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## Top General Escapes Colonel's Sex Assault Suit For Now

By **Daniel Wilson**

Law360 (July 24, 2020, 9:57 PM EDT) -- A California federal judge has at least temporarily tossed a former subordinate's suit accusing the Pentagon's second-highest-ranking officer of subjecting her to unwanted sexual acts and retaliation, ruling that a bar on claims considered incident to military service applied.

Although it was a "close call," the four factors that went into weighing whether the so-called Feres doctrine applied were more in favor of U.S. Air Force Gen. John Hyten, the vice chair of the Joint Chiefs of Staff, than Kathryn Spletstoser, a former U.S. Army colonel, U.S. District Judge Michael Fitzgerald ruled in an order released Thursday.

"Putting all these factors together, the court determines that the allegations in this action ... fall within the Feres doctrine," he said.

The **Feres** doctrine, named after a 1950 U.S. Supreme Court case, extends sovereign immunity to tort claims against the government that involve injuries to or the death of service members considered "incident to military service."

Given the "muddled" precedent around the Feres doctrine, the Ninth Circuit had directed district courts to identify cases with similar fact patterns to help decide cases involving the doctrine, Judge Fitzgerald noted.

There were three similar circuit court decisions most relevant to Spletstoser's case, **in which she alleges** she was targeted in two internal investigations and relieved of a senior position in retaliation for opposing Hyten's sexual advances, despite uniformly glowing performance reviews and an "unblemished" service record beforehand, Judge Fitzgerald said.

Those cases involved four considerations related to the doctrine: whether the alleged acts were on- or off-base; whether they were during working hours and "related to working conditions;" whether the defendant was of a superior rank to the plaintiff and subject to military discipline for harassment; and whether the actions "could conceivably serve any military purpose," according to the judge.

While the military purpose factor weighed against applying the Feres doctrine, the rank and military punishment issue clearly favored applying it, Judge Fitzgerald said.

And although there was some ambiguity about whether the alleged acts occurred on base or were related to working conditions — Spletstoser said that several of the incidents were in hotel rooms during work trips — those two factors also "arguably [favored]" applying the doctrine too, according to the judge.

Judge Fitzgerald allowed Spletstoser to amend her complaint, noting both that a Feres analysis is "highly fact-specific" and that "it is unlikely [for the district court] to have the last word on this issue," meaning a clarified amended complaint would benefit both parties and the Ninth Circuit in any appeal.

The judge also substituted the government as the formal defendant in place of Hyten, because the

general was considered to be acting within the scope of his office at the time of the alleged incidents.

Kathryn Barcroft of Solomon Law Firm PLLC, counsel for Spletstoser, told Law360 on Friday that they will continue to "vigorously pursue" Spletstoser's claims against Hyten through an amended complaint.

Although federal courts have "progressively expanded" Feres immunity over time to apply to injuries caused by one service member to another through intentional torts like assault, "Feres immunity does not and should not apply where, as here, Col. Spletstoser alleged that General Hyten entered her private hotel room after hours and sexually assaulted her," according to Barcroft.

"As with all sexual assault victims, there is nothing uniquely military about her allegations, nor do the allegations further any conceivable military interest warranting Feres immunity," she said.

Maj. Trisha Guillebeau, a spokeswoman for Hyten, acknowledged the order on Friday, but declined to comment on its details, citing "Department of Defense practice in all ongoing civil litigation."

Spletstoser is represented by Kathryn Barcroft and Ariel E. Solomon of Solomon Law Firm PLLC, and Majed Dakak and Trevor Stockinger of Kesselman Brantly Stockinger LLP.

The government is represented by Reginald M. Skinner, Richard Montague and C. Salvatore D'Alessio Jr. of the U.S. Department of Justice's Torts Division.

The case is Spletstoser v. Hyten, case number 2:19-cv-10076, in the U.S. District Court for the Central District of California.

--Editing by Haylee Pearl.

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