

Combating Racial Disparity in Non-Judicial Punishment

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Introduction

As our nation grapples with race issues, the concern about racial disparities in the Air Force criminal justice system has been brought to light once again. A unique aspect of non-judicial punishment (NJP) in the military is that it sometimes blurs the line between true criminal offenses and mere employment, work performance, or behavioral issues. Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, prohibits employment discrimination based on race, color, religion, sex and national origin. The Act also provides for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII and provides specific protection against retaliation (or reprisal). However, for military members, the reality is that the protections guaranteed by the 14th Amendment to the Constitution Equal Protection Clause are almost non-existent. While Title VII is primarily geared towards employment discrimination and not criminal law, the two are inextricably intertwined in the military because non-judicial punishment accounts for both criminal offenses (such as marijuana use) and non-criminal work-related issues (such as showing up to work late). For years the statistics in non-judicial punishment and courts-martial within the Air Force have shown that black male Airmen under the age of 25 and with less than 5 years of service receive NJP at far higher rates than similarly situated white males. (Race and Justice 2020 Memorandum). The statistics indicate that we still have a long road ahead of us working to normalize equality in our military justice system and equal treatment and opportunities in the workplace.

The Problem

One of the prevalent problems facing military members who experience either discrimination in the workplace or disparate impact in the administration of criminal justice is the lack of remedies that are available through our civilian court system in either the criminal

justice or the employment law realm. Military members are barred from being able to bring employment discrimination and retaliation complaints against the Air Force and are instead forced to rely on the Military Equal Opportunity and Inspector General program to remedy these types of grievances without any type of compensatory or punitive damages. Many states such as California have statutes such as the Fair Employment and Housing Act that actually hold the individual supervisors who discriminate personally liable for acts of harassment and discrimination. (FEHA) Likewise, California has created harsh criminal penalties for racially motivated hate crimes. While those statutes do not necessarily address unintentional employment discrimination or unconscious biases that affect the administration of criminal justice, they do at least reflect the seriousness of discrimination and the need to hold those who discriminate accountable.

Mistrust of the Equal Opportunity System

Unfortunately for military members who experience workplace discrimination in the form of lost opportunities, harassment, or biased decision-making and disparate impact in the administration of non-judicial punishment, the military Equal Opportunity (EO) program has shown itself to be somewhat ineffective in addressing these issues for a number of reasons. As stated above, one issue is that when complaints are made with the EO/IG office there is very little incentive for EO to aggressively investigate and prosecute the complaint because the compensatory and punitive damages available to complaints in the civilian world (and to their attorneys) are unavailable to military members. Each base has an EO office; however, that office is employed by the Air Force and is often times more incentivized to protect the Air Force's interests and those of the offending supervisor or commander than to address the complainant's issue.

In addition, military culture itself actively discourages the making of complaints or raising issues about racial discrimination. Military members are indoctrinated with the necessity of following orders, the need for good order and discipline, and service before self. The mentality often fosters a fear of being labeled a complainer, a poor performer, or a problem military member for raising concerns about unequal treatment. Also concerning, is the prevalence of retaliation against those who bring complaints. The EEOC estimates that over 70% of individuals who raise complaints of harassment or discrimination based on a protected characteristic suffer some sort of retaliation. (EEOC) The military is not immune to the concerns of retaliation that are reflected in the data shown in employment discrimination nationwide and military members are especially susceptible to having to remain in a situation where they are being harassed, discriminated against, or retaliated against due to the nature of their military commitment.

Lastly, EO/IG offices often lack the necessary information and data to analyze trends and disparities in the administration of military justice to be able to determine whether a certain Airman or group of Airmen are being affected by disparate treatment. The lack of information and data puts a hefty burden on a young Airman to have to prove by a preponderance of the evidence that they are being more harshly punished, or in some other way discriminated against, on the basis of their race.

Solutions

The United States Supreme Court acknowledged in *McCleskey v. Kemp* through evidence in the form of a complex statistical study that capital punishment is administered in such a way that Black capital murder defendants are 22% more times likely to be sentenced to death than white individuals. In acknowledging this, the Court essentially determined that racial bias is

inevitable in our criminal justice system and that the only way to remedy the staggering statistics would be to revamp the entire criminal justice system.

Perhaps it is time that we rethink racial disparity in the military justice system by shifting the burden of proof onto the military to prove that it is not discriminating against Black Airmen rather than forcing Black Airmen to prove that they are being discriminated against. One way to accomplish this is by educating ourselves about the issue of racial disparity and implicit or unconscious biases that affect our Airmen every day. Racial equality is not a political issue, it is the law. We as the Air Force have a responsibility to ensure that we are not engaging in intentional or unintentional discrimination by applying biases in our administration of justice. We must proactively seek more diversity in leadership so that when non-judicial punishment is administered it comes from someone who understands the unique issues that their Airmen face.

Another way to attack this issue is through more oversight of non-judicial punishment in a “safer” environment. The Department of Defense could establish oversight panels similar to those implemented to address issues involving sexual assault and domestic violence, such as the Central Registry Board (CRB) and the Case Management Group (CMG). The CRB is a panel of individuals from different entities, including the vice commander of each base, law enforcement, a JAG, and Family Advocacy, which is charged with making determinations of whether certain military members have engaged in emotional, physical, child, or sexual abuse. The CMG is a panel that oversees sexual assault case disposition to ensure that the victim receives adequate emotional, physical, and spiritual care to assist in recovery.

The military could utilize this model by forming a panel of diverse individuals, including members who are JAGs, who are charged with reviewing base-wide non-judicial punishment and analyzing data, trends, and complaints across the base to help identify issues and ensure

consistency. Having the panel members comprised of high-level commanders, at the group or wing level would give the panel legitimacy and encourage more accountability, while creating less fear of reprisal from the immediate chain of command. Having a JAG, and other individuals from diverse backgrounds on the panel could help analyze biases, trends or inconsistencies in the administration of justice. Further, the panel could be responsible for collecting and maintaining deeper data in non-judicial punishment to help identify and raise awareness on systemic issues.

Conclusion

Perhaps we need to put the burden on our commanders and supervisors to show that they are effectively mentoring their subordinates, that they are helping all their Airmen succeed, and that they are providing opportunities for all Airmen to meet – and exceed expectations. Racial discrimination is a multi-faceted problem that history and data have shown is far from resolution. Perhaps attacking the issue from an offensive, rather than defensive position, will make the difference.

References

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