States Court of Appeals,
Eleventh Circuit.

July 20, 1987.

Rehearing and Rehearing En Banc
Denied Sept. 3, 1987.

Defendant was convicted of, inter alia,
two counts of bank robbery and of use of a

3. A more recent decision of the Fifth Circuit Court of Appeals casts some doubt on that circuit's position with respect to the *Mindes* test. In *Holdiness v. Stroud*, 808 F.2d 417 (5th Cir. 1987), the court affirmed the dismissal of the plaintiff's action brought pursuant to § 1983 and § 1985 for failure to state a claim upon which relief could be granted. The suit was brought by a former member of the National Guard who sought damages from his superior officers for violation of federal constitutional and statutory rights when he was barred from reenlisting and terminated from his employment as a civil technician. The district court dismissed the § 1983 claims against four of the officers named in the complaint on the grounds that they were federal employees and thus, there was no state action. The plaintiff appealed. In addressing the plaintiff's § 1983 claim,

gun in connection with each count. Consecutive sentences on each of those four counts were imposed by the United States District Court for the Northern District of Georgia, No. CR86-118A, G. Ernest Tidwell, J., and defendant appealed. The Court of Appeals, Morgan, Senior Circuit Judge, held that greater enhancement based on "second or subsequent" use of a gun was triggered even though charged in the same indictment as the offense which led to the first conviction.

Affirmed.

Criminal Law ⇐ 1208.6(2)

Defendant's second conviction under statute providing additional penalty for use of a gun during crime of violence triggered the greater enhancement provision for the "second or subsequent conviction" even though charged in the same indictment as incident which resulted in his first conviction. 18 U.S.C.A. § 924(c).

Thomas J. Waldrop, Federal Defender
Program, Inc., Atlanta, Ga., for defendant-
appellant.

Charles E. Brown, Julie Carnes, Asst.
U.S. Attys., Atlanta, Ga., for plaintiff-ap-
pellee.

Appeal from the United States District
Court for the Northern District of Georgia.

the court found the requisite state action but noted that the *Crawford* decision held that § 1983 does not provide a cause of action for service connected disputes. The court, however, also referred to the First Circuit's opinion in *Penagaricano*, 747 F.2d 55, which applied the *Mindes* test in such instances. The *Holdiness* court then stated: "[w]e follow *Crawford* in applying the *Chappell* rule to Guard members, and using the tests in *Chappell* and *Mindes*, hold that the remedy sought by *Holdiness* would be so disruptive to military service that the claim should not be entertained by the federal courts." *Holdiness*, 808 F.2d at 423. The court did not remand the case to the district court for consideration of the *Mindes* factors, evidently finding that step unnecessary in light of *Crawford* and *Chappell*.

insurance purchased by the Sheriffs' Fund from a syndicate of insurers does. Finally, we note that the provisions of section 768.28(13) at issue in *Hillsborough Hospital* only authorize a self-insurance pool to pay claims "which [the agency] may be liable to pay pursuant" to \$100,000 waiver of sovereign immunity in section 768.28. Therefore, because the insurance purchased by the Sheriffs' Fund *only* covers liabilities in excess of the section 768.28 waiver, the authority to purchase this insurance cannot come from section 768.28(13), and *Hillsborough Hospital*, therefore, can not be applicable.

The sheriffs in Florida have elected to set up a self-insurance pool to pay claims up to \$100,000. The holding in *Hillsborough Hospital* prevents an individual plaintiff from recovering more than \$100,000 from the money in this fund. The Sheriff's Self-Insurance Fund, however, has taken some of the moneys in this fund and purchased an insurance policy for liabilities in excess of the \$100,000 waiver found in section 768.28(5). The statutes that allow the sheriffs to purchase this insurance have been interpreted as a waiver of sovereign immunity up to the amount of the policy. Consequently, the fund's purchase of the \$1,000,000 policy constitutes a waiver of sovereign immunity up to that amount.²³ The district court correctly refused to limit the judgment to \$100,000.²⁴

Because we reject each of the five grounds that the defendant presents for overturning the judgment of the district court, the judgment of that court is AFFIRMED.



23. The defendant places much significance on the fact that the excess liability policies do not contain the waiver language required by both section 30.55(2) and section 286.28(2). We refuse to place any significance in the parties' failure to include these contractual provisions. The policy does provide that persons who secure a judgment against the insured sheriffs shall be entitled to recover under the policy. In addition, we note that Florida law includes required policy provisions as part of every insurance contract whether or not the provisions

John DOE, Plaintiff-Appellant,

v.

H. Lawrence GARRETT, III, as Secretary of the Department of the Navy, and J.W. Harris, as Commanding Officer, Naval Air Reserve, Jacksonville, Defendants-Appellees.

No. 89-3404.

United States Court of Appeals,
Eleventh Circuit.

June 25, 1990.

Naval reserve member, who tested positive for Human Immunodeficiency Virus (HIV), but did not show any symptoms of Acquired Immune Deficiency Syndrome (AIDS) itself, brought action challenging his scheduled release from active duty in naval reserve canvasser recruiter program. After being ordered to exhaust his administrative remedies, and obtaining partial relief from the Board for Correction of Naval Records, member contended that relief granted by Navy was inadequate, and asserted Rehabilitation Act and due process claims and claim of estoppel. The United States District Court for the Middle District of Florida, John H. Moore, II, J., No. 86-971-CIV-J-16, 725 F.Supp. 1210, entered summary judgment against member, and member appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) Rehabilitation Act did not apply to uniformed members of armed services; (2) exclusion of member from reenlistment in program did not implicate protected property or liberty interest; and (3) there was no basis for claim of equitable estoppel.

Affirmed.

appear in the insurance policy. *Department of Insurance v. Teachers Insurance Co.*, 404 So.2d 735, 741 (Fla.1981).

24. As with the question of whether the notice of claim issue should be certified to the Florida Supreme Court, we find that the applicable state precedent is sufficient to render a decision on this issue, and, we, therefore, decline to certify this question to the Florida Supreme Court.

Administrative Law and Procedure ⚡229

Civil Rights ⚡194

Private actions against federal government employers under Rehabilitation Act must satisfy requirement of exhaustion of administrative remedies in manner prescribed by Title VII. Rehabilitation Act of 1973, §§ 501, 504, 505(a)(1), as amended, 29 U.S.C.A. §§ 791, 794, 794a(a)(1); Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Civil Rights ⚡107(1), 143

Rehabilitation Act did not apply to uniformed military personnel; it would be incongruous to allow uniformed military personnel to bring discrimination claims against military based on handicap, when statutory discrimination claims based on sex, race, religion, or national origin were barred. 10 U.S.C.A. § 591(b); Rehabilitation Act of 1973, §§ 501, 504, 505(a)(1), as amended, 29 U.S.C.A. §§ 791, 794, 794a(a)(1); Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Armed Services ⚡11

Constitutional Law ⚡277(2)

Military officer's expectation of continued military employment does not rise to level of property interest unless it is rooted in some statute, regulation, or contract. U.S.C.A. Const.Amend. 5.

Armed Services ⚡11

Constitutional Law ⚡277(2)

Naval reserve member did not have constitutionally protected property interest in reenlistment in naval reserve canvasser recruiter program, in view of navy regulations governing program providing that assignments were temporary, that reassignment was not guaranteed, and that even incumbent officers' participation in program could be discontinued, and specific military regulations excluding persons testing positive for Human Immunodeficiency Virus (HIV), such as member, from eligibility for program. U.S.C.A. Const.Amend. 5.

Constitutional Law ⚡278.4(3) United States ⚡36

Discharge or termination of government employee on basis of false and stigmatizing reasons publicized by governmental employer implicates protected liberty interest in employee's reputation and ability to gain future employment; a critical element of claimed invasion of reputational liberty interest, however, is falsity of asserted basis for employment decision at issue. U.S.C.A. Const.Amend. 5.

Armed Services ⚡11

Constitutional Law ⚡278.6(1)

Navy's exclusion of naval reserve member from naval reserve canvasser recruiter program because of member's testing positive for Human Immunodeficiency Virus (HIV) did not deprive member of protected liberty interest, where member never disputed that he did in fact carry virus, and thus did not claim that asserted basis for employment decision at issue was false. U.S.C.A. Const.Amend. 5.

Armed Services ⚡11

Constitutional Law ⚡72

Judicial review of naval reserve member's claim that he was deprived of due process by Navy's decision not to permit him to reenlist in naval reserve canvasser recruiter program, which decision was based upon his testing positive for Human Immunodeficiency Virus (HIV), was disfavored, in view of nature and strength of claim and type and degree of anticipated interference with military function. U.S.C.A. Const.Amend. 5.

Estoppel ⚡62.2(4)

Navy was not equitably estopped from denying naval reserve member, who tested positive for Human Immunodeficiency Virus (HIV), prospective reassignment to naval reserve canvasser recruiter program, where Navy never led member to believe that he had any expectation of serving in program in violation of regulations excluding HIV-positive persons; member challenged Navy's termination of his assignment to program, the Board for Correction of Naval Records ultimately agreed that member was entitled to serve out his term,

and thereafter the Navy refused to reenlist member in program.

William J. Sheppard, Matthew Farmer, Sheppard & White, Jacksonville, Fla., for plaintiff-appellant.

Dorothea Beane, Ralph J. Lee, Asst. U.S. Attys., Jacksonville, Fla., Lt. Cdr. Brian Robertson, Dept. of Navy, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

JOHNSON, Circuit Judge:

Plaintiff John Doe appeals from the district court's grant of summary judgment for the defendants, Secretary of the Navy William L. Ball, III, and Captain J.W. Harris, USNR-TAR,¹ Commanding Officer of the Naval Air Reserve in Jacksonville, Florida ("the Navy"), in Doe's suit against the Navy under the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 791, 794, 794a (West 1985 & Supp.1989) ("the Act"), and the Due Process Clause of the Fifth Amendment.

1. STATEMENT OF THE CASE

Doe enlisted in the Navy in 1972, and served, with a short break in 1975, until 1977. He reenlisted in the Naval Reserve in 1981 and was discharged on January 16, 1985. On July 13, 1985, he reenlisted in the Naval Reserve for a two-year term and was accepted into the Naval Reserve Canvasser Recruiter ("NRCR") program, as a temporary active-duty officer assigned to assist recruiting efforts. Doe reported for duty in the NRCR program at Jacksonville, Florida on November 25, 1985. He re-

ceived excellent ratings in the NRCR program, and his initial term of service was extended from May 31, 1986 to September 30, 1986. His performance evaluation indicated that he "display[ed] outstanding potential to be a truly dynamic recruiter," and that he was "conscientious, enthusiastic and highly motivated." Doe was subsequently recommended for an extension of temporary active duty through September 30, 1987, which was tentatively approved by Naval Military Personnel Command ("NMPC") on July 8, 1986.

On July 20, 1986, Doe was admitted to the Naval Hospital at Portsmouth, Virginia, following the tragic news that he had tested positive as a carrier of the AIDS virus (also known as Human Immunodeficiency Virus or "HIV"). He did not, however, show any symptoms of AIDS itself.² On August 26, 1986, Doe was informed by NMPC that, because of his AIDS infection, he would not be allowed to continue on active duty beyond September 30, 1986. On August 27, 1986, the Navy nevertheless allowed Doe to accept his previously approved extension of temporary active duty through September 30, 1987. Later the same day, however, following receipt of a message from NMPC, this extension was cancelled. On September 30, 1986, Doe was released from active duty and returned to inactive status in the Naval Reserve. His final performance evaluation was again very favorable.

At the time Doe tested HIV-positive and was released from the NRCR program, the governing Navy regulation, Secretary of the Navy Instruction 5300.30, dating from December 4, 1985 ("the 1985 regulation"), provided that Naval personnel infected with AIDS but showing no symptoms of the disease should be "retained in service." On April 20, 1987, however, this regulation was superseded by a Secretary of Defense

leased on September 16, 1986. His physician certified that there was "medically no reason for [Doe] to be separated from the Navy at this time." So far as the record before this Court reveals, Doe has not subsequently developed symptoms of AIDS or AIDS-related complex itself.

* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

1. United States Naval Reserve, Training and Administration of Reserves.

2. In September 1986, Doe was hospitalized briefly with a possible symptom of AIDS. This symptom disappeared, however, and he was re-

Memorandum ("the 1987 regulation") providing that Naval Reserve personnel infected with AIDS were ineligible for active-duty status for periods exceeding thirty days, except under conditions of mobilization.³

Doe brought suit in the district court on September 22, 1986, challenging his scheduled release from active duty in the NRCR program. The court ordered Doe to exhaust his administrative remedies, and he applied to the Navy's Board for Correction of Naval Records ("BCNR") in November 1986. On September 14, 1987, the BCNR found that Doe's release from active duty violated the Navy's 1985 regulation, and recommended correction of Doe's records and an award of back-pay commensurate with active-duty status through September 30, 1987. The BCNR also recommended that Doe's enlistment in the Naval Reserve be extended through October 12, 1987. The Secretary of the Navy adopted the BCNR's recommendation on March 15, 1988. Doe thereafter returned to the district court, contending that the relief granted by the Navy was inadequate and that (1) the Navy's exclusion of him from reenlistment in the NRCR program on grounds of his AIDS infection violated the Rehabilitation Act, (2) the Navy had an obligation under the Act to implement an affirmative action plan for personnel handicapped by AIDS, (3) he was entitled to damages and injunctive relief⁴ for the Navy's alleged violation of his due process rights in connection with his 1986 release from active duty and his prospective exclusion from the NRCR program, and (4) he was entitled to attorney's fees and costs.

On May 4, 1989, the district court entered summary judgment denying Doe all relief. *Doe v. Ball*, 725 F.Supp. 1210 (M.D. Fla.1989). The court found that (1) the Rehabilitation Act did not apply to uni-

formed members of the armed services such as Doe, (2) the court was precluded from reviewing the constitutional validity of the Navy's personnel decisions as to Doe under *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.1971), and that, even if review were not precluded, Doe had failed to establish a deprivation of any constitutionally-protected property or liberty interest, and (3) Doe was therefore not entitled to attorney's fees or costs. Doe appeals to this Court, contending that the district court erred in its conclusions on the Rehabilitation Act and due process issues, and raising for the first time the argument that the Navy is equitably estopped from refusing to reenlist him in the NRCR program. The questions presented are issues of law subject to *de novo* review.

II. ANALYSIS

A. The Rehabilitation Act

[1] The district court held that Doe "has no remedy under the Rehabilitation Act," *Doe*, 725 F.Supp. at 1214, relying on well-established caselaw excluding uniformed military personnel from protection under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-16 (West 1981). See *Stinson v. Hornsby*, 821 F.2d 1537, 1539, 1541 (11th Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988); *accord Roper v. Department of the Army*, 832 F.2d 247, 248 (2d Cir.1987); *Gonzalez v. Department of the Army*, 718 F.2d 926, 927-29 (9th Cir.1983). The district court also held that, "[p]ursuant to the remedial scheme of Title VII, a private action [under the Rehabilitation Act] may not be commenced until administrative remedies are exhausted." *Doe*, 725 F.Supp. at 1213 n. 6. The court noted that Doe's proceedings before the BCNR satisfied this requirement. *Id.*⁵ Although the district

4. Doe's counsel, at the conclusion of oral argument, indicated that Doe had abandoned any claim for damages in this regard and sought only injunctive relief on this claim. See Part II(B) below.

5. While the Navy argued before the district court that Doe had not exhausted before the BCNR his claim for prospective reenlistment in

court did not specifically address the issue, we note that it is well established that infection with AIDS constitutes a handicap for purposes of the Act. See *Martinez v. Hillsborough County School Board*, 861 F.2d 1502, 1506 (11th Cir.1988); see also *Nassau County School Board v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). Doe argues that the district court erred by relying on Title VII caselaw because section 794(a)(2) of the Act makes available to claimants under section 794 the "remedies, procedures, and rights" of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 1981). While Doe's argument might appear at first glance to have merit, we conclude that the district court's conclusion was correct.

An outline of the statutory framework is necessary to place the issue in context. Section 794(a) of the Rehabilitation Act⁶ provides:

No otherwise qualified individual with handicaps in the United States ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Section 791 of the Act⁷ imposes an obligation on federal agencies to promulgate affirmative action plans assuring "adequate hiring, placement, and advancement opportunities for individuals with handicaps." 29 U.S.C.A. § 791(b). The substantive scope of section 791 thus goes well beyond the simple nondiscrimination requirement of section 794(a). See *South-eastern Community College v. Davis*, 442 U.S. 397, 410-13, 99 S.Ct. 2361, 2369-70, 60 L.Ed.2d 980 (1979). Prior to 1978, however, section 794(a) did not apply to federal agencies and section 791 did not afford

the NRCR program, the Navy abandons any claim in this regard on appeal. It appears obvious that Doe sought from the BCNR all the relief which the BCNR could conceivably have granted him.

federal employees any private right of action.

Congress amended the Act in 1978 to include the reference in section 794(a) to "Executive agency[ies]" and the Postal Service, thereby "extend[ing] [its] proscriptions ... to activities of the federal government." See *Treadwell v. Alexander*, 707 F.2d 473, 475 (11th Cir.1983); Rehabilitation Amendments of 1978, P.L. 95-602, § 119, 92 Stat. 2955, 2982. The 1978 amendments also enacted section 794a(a) of the Act, which states:

(a)(1) The remedies, procedures, and rights set forth in [Title VII, 42 U.S.C.A. § 2000e-16] ... shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under [section 791], a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in [Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d], shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

See P.L. 95-602, § 120, 92 Stat. 2955, 2982-83. As this Court noted in *Treadwell*, 707 F.2d at 475, section 794a(a)(1) "created a private right of action under [section 791] in favor of persons subjected to handicap discrimination by employing agencies of the federal government." This private right of action, by its very terms, incorpo-

6. This section is frequently referred to as "section 504" of the Act, according to the section designation in the original legislation.

7. This section is frequently referred to as "section 501" of the Act. See note 6, *supra*.

rated Title VII's requirement of exhaustion of administrative remedies.

Section 794a(a)(2), on the other hand, reflects the fact that section 794 is fundamentally modeled after Title VI. See *Alexander v. Choate*, 469 U.S. 287, 293 n. 7, 105 S.Ct. 712, 716 n. 7, 83 L.Ed.2d 661 (1985). This Court's predecessor first held that Title VI created an implied private cause of action in *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852 (5th Cir.) (Wisdom, J.), *cert. denied*, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967), and we held likewise with regard to section 794 in *Helms v. McDaniel*, 657 F.2d 800, 806 n. 10 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 946, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982). See also *Camenisch v. University of Texas*, 616 F.2d 127, 131 (5th Cir.1980) (Tuttle, J.), *vacated on other grounds*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Furthermore, it is established, as a general matter, that Title VI—and by extension section 794—does not incorporate Title VII's requirement of exhaustion of administrative remedies. See *Milbert v. Koop*, 830 F.2d 354, 356 (D.C.Cir.1987) (Frank A. Kaufman, J., sitting by designation); *Cheyney State College Faculty v. Hufstедler*, 703 F.2d 732, 737 (3d Cir.1983); *Miener v. Missouri*, 673 F.2d 969, 978 & n. 10 (8th Cir.) (Henley, J.), *cert. denied*, 459 U.S. 909, 916, 103 S.Ct. 215, 74 L.Ed.2d 171 (1982); *Camenisch*, 616 F.2d at 133-36. The 1978 amendments thus posed the question whether handicapped persons bringing Rehabilitation Act claims against federal government employers could proceed under the direct, Title VI-style cause of action available to all other claimants under section 794, or were limited to the remedy created by section 794a(a)(1), with its incorporation of Title VII's administrative exhaustion requirement.

The present Fifth Circuit, in *Prewitt v. United States Postal Service*, 662 F.2d

8. *Prewitt* was decided by Unit A of the Fifth Circuit on November 5, 1981, subsequent to the October 1, 1981 circuit split, and is therefore not binding precedent on this Court. See *Treadwell*, 707 F.2d at 475 n. 4; *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

292, 302-04 (5th Cir. Unit A 1981),⁸ held that in order to accommodate Congress's intent in enacting the 1978 amendments, it was necessary to impose the section 791/Title VII exhaustion requirement on federal employees bringing actions under section 794. Several circuits have gone further and held that private actions against federal employers may not be brought under section 794 at all, but only pursuant to section 791 and the Title VII remedies of section 794a(a)(1). See *Johnston v. Horne*, 875 F.2d 1415, 1420-21 (9th Cir.1989), and cases cited therein (7th, 9th, and 10th Circuits). Those circuits which, like *Prewitt*, have found that section 794 affords a private right of action to federal employees have nevertheless agreed with *Prewitt* that such claimants must satisfy the section 794a(a)(1) procedures. See *Milbert*, 830 F.2d at 357, and cases cited therein (5th, 6th, and 8th Circuits).⁹ The basic rationale for the approach taken by these courts, as stated by the Seventh Circuit, is that, because Title VII is the exclusive remedy for federal government discrimination on grounds of race, religion, sex, or national origin, "we ... cannot believe that ... Congress would have wanted us to interpret the Act as allowing the handicapped—alone among federal employees or job applicants complaining of discrimination—to bypass the administrative remedies in Title VII." *McGuinness v. United States Postal Service*, 744 F.2d 1318, 1322 (7th Cir. 1984); see also *Boyd v. United States Postal Service*, 752 F.2d 410, 413-14 (9th Cir.1985).

Support for this conclusion is also found in the language of section 794a(a)(2), which applies Title VI remedies and procedures only to claimants suing "any recipient of Federal assistance or Federal provider of such assistance under section 794." This would seem to encompass private or state

9. The D.C. Circuit in *Milbert*, while agreeing with *Prewitt* that exhaustion was required under either section 791 or 794, declined to decide whether a claimant suing a federal agency could proceed under section 794 at all. The court "strongly suggest[ed]," however, that such a claimant "seek relief under section [791] rather than under section [794]." 830 F.2d at 357.

recipients of federal funds and their federal providers, but not federal agencies themselves. See *Morgan v. United States Postal Service*, 798 F.2d 1162, 1165 (8th Cir. 1986), *cert. denied*, 480 U.S. 948, 107 S.Ct. 1608, 94 L.Ed.2d 794 (1987). While this Court has not yet explicitly decided this issue, we have cited *Prewitt* with approval and have noted that "we look to it for guidance." *Treadwell*, 707 F.2d at 475 & n. 4.¹⁰ For the reasons stated in *Prewitt* and discussed above, we take this opportunity to explicitly adopt *Prewitt*'s holding that private actions against federal government employers under the Act, whether brought under section 791 or 794, must satisfy "the requirement of exhaustion of administrative remedies in the manner prescribed by section [794a(a)(1)] and thus by Title VII." *Milbert*, 830 F.2d at 357.

[2] We think this conclusion goes far to support the district court's reasoning that Title VII caselaw must be consulted in considering the application of the Rehabilitation Act to uniformed military personnel. The reasons underlying the Title VII "military exception" have been well stated by Judge Fletcher for the Ninth Circuit in *Gonzalez*, 718 F.2d at 927-29, and need not be repeated here. See also *Johnson v. Alexander*, 572 F.2d 1219, 1223-24 (8th Cir.) (Henley, J.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658 (1978). As noted above, this Court has adopted that exception. *Stinson*, 821 F.2d at 1539, 1541. Just as it would be incongruous to require persons claiming discrimination on grounds of sex, race, religion, or national origin—but not handicapped discrimination

10. *Treadwell* appeared to adopt, at least by implication, *Prewitt*'s holding that a cause of action against federal employers existed under section 794. See *Treadwell*, 707 F.2d at 475 (noting that the plaintiff had "brought suit under §§ [791] and [794]"). We concur in that implication and hereby make it explicit. *Treadwell* did not, however, address the exhaustion of remedies issue.

11. We did not address that issue in *Smith* because the district court did not; the district court granted summary judgment for the Navy on different grounds, which this Court upheld on appeal. See *Smith v. United States Navy*, 573 F.Supp. 1361, 1364 (S.D.Fla.1983), *aff'd*, 763

claimants—to follow Title VII procedures in suing federal employers, so it would be incongruous to allow uniformed military personnel to bring discrimination claims against the military based on handicap, when statutory claims based on sex, race, religion, or national origin are barred.

Any doubt we might entertain on this issue is dispelled by *Smith v. Christian*, 763 F.2d 1322 (11th Cir.1985), in which this Court rejected a section 794 claim brought against the Navy by an individual who was denied a commission in the Naval Reserve Medical Service Corps because he was missing his right index finger. Without addressing the issue whether the claimant had a cause of action against the military under section 794 to begin with,¹¹ *Smith* found that section 794 did not override the Navy's countervailing statutory authority to prescribe physical qualifications for enlistees, an area over which we found "Congress has given the Executive Branch wide latitude." *Smith*, 763 F.2d at 1325. *Smith* found the Navy's authority specifically rooted in two statutes, 10 U.S.C.A. § 591(b) (West 1983) and 10 U.S.C.A. § 5579(a) (West 1959). See *Smith*, 763 F.2d at 1324 & n. 3. Only the former applies here.¹² It states: "Except as otherwise provided by law, the Secretary concerned shall prescribe physical, mental, moral, professional, and age qualifications for the appointment of persons as Reserves of the armed forces under his jurisdiction." Doe understandably focuses on the opening phrase, which *Smith* did not recite, and argues essentially that *Smith* reached the wrong conclusion. Whatever the strength of *Smith*'s reasoning, however, we are

F.2d 1322 (11th Cir.1985). *Smith* did, however, cite "generally" to the Eighth Circuit's decision in *Johnson v. Alexander*, *supra*, which articulated the "military exception" to Title VII. See *Smith*, 763 F.2d at 1325.

12. Section 5579 applied only to the Navy's Medical Service Corps and was repealed effective September 15, 1981. See Defense Officer Personnel Management Act of 1980, P.L. 96-513, §§ 321, 701(a), 94 Stat. 2835, 2892, 2955. Section 5579 was relevant in *Smith* because the claimant there had applied and been rejected prior to its repeal. See *Smith*, 573 F.Supp. at 1362-63, 1366.

bound by it as precedent.¹³ We note that the disputed language might plausibly be read simply to denote that entities other than the "Secretary concerned" might be authorized by law to prescribe qualifications for the Reserves, rather than to suggest substantive limitations on those qualifications. We believe *Smith* supports, *a fortiori*, the Navy's exclusion of Doe from reenlistment in the NRCR program.

For the foregoing reasons, we agree with the district court that Doe has no remedy under the Rehabilitation Act.

B. The Due Process Clause

It is unclear from Doe's brief on appeal whether his due process claim relates to his release from the NRCR program in 1986; his exclusion from reenlistment in the program subsequent to September 30, 1987, or both. The district court found that the BCNR had already afforded Doe complete relief for the 1986 release, and thus focused primarily on his reenlistment claim. See *Doe*, 725 F.Supp. at 1216. At the conclusion of oral argument before this Court, Doe's counsel stated that Doe now seeks only injunctive relief on the due process claim, not damages. Because it is clear that there is no conceivable injunctive remedy which could provide any relief for Doe's 1986 release beyond that already granted by the BCNR, Doe's only remaining due process claim before this Court relates to his exclusion from reenlistment in the NRCR program.

[3,4] The Navy's refusal to reenlist Doe in the NRCR program does not impinge on any constitutionally-protected property interest. It is well established that a military officer's expectation of continued military employment does not rise to the level of a property interest unless it is rooted in some statute, regulation, or contract. *Sims v. Fox*, 505 F.2d 857, 860-62 (5th Cir.1974) (*en banc*), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678

13. Only the *en banc* Court may overrule a prior panel decision. See *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir.1986).

14. The district court thus erred in holding, on the basis of *Paul v. Davis*, 424 U.S. 693, 96 S.Ct.

(1975); *accord Alberico v. United States*, 783 F.2d 1024, 1026-27 (Fed.Cir.1986). In this case, as we have noted in Part I, the applicable military regulations in effect since April 1987 specifically exclude Doe from eligibility for the NRCR program because of his HIV-positive status. More generally, the Navy's regulations governing the NRCR program, as set forth in Naval Military Personnel Command Instruction 1001.1B, provide that assignments to the NRCR program are for temporary periods of 180 days, one year, or two years, that retention beyond the initial period "is not implied or guaranteed," and that the NRCR program "is not a career program." Assignments and reassignments to the program are made by the Commander of the Naval Military Personnel Command from among applicants meeting a detailed list of requirements; nothing in the regulations suggests any vested right or assurance that any applicant will be accepted into the program. To the contrary, the regulations specifically warn that even incumbent NRCR officers "may be non-continued . . . in accordance with the needs of the Naval Reserve Recruiting Program." Courts have rejected claimed property interests even in cases involving outright discharge from career positions in the military. See *Sims*, 505 F.2d at 858-60; *Alberico*, 783 F.2d at 1026-27. Accordingly, Doe's claim to a property interest in prospective reassignment to the NRCR program is devoid of merit.

[5,6] Doe's claim to a protected liberty interest is equally devoid of merit. It is established that discharge or termination of a government employee on the basis of false and stigmatizing reasons publicized by the governmental employer implicates a protected liberty interest in the employee's reputation and ability to gain future employment. See *Buxton v. Plant City*, 871 F.2d 1037, 1042-43 (11th Cir.1989).¹⁴ A

1155, 47 L.Ed.2d 405 (1976), that an allegation of damage to reputation accompanying wrongful discharge "is insufficient to state a constitutional claim." *Doe*, 725 F.Supp. at 1217. *Paul* involved a claimed liberty interest resting on reputation alone, unconnected to any govern-

critical element of a claimed invasion of a reputational liberty interest, however, is the *falsity* of the government's asserted basis for the employment decision at issue. See *Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 883, 51 L.Ed.2d 92 (1977); *Buxton*, 871 F.2d at 1042 & n. 4. Doe has never disputed that he does in fact carry the AIDS virus, the basis for the Navy's disputed "employment decisions" in this case. Because he does not claim falsity, he has failed to raise any "factual dispute . . . which has some significant bearing on [his] reputation." *Codd*, 429 U.S. at 627, 97 S.Ct. at 884.

[7] Because Doe's due process claim so clearly fails on the merits, we need not consider at any length the district court's initial finding that Doe's claim is unreviewable under *Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir.1971), which set forth a four-part balancing test governing the judicial reviewability of constitutional challenges to military personnel decisions. Cf. *Stinson*, 821 F.2d at 1540-41 (district court

mental employment action. See *Paul*, 424 U.S. at 709-10, 96 S.Ct. at 1164-65; cf. *Green v. Branley*, 895 F.2d 1387, 1393 (11th Cir.1990) ("[reputational] liberty interest survives even where . . . the withdrawal of employment does not impinge on a recognizable property interest").

15. This Court in *Stinson* took the rather severe approach of reversing and remanding the district court's dismissal on the merits of a constitutional claim because the district court had not applied *Mindes* to determine whether the claim was reviewable in the first place. We reversed despite the fact that the issue on the merits was quite simple, the district court's disposition appeared plainly correct, and the district court's consideration of *Mindes* on remand could not possibly have led to a different result. See *Stinson*, 821 F.2d at 1541-43 (Henderson, J., specially concurring) (criticizing *Mindes* and suggesting disposition of plainly meritless constitutional claims "without resort to the cumbersome *Mindes* analysis"); *accord Watson v. Arkansas National Guard*, 886 F.2d 1004, 1009-10 (8th Cir.1989).

We note that despite the apparent assumption of *Stinson*, this Court and its predecessor have not always applied *Mindes* in constitutional challenges to military personnel decisions. The former Fifth Circuit, for example, failed to apply *Mindes* in *Sims v. Fox*, *supra*, decided only three years after *Mindes*. Furthermore, while *Mindes* refers to statutory as well as constitutional claims, it appears well established that

must apply *Mindes* analysis before reaching merits of constitutional claim).¹⁵ We find nothing objectionable in the district court's application of *Mindes*, and we think it clear that under *Mindes* factors one and three, at least,¹⁶ review of Doe's due process claim in this case is disfavored.

C. Equitable Estoppel

[8] Doe raises for the first time before this Court the argument that the Navy's past conduct toward him equitably estops it from denying him prospective reassignment to the NRCR program, relying heavily on the Ninth Circuit's recent decision in *Watkins v. United States Army*, 875 F.2d 699 (9th Cir.1989) (*en banc*). Because Doe failed to raise this contention before the district court, we need not address it on appeal. Cf. *In re Daikin Miami Overseas, Inc.*, 868 F.2d 1201, 1207 (11th Cir.1989) (issue not raised below may be considered where "pure question of law" is involved and refusal to consider it "would result in a

Mindes need not be applied before reaching the merits of a statutory claim against the military. See *Stinson*, 821 F.2d at 1539-40; *Smith*, 763 F.2d at 1324-25 (both rejecting statutory claims without resort to *Mindes* analysis). It would obviously be inappropriate for the federal courts to second-guess whatever balancing of policy interests might underlie a decision by Congress to subject the military to liability under a legal standard going beyond constitutional requirements. Such balancing by the courts is appropriate and often necessary with regard to constitutional claims, however, because individual constitutional rights must be reconciled with Congress's constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces." Const. Art. I, § 8, cl. 14.

16. Factor one relates to "[t]he nature and strength of the plaintiff's challenge to the military determination," and notes that "[a]n obviously tenuous claim of any sort must be weighed in favor of declining review." *Mindes*, 453 F.2d at 201. Factor three relates to "[t]he type and degree of anticipated interference with the military function." *Id.* It is obvious that finding a protected property interest in not being denied acceptance to a military program such as the NRCR program—with the presumptive consequence of requiring some kind of due process hearing for every rejected applicant—would threaten substantial interference with the military's personnel selection processes.

miscarriage of justice"). In the interest of responding fully to all aspects of Doe's claim, however, we note that Doe's analogy to *Watkins* is strained indeed. In *Watkins*, the Army had refused to reenlist a career soldier with an outstanding record solely on the basis of his admitted homosexuality, despite the fact that the Army had repeatedly reenlisted him over the previous fifteen years, in violation of its own regulations and with full knowledge of his homosexual orientation, which he had candidly and repeatedly acknowledged over the years. See *Watkins*, 875 F.2d at 701-03. The Ninth Circuit held that the Army had induced Watkins's reliance on its previous course of conduct and was therefore equitably estopped from refusing to reenlist him. See *id.* at 709-11. In this case, by contrast, Doe has never relied to his detriment on any violation by the Navy of its own regulations. Doe *challenged* the Navy's termination of his NRCR assignment in 1986 as being in violation of the 1985 regulation, and the BCNR ultimately agreed that under that regulation Doe was entitled to serve out his term through September 30, 1987. Thereafter, the Navy has refused to reenlist Doe in the NRCR program, in accordance with its 1987 regulation. Unlike the situation in *Watkins*, the Navy has never led Doe to believe that he has any expectation of serving in the NRCR program in violation of the regulations excluding HIV-positive individuals. Doe's estoppel claim thus lacks merit.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.



Nicholas D. LENGEN,
Plaintiff-Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
National Transportation Safety Board,
and Federal Aviation Administration,
Administrator, Defendants-Appellees.

No. 89-8154.

United States Court of Appeals,
Eleventh Circuit.

June 25, 1990.

Air traffic controller applicant, whose arm had been amputated, brought action against the Federal Aviation Administration (FAA) and the Department of Transportation (DOT) claiming that they discriminated against him in violation of the Rehabilitation Act. The United States District Court for the Northern District of Georgia, No. 1:85-cv-4329-RLV, Robert L. Vining, Jr., J., entered order finding discrimination but denying damages, and applicant appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) finding that applicant had to undergo FAA Academy training to be hired was clearly erroneous, and (2) conclusion that applicant's refusal to undergo training following litigation below precluded award of back pay was clearly erroneous.

Denial of back pay reversed and remanded.

1. Civil Rights ⇐272

Back pay should be awarded to successful Rehabilitation Act plaintiff absent special circumstances. Rehabilitation Act of 1973, §§ 504, 505(a)(1), as amended, 29 U.S.C.A. §§ 794, 794a(a)(1).

2. Civil Rights ⇐272

District court's determination, in air traffic controller applicant's Rehabilitation Act action against Federal Aviation Administration (FAA) and the Department of Transportation (DOT), that applicant had to complete FAA Academy training in order to be hired was clearly erroneous, for pur-

their application here. It suggests that the decision was made by an unidentified person (evidently on the assumption that the true authors of the tentative and final decisions were persons other than those named), and that this denied it an opportunity to question the authors' credentials; that the "true" decisionmaker at both the tentative and final phases may be one and the same person; and that the FDA relied in its final decision on assertions never previously revealed.

In light of our finding that the FDA's decision was arbitrary and capricious, we believe it would be inappropriate for us to address Zotos's constitutional claims. See *Ashwander v. TVA*, 297 U.S. 288, 345-48, 56 S.Ct. 466, 482-83, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C.Cir.1987). A thorough FDA effort to resolve the substantive conflicts that we have identified seems likely to dispose of the objections to the agency's application of its procedures. The facial objections may well also become moot, either through the communications between Zotos and the agency in the proceedings on remand or (possibly) through a different outcome.

It is so ordered.



Dr. Alfred MILBERT, Appellant,

v.

Dr. C. Everett KOOP, U.S. Surgeon General, et al.

No. 86-5600.

United States Court of Appeals,
District of Columbia Circuit.

Argued May 5, 1987.

Decided Oct. 6, 1987.

Commissioned officer of United States Public Health Service brought action seek-

* Judge Silberman took no part in the preparation of this opinion and has recused himself in con-

ing relief under Rehabilitation Act. The United States District Court for the District of Columbia, Harold H. Greene, J., dismissed complaint and appeal was taken. The Court of Appeals, Frank A. Kaufman, Senior District Judge, sitting by designation, held that military exception to Title VII, and therefore to Rehabilitation Act, did not apply to commissioned officer of United States Public Health Service and did not bar officer from bringing suit under Rehabilitation Act.

Reversed and remanded.

Civil Rights §13.6

Military exception to Title VII, and therefore to Rehabilitation Act which was incorporated into Title VII, did not apply to commissioned officer of the United States Public Health Service, and did not bar commissioned officer from bringing suit under Rehabilitation Act. Rehabilitation Act of 1973, §§ 501, 503, 504, 505(a), (a)(1), as amended, 29 U.S.C.A. §§ 791, 793, 794, 794a(a), (a)(1); Civil Rights Act of 1964, §§ 601 et seq., 701 et seq., as amended, 42 U.S.C.A. §§ 2000d et seq., 2000e et seq.

Appeal from the United States District Court for the District of Columbia.

Mark A. Packman, with whom Judith E. Schaeffer was on the brief, for appellant. Amy G. Applegate also entered an appearance, for appellant.

Jeffrey Hunter Moon, Asst. U.S. Atty., with whom Joseph E. diGenova, U.S. Atty., R. Craig Lawrence and Michael J. Ryan, Asst. U.S. Attys., were on the brief, for appellees.

Before EDWARDS and SILBERMAN*, Circuit Judges, and

nection with this case.

Title VII applies to PHS commissioned officers

KAUFMAN**, Senior United States District Judge for the District of Maryland.

Opinion for the Court filed by Senior District Judge FRANK A. KAUFMAN.

FRANK A. KAUFMAN, Senior District Judge:

Appellant, Dr. Alfred N. Milbert, has been a member of the Commissioned Corps of the United States Public Health Service (PHS) since 1976. In 1981 the PHS assigned Milbert to the Food and Drug Administration (FDA) to work as a toxicologist. In 1982 Milbert began suffering from a variety of physical ailments allegedly caused by his exposure to airborne contaminants at his work site.¹ After Milbert was advised by his physicians to avoid further exposure to those contaminants, he requested his immediate supervisors in the FDA to move him to a new office. However, according to Milbert, those supervisors failed to grant that request.² Milbert further contends that because he so sought relief concerning his problems with the airborne contaminants, his supervisors retaliated against him by (1) failing to promote him, and (2) giving him a negative work performance appraisal in the October 25, 1987 Commissioned Officer's Effectiveness Report (COER).

After Milbert had fully but unsuccessfully exhausted his administrative remedies concerning his claim of handicap discrimination, Milbert timely filed this case in the United States District Court for the District of Columbia, seeking relief solely under section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Milbert's said complaint was dismissed by the district court, with prejudice, on the ground that members of the Commissioned Corps of the PHS are not entitled to the protections of the Rehabilitation Act. The within appeal followed.

** Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

1. Milbert's complaint in the within case was dismissed on the pleadings by the district court. Accordingly, Milbert's factual allegations are deemed to be true for purposes of this appeal.

THE REHABILITATION ACT OF 1973 AS AMENDED IN 1978

Congress enacted the Rehabilitation Act in 1973 to aid handicapped individuals and in so doing, in section 501 of that Act, "established the principle that (a) the federal government, (b) federal contractors, and (c) recipients of federal funds cannot discriminate against the handicapped." *Prewitt v. United States Postal Service*, 662 F.2d 292, 301 (5th Cir.1981). Section 504 provides that "no otherwise qualified individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving financial assistance." 29 U.S.C. § 794. Section 505(a)(2) makes applicable to section 504 the "remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964." 29 U.S.C. § 794a(a)(2).

In *Prewitt*, Judge Tate, in the course of reviewing the legislative history of the Act, commented:

Under the original 1973 Rehabilitation Act, a private cause of action founded on handicap discrimination was not recognized upon section 501 as against a federal government employer; the literal statutory wording merely required federal agencies to submit affirmative actions plans. However, due to differences in statutory wording, all courts that considered the issue found that section 504 established a private cause of action for handicapped persons subjected to discrimination by recipients of federal funds, while the federal courts split on the question whether the same was true under section 503 for individuals subjected to handicap discrimination by federal contractors.

In 1978, the Rehabilitation Act was amended to provide a private cause of

Shear v. National Rifle Association, 606 F.2d 1251, 1253 (D.C.Cir.1979).

2. Milbert states that he was subsequently assigned to another office after he had spoken with senior supervisory officials in the FDA.

Rehab Act

action in favor of persons subjected to handicap discrimination by the federal government employing agencies. In the House, an amendment was adopted and ultimately enacted by the Congress that extended section 504's proscription against handicap discrimination to 'any program or activity conducted by an Executive agency or by the United States Postal Service;' the legislative history, as well as the judicial interpretations, fully recognized that a private right of action had been created by section 504.

The Senate, at the same time, added a new section 505(a)(1) to the Rehabilitation Act, which created a private right of action under section 501.

Prewitt, 662 F.2d at 302-03 (footnotes omitted) (emphasis in original).

Section 505(a) provides as follows:

The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. § 794a(a)(1, 2).

Thus, Title VII and its exhaustion requirements were incorporated by the Congress in 1978 into the remedy procedures

of section 501. By way of contrast, section 504 incorporates Title VI—not Title VII—procedures. Title VI, which relates to the cutting off of funding of federal programs when certain prescribed discriminatory conduct occurs, does not contain exhaustion requirements similar to those of Title VII.

Ultimately, both Houses of Congress passed the 1978 amendments to the Rehabilitation Act of 1973, seemingly without recognizing that the 1978 amendments contained two different approaches in the creation of a right of action by a federal government employee against his agency. Commenting in that regard, Judge Tate wrote in *Prewitt*:

In summary, the 1978 amendments to the Rehabilitation Act 1) established a private right of action, subject to the same procedural constraints (administrative exhaustion, etc.) set forth in Title VII of the Civil Rights Act, in favor of section 501 claimants, and 2) extended section 504's proscription against handicap employment discrimination to cover the activities of the federal government itself.

Thus, by its 1978 amendments to the Rehabilitation Act, Congress clearly recognized both in section 501 and in section 504 that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the federal government and its agencies. The amendments to section 504 were simply the House's answer to the same problem that the Senate saw fit to resolve by strengthening section 501. The joint House-Senate conference committee could have chosen to eliminate the partial overlap between the two provisions, but instead the conference committee, and subsequently Congress as a whole, chose to pass both provisions, despite the overlap. 'When there are two acts upon the same subject, the rule is to give effect to both if possible.' *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). By this same principle, in order to give effect to both the House and the Senate 1978 amendments finally enacted, we must read the

exhaustion of administrative remedies requirement of section 501 into the private remedy recognized by both section 501 and section 504 for federal government handicap discrimination.

Prewitt, 662 F.2d at 304 (emphasis in original).

Since 1978, the right of a federal governmental employee to sue his employing agency under the Rehabilitation Act has been unquestioned. See, e.g., *Morgan v. United States Postal Service*, 798 F.2d 1162 (8th Cir.1986); *Boyd v. United States Postal Service*, 752 F.2d 410 (9th Cir.1985); *Shirey v. Devine*, 670 F.2d 1188 (D.C.Cir. 1982). But there exists a split among the courts as to whether such a suit may be brought under section 504 as well as under section 501. Compare *Morgan v. United States Postal Service*, 798 F.2d 1162, 1165 (8th Cir.1986) and cases stated therein; *Smith v. United States Postal Service*, 742 F.2d 257, 259-60 (6th Cir.1984); *Prewitt v. United States Postal Service*, 662 F.2d 292, 304 (5th Cir.1981), answering the question in the affirmative, with *Boyd v. United States Postal Service*, 752 F.2d 410, 413 (9th Cir.1985); *McGuinness v. United States Postal Service*, 744 F.2d 1318, 1321 (7th Cir.1984), indicating a negative response to that question. However, those courts which have taken the approach that a private cause of action exists under either section 501 or section 504 or both, have read into section 504 the requirement of exhaustion of administrative remedies in the manner prescribed by section 505(a)(1) and thus by Title VII.

The court below seemingly did not decide the question of whether Milbert can proceed under section 504 since it denied relief on the basis of the "military exception" discussed *infra*. On appeal, while maintaining his right to proceed herein under section 504, Milbert has alternatively asked this Court to permit him, on remand, to amend his complaint to seek relief under section 501. In view of the underlying philosophy of Fed.R.Civ.P. 15,³ which favors the grant of petitions to amend, and in view of our disagreement with the court

3. See *Hanson v. Hoffmann*, 628 F.2d 42, 53 n. 11 (830 F.2d—10)

below with regard to the "military exception," see the discussion *infra* at pp. 358-359, there would appear no reason why we should not grant Milbert's said alternative request to amend his complaint to enable him to go forward under section 501. In that context, we need not resolve the question, which has divided the circuits, whether a person such as Milbert can proceed under section 504 as well as under section 501. We would, however, strongly suggest that in the future, plaintiffs such as Milbert seek relief under section 501 rather than under section 504.

APPLICABILITY OF THE REHABILITATION ACT TO EMPLOYEES OF PHS

Title 42 U.S.C. § 2000e-16 (referred to in section 501) provides:

(a) 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, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriate funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(Emphasis added).

The question has arisen in other cases as to whether uniformed members of the military service are "employees . . . in military departments" as those words are used in Title VII. A number of courts have answered that question in the negative. In *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986, 99 S.Ct.

(D.C.Cir.1980).

79, 58 L.Ed.2d 658 (1978), Judge Henley wrote:

From our consideration of the record and of the briefs and arguments it is clear to us that at the heart of plaintiff's claim is the premise that the relationship between the government and a uniformed member of the Army, Navy, Marine Corps, Air Force or Coast Guard is that of employer-employee, and that an applicant for enlistment in one of those agencies is an applicant for 'employment' and should have his application judged by Title VII standards. We cannot accept that premise and accordingly cannot accept counsels' conclusions thereon.

While military service possesses some of the characteristics of ordinary civilian employment, it differs materially from such employment in a number of respects that immediately spring to mind,⁴ and the peculiar status of uniformed personnel of our armed forces has frequently been recognized by the courts. See, for example, the following cases which, among others, were cited by the district court in its discussion of the question of whether the case presented a justiciable controversy: *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973); *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953). See also the discussion of the status of an enlistee in the Army that appears in the rather old case of *In re Grimley*, 137 U.S. 147, 11 S.Ct. 54, 34 L.Ed. 636 (1890).

⁴ An enlisted man in the Army, for example, is not free to quit his 'job,' nor is the Army free to fire him from his employment. Additionally, the soldier is subject not only to military discipline but also to military law.

Johnson, 572 F.2d at 1223-24. Similarly, *Gonzalez v. Department of Army*, 718 F.2d 926 (9th Cir.1983), Judge Fletcher concluded that the 1972 amendments to Title

But see Judge Weinstein's opposite views in *Hill v. Berkman*, 635 F.Supp. 1228 (E.D.N.Y. 1986).

It is to be noted, however, that the PHS is a "uniformed service." See 5 U.S.C. § 2101(3); 10

VII, 42 U.S.C. § 2000e-16 (allowing federal employees to sue their employing federal agency) were "not intended to extend Title VII coverage to enlisted and commissioned members of the armed forces in active service." *Gonzalez*, 718 F.2d at 928.⁴

This Circuit has not yet determined, and in the within case, need not determine the question of whether members of the armed forces may bring suit under Title VII. Assuming, however, *arguendo* only, that members of the armed forces have no such right, the question here at issue is whether commissioned officers of the PHS are, as the court below concluded, analogously excepted from the protections of Title VII and, because of Title VII's incorporation into the Rehabilitation Act as amended in 1978, also from the protections of that latter Act. 29 U.S.C. § 794a(a)(1); 42 U.S.C. § 2000e-16.

In *Salazar v. Heckler*, 787 F.2d 527 (10th Cir.1986), the Tenth Circuit concluded that the case law excepting members of the military from Title VII is equally applicable to commissioned officers of the PHS. *Id.* at 533. In *Salazar*, Judge Bohanon reviewed the many similarities between the commissioned officers of the PHS and members of the armed forces. *Salazar*, 787 F.2d at 530-31. However, there are also many material differences between commissioned officers of the PHS and members of the armed forces, differences which, in our view, make inapplicable the stated and implied rationales for the "military exception" relied upon by those courts which have excluded active members of the armed forces from the protection of Title VII. Those differences include:

- (1) The PHS is not defined as one of the "armed forces." See 10 U.S.C. § 101(4); 37 U.S.C. § 101(4).⁵
- (2) The PHS is an agency of the Department of Health and Human Services. 42 U.S.C. § 202. It is neither a com-

U.S.C. § 1072(1); 37 U.S.C. § 101(3); 42 U.S.C. § 201(p). However, the wearing of a uniform does not necessarily mean that the wearer is engaged in military-type duty.

ponent of any armed force nor is its primary mission the assistance of any armed force. Rather, the Congress has assigned to it the task of generally aiding and improving the public health.

- (3) Unlike most members of the armed forces, a commissioned officer of the PHS is free unilaterally to terminate his status as a commissioned officer of the PHS. See *Officers Handbook for Officers of the Commissioned Corps (CCPM Pamphlet 10-B)* at 7-8. ("Except during a period of war or national emergency when the commissioned corps has been declared a military service, an officer may resign his commission at any time.")
- (4) The PHS is not a "Military Service" until the President so declares, by executive order, in time of war or national emergency. 42 U.S.C. § 217.
- (5) Officers of the PHS are not subject to the Code of Military Justice unless the President so declares pursuant to the provisions of 42 U.S.C. § 217.

While the issue is not free from debate, we are of the view that these differences significantly and sufficiently distinguish members of the PHS from members of the armed forces so as to cause us to conclude that the "military exception" to Title VII and therefore to the Rehabilitation Act does not apply to a commissioned officer of the PHS and bar him from bringing suit under the Rehabilitation Act. Therefore, Milbert's within suit is not barred because he is employed by the PHS.

Accordingly, we hereby remand the instant case to the district court for further proceedings during which Milbert shall be permitted to amend his complaint to assert his right to relief under section 501.

Reversed and remanded.



DUKE POWER COMPANY, Petitioner.

v.

U.S. DEPARTMENT OF ENERGY, et al., Respondents.

No. 86-1522.

United States Court of Appeals,
District of Columbia Circuit.

Oct. 6, 1987.

On petition challenging Department of Energy regulations, the Court of Appeals held that United States District Court for the District of Columbia, rather than the United States Court of Appeals for the District of Columbia, had jurisdiction over action challenging Department of Energy regulations regarding Department's uranium enrichment services criteria.

Petition transferred.

Federal Courts ¶1133

United States District Court for the District of Columbia, rather than the United States Court of Appeals for the District of Columbia, had jurisdiction over action challenging Department of Energy regulations regarding Department's uranium enrichment services criteria. Atomic Energy Act of 1954, §§ 1 et seq., 161(v), 189, as amended, 42 U.S.C.A. §§ 2011 et seq., 2201(v), 2239; 28 U.S.C.A. §§ 1631, 2341 et seq., 2342(4); Department of Energy Organization Act, §§ 2 et seq., 502(a, b), 42 U.S.C.A. §§ 7101 et seq., 7192(a, b); Energy Reorganization Act of 1974, § 2 et seq., 42 U.S.C.A. § 5801 et seq.

Petition for Review of an Order of the U.S. Department of Energy.

Leonard Schaitman and Marc Johnston, Dept. of Justice, Washington, D.C., were on respondents' motion to dismiss.

J. Michael McGarry, III, Washington, D.C., and Steve C. Griffin, Jr., were on petitioner's opposition.