

CHAPTER 16

SENIOR OFFICERS LEGAL ORIENTATION

HANDLING SEXUAL HARASSMENT COMPLAINTS

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OUTLINE OF INSTRUCTION

I. INTRODUCTION.

II. DEFINING SEXUAL HARASSMENT.

A. DoD Definition. DoD Dir 1350.2 (Aug. 18, 1995).

1. Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:
 - a. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or
 - b. Submission to, or rejection of, such conduct by a person is used as a basis for career or employment decisions affecting that person; or
 - c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive environment.
2. Such conduct, to be actionable as "abusive work environment" harassment, need not result in concrete psychological harm to the victim, but rather need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.
3. "Workplace" is an expansive term for military members and may include conduct on or off duty, 24 hours a day.

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4. Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay or job of another soldier or civilian employee is engaging in sexual harassment.
5. Any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment.

(AR 600-20, para 7-4 adopts this definition with minor differences.)

B. Title VII (of the Civil Rights Act of 1964) definition.

1. Title VII is implemented in the federal government through the Code of Federal Regulations (CFR). 29 CFR § 1604.11 contains the following definition of sexual harassment:
 - a. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
 - (1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 - (2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
 - (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
2. Sexual harassment in violation of Title VII is also defined by the courts, as discussed below in paragraph D.

C. 10 USC § 1561 Definition:

1. Conduct (constituting a form of sex discrimination) that:
 - a. Involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when:
 - (1) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay or career;
 - (2) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
 - (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment; and
 - (4) Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.
2. Any use or condonation by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the armed forces or a civilian employee of the Department of Defense.
3. Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature in the workplace by any member of the armed forces or civilian employee of the Department of Defense.

D. Types of Sexual Harassment

1. Old Terms: Traditionally, federal courts categorized sexual harassment claims as Quid Pro Quo or Hostile Work Environment:

- a. "Quid Pro Quo." A request for sexual favors in return for a job benefit, or in connection with the threat of the loss of a job, grade, or an unfavorable performance rating if the employee fails to grant the requested favors.
 - b. "Hostile Work Environment." Deliberate or repeated verbal comments, gestures, or physical contact of a sexual nature that create an offensive or hostile workplace.
2. New Terms: The Supreme Court appears to reject the traditional model in two decisions handed down in 1998. In Ellerth, the Supreme Court discussed whether the "quid pro quo" and "hostile environment" terms had outlived their usefulness. "The terms quid pro quo and hostile work environment are helpful, perhaps in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility." Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257, 2264 (1998).
- a. "Tangible Employment Action" harassment. Sexual harassment that results in a negative tangible employment action (usually involves actions such as a demotion, removal, downgrade, bad appraisal, etc). This type of harassment almost invariably involves harassment by the supervisor.
 - (1) The action must constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257, 2268 (1998).
 - (2) A tangible employment action would not include a "bruised ego," a demotion without change in pay, benefits, duties, or prestige, or a reassignment to a more inconvenient job. Id. at 2268.
 - (3) Sexual advances must be "unwelcome." 29 C.F.R. §1604.11(a).

- b. Hostile Environment harassment. Sexual harassment that is so objectively offensive as to alter the conditions of employment even though the victim suffers no tangible employment action.
- (1) The conduct must be "severe or pervasive." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). Single act versus pattern of conduct: the requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents.
 - (2) Do not measure the conduct in isolation. Look at all the circumstances, such as frequency of the discriminatory conduct, its severity, whether it is physically threatening or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
 - (3) "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher v. Boca Raton, 524 U.S. 775, 788 (1998).
 - (4) The conduct must be unwelcome. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).
 - (5) Complainant's Participation.
 - (a) Employee's hostile work environment claim was rejected because of her active and often enthusiastic participation in sexual shenanigans. Reed v. Shepard, 939 F.2d 484, 491-92 (7th Cir. 1991).

- (b) But employees do not forfeit their rights to be free of a sexually offensive workplace merely because they participate to some degree in sexual horseplay, especially when they engage in such behavior defensively. *See Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007 (7th Cir. 1994)(Employee's use of vulgar language is not fatal to her claim because she otherwise made clear that she did not welcome the sexually-directed actions of others).
- (6) Does not require the loss of job benefits or opportunities. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).
- (7) Psychological and emotional work environment as a condition of employment. A violation can be shown either by evidence that the misconduct interfered with an employee's work or that the environment could "reasonably be perceived and is perceived as hostile or abusive." *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993).
- (8) "Reasonable person" and "reasonable victim" test. Objective/subjective elements. *Harris v. Forklift Systems Inc.*, 114 S.Ct. 367 (1993); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986). A "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Farragher v. Boca Raton*, 524 U.S. 775 (1998).
- (9) Need not necessarily be directed at complainant. Evidence of harassment directed at employees other than the plaintiff is relevant to show a hostile work environment. *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988); *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988).

- (10) The harassing official need not be of the opposite sex as the complainant. EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989), Oncale v. Sundowner Offshore Services, 118 S. Ct. 998 (1998).

- E. Agency Liability for Sexual Harassment. Discussed in Section VIII, below.

III. EO COMPLAINT PROCESSING.

- A. AR 600-20, Appendix E.
- B. Applies to soldiers, DA civilian employees, and family members (but DA civilian employees will generally use more specific means; *see* Section V below (EEO)).
- C. Informal Complaint. AR 600-20, Appendix E-1 (a).
 1. Any complaint that the soldier, employee, or family member does not wish to file in writing.
 2. Not subject to time suspense or reporting.
 3. Attempted resolution at the lowest possible level.
- D. Formal Complaint. AR 600-20, Appendix E-1 (b).
 1. Filed by submitting a sworn statement on DA Form 7279-R.
 - a. Basis of complaint.
 - b. Dates, parties, witnesses.
 - c. Requested remedy.

2. Timely submission required (w/in 60 calendar days of the incident). Processed through chain of command or alternative agency.
 - a. Reporting complaint to chain of command “strongly encouraged.”
 - b. “Alternative agencies” when complainant perceives chain of command as the problem:
 - (1) Higher echelons of chain of command.
 - (2) EO advisor.
 - (3) Inspector General. Investigation governed by AR 20-1, not AR 600-20. DA Form 7279-R not used. Confidentiality policy.
 - (4) Chaplain.
 - (5) Provost Marshall, Criminal Investigation Command.
 - (6) Medical agencies.
 - (7) Staff Judge Advocate.
 - (8) Housing referral office.
3. The EO complaint process, in itself, provides no promises of confidentiality. Note, however, that other regulations may provide confidentiality to complainants (e.g., Inspector General, Staff Judge Advocate legal assistance).

4. Actions by “alternative agencies.” Appendix E-2.
 - a. Talk with the complainant; gather as much information as possible; tell complainant what role (if any) that agency will have in resolving the complaint.
 - b. Annotate DA Form 7279-R.
 - c. If resolution is beyond agency’s charter, refer complainant to appropriate agency or commander, with complainant’s consent.
 - d. Most “alternative agencies” do not have an independent investigatory charter. Exceptions: Inspector General; higher commanders in the chain of command.
5. Investigation. *Commander* will either conduct an investigation personally or immediately appoint an investigating officer according to the provisions of AR 15-6. AR 600-20, Appendix E-4 (b).
 - a. Referral to battalion/brigade *commander* for appointment of investigating officer under AR 15-6.
 - b. Fourteen days (3 weekend drill periods) to complete the investigation. Possible extension of 30 days (2 weekend drill periods).
6. Feedback. Written feedback within 14 days (3 weekend drill periods) after acknowledgment of complaint.
 - a. Summary of investigative results.
 - b. Remedial actions taken.
 - c. Copy provided to complainant.

7. Appeal by complainant in writing to the next higher commander, up to GCMCA.
 - a. Within 7 days following notification of results of investigation and acknowledgment of actions taken by the command to resolve the complaint.
 - b. Options outside the EO system.
 8. Follow up. Thirty to forty-five days after final decision on the complaint, Equal Opportunity Advisor conducts an assessment on **all** EO complaints, substantiated and unsubstantiated, to determine effectiveness of any corrective action taken and to detect reprisal. Not recorded on DA Form 7279-R.
 9. File maintained for two years.
- E. Complaints against promotable colonels, active or retired GOs, IGs, members of the SES or Executive Schedule employees forwarded to Investigations Division, US Army Inspector General Agency, ATTN: SAIG-IN, Pentagon, Washington DC 20310-1700 “by rapid but confidential means within 5 calendar days of receipt.” AR 600-20, Appendix E-2d.

IV. EO STAFFING.

- A. AR 600-20.
 1. Commander. Commanders at all levels are the EO Officers for their commands. AR 600-20, para. 6-2g.
 2. Equal Opportunity Advisor (EOA).

- a. Role. EOA's are "agents for cultural change" and the eyes and ears for the commander. They are responsible for understanding and articulating EO policy; assisting the commander with the Consideration of Others Program; recognizing and assessing indicators of discrimination; recommending remedies; collecting, organizing, and interpreting demographic data; assessing command climate; developing affirmative action plans; EO training; complaint processing.
 - b. EOA's may conduct inquiries in accordance with the commander's guidance.
 - c. Brigade-level or equivalent and higher commands. Primary, full-time duty. Has direct access to commander. Commander must be EO Advisor's rater or senior rater.
 - d. Density.
 - (1) Brigade-level and higher units; installations to 10,000 soldiers; base support battalions: SFC (E-7) or higher.
 - (2) Installations over 10,000 soldiers, and area support groups: MSG (E-8) and SFC.
 - (3) MACOM: LTC/MAJ, SGM, & MSG.
3. Equal Opportunity Representative.
- a. Role. Assists commanders at the battalion level and below in carrying out the EO program in their units. *May not* conduct investigations.
 - b. Assigned to battalion and company size organizations. Not a full time duty. SSG or SFC is typical, but can be SSG – 1LT.

V. EEO COMPLAINT PROCESS.

A. Administrative Complaint Procedures--Nonmixed Cases.

1. References. 29 C.F.R. Part 1614; AR 690-600 (currently under revision).
2. Complaint process.
 - a. Informal stage: Employee contacts EEO Counselor.
 - (1) Timing--within 45 days of matter of which complained. 29 C.F.R. § 1614.105(a).
 - (a) Commencement of 45-day period.
 - (i) Personnel action--effective date of action.
 - (ii) Event not constituting a personnel action--date individual knew or reasonably should have known of discriminatory event.
 - (2) Counselor actions. 29 C.F.R. § 1614.105.
 - (a) Initial interview.
 - (i) Advise complainant.
 - (ii) Gather facts from complainant.
 - (iii) Identify primary agency witness(es) .
 - (b) Counselor inquiry, including interview with primary agency witnesses.

- (c) Final interview.
 - (i) Time--within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. In addition, the 30-day period would be automatically extended to 90 days if the agency has a precomplaint dispute resolution program and the employee agrees to participate in it. 29 C.F.R. § 1614.105(d)-(f).
 - (ii) Notice of right to file formal complaint.
- (d) Final report.
- (e) Identity of complainant. EEO Counselor does not reveal without complainant's consent. 29 C.F.R. § 1614.105g.

b. Formal stage.

- (1) Written complaint to EEO Officer. 29 C.F.R. § 1614.106(b).
 - (a) Timing--within 15 days of final interview with EEO Counselor.
 - (b) After acceptance, the agency may dismiss the complaint:
 - (i) If complainant files suit in federal court.
 - (ii) If complainant fails to prosecute or the issue is moot.

- (iii) If complainant did not meet time limits.
 - (iv) If complaint has already been raised using the grievance procedure or in appeal to the Merit Systems Protection Board.
 - (v) If complainant is found to be misusing the EEO process.
- (c) Investigation. Series of interviews or a fact-finding conference resulting in a report of investigation (ROI). AR 690-600, para. 2-9. Agencies must complete the investigation within 180 days of the filing of the complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.106(e) and 1614.108(e). Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods to develop a record. Agencies are encouraged to incorporate alternative dispute resolution (ADR) techniques. 29 C.F.R. § 1614.108(b).
- (d) Complainant decides on course of action -- within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).
- (i) Request a final agency decision from the agency head based on the record.
 - (ii) Request a hearing and decision from administrative judge from EEOC.

- (iii) File suit in federal District Court if no final agency decision has yet issued and 180 days has elapsed since filing complaint.
 - (2) EEOC hearing. 29 C.F.R. § 1614.109.
 - (a) Hearing procedures.
 - (i) Evidence. 29 C.F.R. § 1614.109(f). Documentary and testimonial.
 - (ii) Witnesses. Direct evidence, not unduly repetitious, under oath.
 - (iii) Alternatives to testimony. Written statements (sworn), video teleconference, phone testimony.
 - (b) Record of hearing. 29 C.F.R. § 1614.109(h). Agency pays for verbatim transcripts.
 - (c) Decisions. 29 C.F.R. § 1614.109(i). The administrative judge (AJ) must issue a decision on the complaint within 180 days of the request for hearing.
- c. Final orders. The agency must issue a final order within 40 days after receiving the administrative judge's decision and hearing file. The order must state whether or not the agency will fully implement the decision. If the order states that the agency will not, the agency must file an appeal with the EEOC at the same time as it issues its final order (within 40 days of receiving judge's decision). 29 C.F.R. § 1614.110, § 1614.401.
- d. Complainant's Appeal to EEOC. An appeal of the final agency order must be filed with the EEOC within 30 days. 29 C.F.R. § 1614.401, § 1614.402.

- e. Remedial actions.
 - (1) Nondiscriminatory placement.
 - (2) Back pay.
 - (3) Compensatory damages up to \$300,000.
 - (4) Fees and costs.

- f. Miscellaneous issues in the administrative complaint process. 29 C.F.R. § 1614.605.
 - (1) Representation. Complainants have the right to be accompanied, represented, and advised by a representative of their choice at any stage of the EEO complaint process.

 - (2) Official time. Complainants get reasonable amount of official time to prepare and attend. Witnesses are in duty status when testifying (as required by administrative judge). If Complainant's representative is Federal employee (i.e., union rep), the representative gets reasonable amount of official time to prepare, but if representation conflicts with work duties, representative may be disqualified. 29 C.F.R. § 1614.605(c). The agency does not have to change work schedules or incur overtime wages for Complainant's or the representative's preparation time.

VI. 10 USC § 1561 INVESTIGATION PROCESS FOR COMPLAINTS OF SEXUAL HARASSMENT.

- A. Action when military member alleges sexual harassment:

[See directive-type memorandum from Assistant Secretary of Defense for Force Management, SUBJECT: DoD Interim Policy for Implementation of 10 U.S.C. 1561, Sexual Harassment Investigations and Reports, dated February 25, 1998.]

1. The DoD policies and procedures governing investigating and reporting sexual harassment complaints shall be used. Therefore, the provisions of AR 600-20 (EO Complaint Process), detailed above, will apply.

B. Action when DoD civilian alleges sexual harassment:

[See directive-type memorandum from Assistant Secretary of Defense for Force Management, SUBJECT: Interim Policy for DoD Implementation of 10 U.S.C. 1561: Sexual Harassment Investigations and Reports for Civilian Employees of the Military Services, dated February 9, 1999.]

1. Establish a separate POC on the installation to handle 10 USC §1561 complaints. That person should be separate from the EEO Officer to avoid any perceived conflict-of-interest issues.
 2. The 1561 POC shall, within 48 hours after initial contact by an aggrieved person, submit in writing as detailed a description as possible of the allegation to the appropriate commanding officer or military officer-in-charge.
 3. Within 72 hours of receipt of written notification from a 1561 POC, a commanding officer, or officer-in-charge shall
 - a. Forward the complaint or a detailed description of the allegation to the next superior officer in the chain of command who is authorized to convene a general court-martial;
 - b. Commence, or cause the commencement of, an investigation of the complaint; and
 - c. Advise the complainant of the commencement of the investigation.
- C. Duration of investigation.--To the extent practicable, a commanding officer shall ensure that the investigation of the complaint is completed not later than 14 days after the date on which the investigation is commenced.

1. If it is not practical to complete the investigation in 14 days, the commanding officer shall submit a report on the progress made in completing the investigation to the General Court-Martial Convening Authority within 20 days of the start of the investigation and every 14 days thereafter until it is completed.
- D. Report on investigation.--To the extent practicable, a commanding officer receiving such a complaint shall--
1. Determine if the allegations have been substantiated within 3 days of receipt of the investigation report;
 2. Notify the aggrieved person in writing within 6 days of receipt of the investigation findings of the investigation findings, the decision made on substantiation of the allegations and the decision on corrective action taken or proposed;
 3. Submit a final report on the results of the investigation, including any action taken as a result of the investigation, to the General Court-Martial Convening Authority (within 20 days from the start of the investigation, if practicable).
- E. If the aggrieved civilian employee raises the complaint with the EEO Office rather than with the 1561 POC, the EEO Counselor should determine if the civilian employee is *directly* supervised by a military commanding officer of military officer-in-charge.
1. If not, the EEO Counselor will continue with the EEO procedures of 29 C.F.R. §1614 (discussed above).
 2. If so, the EEO Counselor will advise the civilian employee of the 1561 POC and inform the civilian employee that he or she must contact the 1561 POC in order to file a complaint under those provisions. The EEO Counselor shall then continue processing the complaint under the EEO procedures of 29 C.F.R. §1614 (discussed above).

VII. SANCTIONS FOR SEXUAL HARASSERS.

- A. Military members.

1. Administrative action.
 2. Action under the Uniform Code of Military Justice (UCMJ).
- B. Civilian employees.
1. May be subjected to administrative discipline in accordance with the Army Table of Penalties (AR 690-700, chap 751, Table 1-1).
 2. No requirement for victims to file EEO complaints. A victim may seek redress or not, as he or she sees fit, but the right of the service to discipline employees who harass or discriminate is not affected in either event. Hostetter v. United States, 739 F.2d 983 (4th Cir. 1984).

VIII. LIABILITY.

- A. Agency Liability. The Army may be liable for sexual harassment by its military or civilian employees.
1. Sexual Harassment by Supervisor.
 - a. Tangible Employment Action Case. If the harassment is by the employee's supervisor and results in a tangible employment action, the agency is strictly, or automatically, liable under Title VII. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998).
 - b. Hostile Environment Case. If the harassment is by the employee's supervisor, does *not* result in a tangible employment action, but is so offensive as to alter the employee's conditions of employment, the agency is liable under Title VII *unless*:
 - (1) The agency shows it exercised reasonable care to prevent or correct promptly any sexually harassing behavior, and

- (2) The agency shows the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the agency or to avoid harm otherwise. Ellerth, 118 S.Ct. at 2270.

Note: This 2-prong test is an affirmative defense subject to proof by a preponderance of evidence.

2. Sexual Harassment by Non-Supervisor (Co-Worker). If the harassment is by the employee's co-worker, the agency is only liable if the agency knew or should have known of the harassing conduct and failed to take prompt and effective corrective action.
3. A published procedure for handling sexual harassment complaints, disseminated to the workforce, and suitable to the employment circumstances may be sufficient to show that the agency exercised reasonable care to prevent and promptly correct sexually harassing behavior. Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).
4. The Civil Rights Act of 1991 permits federal civilian employees who prove intentional discrimination to recover up to \$300,000 in compensatory damages for future pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

B. Personal liability. Agency officials may be sued in their individual (personal) capacities and held personally liable for sexual harassment.

1. Agency officials, including members of the Armed Forces, who are sued for common law torts are entitled to immunity under the Westfall Act so long as the alleged tort was committed *within the scope of their employment*. Federal Employees Liability Reform and Tort Compensation Act, (codified at and amending 28 U.S.C. § 2671, 2674, 2679). However, sexual harassment is not within the scope of employment.

- a. Wood v. United States, 995 F.2d 1122 (1st Cir. 1993) (Army officer sued in individual capacity for common law torts arising from claims of sexual harassment was not acting within scope of employment and therefore was not entitled to immunity under Federal Employees Liability Reform and Tort Compensation Act). Accord McHugh v. University of Vermont, 758 F. Supp. 945 (D. Vt. 1991), aff'd, 966 F.2d 67 (2d Cir. 1992). Turner v. United States, 595 F. Supp. 708 (W.D. La. 1984) (National Guard recruiter found to be acting outside the scope of his employment in conducting complete physical examinations of female applicants).
2. The statutory immunity provided by the Westfall Act requires that Department of Justice certify that the actions of the agency official were within the course and scope of employment. This certification can be challenged in court.
 - a. Mackey v. Milam, 154 F.3d 648 (6th Cir. 1998) (Certification by United States Attorney under Westfall Act that federal employee was acting within scope of his employment does not conclusively establish as correct the substitution of United States as defendant in place of the employee, but provides prima facie evidence that the employee was acting within scope of his employment. Under the Westfall Act, whether a federal employee was acting within the scope of his employment is a question of law made in accordance with the law of the state where the conduct occurred.)
3. *Feres* doctrine bars common-law tort suits by service members against superiors in personal capacity for actions that arise incident to military service. *See generally* Feres v. United States, 340 U.S. 135 (1950).
4. *Bivens* claims for constitutional torts not generally actionable by service members, because courts consistently find that special factors (e.g., military discipline) counsel hesitation or that Congress intended another remedy (e.g., UCMJ) to be exclusive. *See generally* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and Chappell v. Wallace, 462 U.S. 296 (1983). The constitutional claim must arise “incident to service.” Id.

IX. CONCLUSION.

"Neither men nor women should have to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).