

Although this report is dated in several respects, it provides a framework for addressing the issues discussed and still faced by women in the military

Women in the Military Issue Paper

**Sexual Harassment of Women
in the Military**

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Sexual Harassment of Women in the Military

Following the widely publicized Tailhook incident, in which 26 women reported being sexually assaulted at a September 1991 gathering of Navy aviators, sexual harassment of military women has received significant attention. However, the problem of widespread sexual harassment in the military was not new, either to women in uniform or to Pentagon officials responsible for addressing it. This paper describes the extent of sexual harassment in the Armed Forces, and suggests reasons behind the problem, including laws restricting assignability of women and an inadequate system for redressing sexual harassment complaints. It also proposes reforms to reduce this form of sex discrimination in the military.

Widespread Sexual Harassment of Military Women Documented

The Pentagon has possessed information about widespread sexual harassment in the military for at least a decade:

- A 1980 study of sexual harassment in the Navy found that 60 percent of women surveyed had been sexually harassed; a 1983 study found that 84 percent of Navy women sampled had been victims of sexual harassment.
- The 1987 Study Group on the Progress of Women in the Navy found that over half of the 1,400 women interviewed had been victims of sexual harassment while in the Navy.
- The Department of Defense Task Force on Women in the Military in January, 1988, reported that sexual harassment remains a “significant problem” in all the services.
- A 1990 study of over 20,000 military personnel conducted by the Defense Manpower Data Center found that nearly 2 out of every 3 women were sexually harassed in the prior year.

While the typical victim of sexual harassment is an enlisted woman, twelve percent of female victims are officers. At least fourteen women assaulted in the Tailhook incident were officers.

In the wake of Tailhook, veterans and active duty women have come forward alleging both serious assaults and a failure of their commands to take their complaints seriously. Some of the most troubling cases occurred during the Persian Gulf War. At least 24 U.S. Army servicewomen were raped or sexually assaulted by United States military personnel during the year-long deployment, many by higher-ranking soldiers.

Complaints Ignored; Women Lack Confidence in Grievance Process

Studies documenting widespread sexual harassment also indicate that few women use the military's formal or informal grievance process because of lack of confidence in the military system for redress. The Defense Manpower Data Center study found that less than 40 percent of the women believed that sexual harassment charges would be swiftly investigated or that penalties would be enforced against the perpetrators. Many victims of harassment believed that reporting the incident would result in problems for them: 38 percent were afraid work would get unpleasant and 33 percent thought they would be labeled a troublemaker. The 1987 Navy study similarly found that most victims of sexual harassment were reluctant to report such incidents because they lacked confidence in the grievance procedures.

Percentages of Military Women Experiencing Sexual Harassment by Service

<u>Army</u>	<u>Navy</u>	<u>Air Force</u>	<u>Marines</u>
68%	66%	57%	75%

*Source: Dr. Michael Lawrence,
Defense Manpower Data Center*

The experience of Lt. Paula Coughlin, the first Tailhook victim to come forward, illustrates the failings of the system. The Supervisor to whom Lt. Coughlin reported the incident told her "that's what you have to expect when you go up to the third deck with a bunch of drunk aviators," and ignored her complaint. (He was later removed from his command.) One of the Naval Investigative Service (NIS) investigators sent to interview Lt. Coughlin propositioned her during the interview.

The Navy's inquiry into Tailhook further illustrates failings in the military system for investigating sexual harassment complaints. Initially, efforts were made to cover up the incident; among the 1,500 interviews conducted by the NIS, the Navy's primary criminal investigative agency, no aviator or senior official admitted to knowledge of the assaults. A Pentagon report issued September 24 concluded that Navy officials deliberately undermined their own investigation to protect their colleagues. Several senior Navy officials were removed from their positions. These included Navy Secretary Lawrence Garrett III who had attended Tailhook and Rear Admiral Duvall M. Williams, commander of the Naval Investigative Service, who had compared female Navy Pilots to "go-go dancers, topless dancers or hookers." The Navy's judge advocate general and inspector general were also removed.

Restrictive Laws Contribute to Harassment Problem

Several factors, in addition to inadequate enforcement of sexual harassment policies, contribute to the high rate of harassment for military women. As Navy Secretary Sean O'Keefe stated in connection with Tailhook, "We know that the larger issue is a cultural problem which has allowed demeaning behavior and attitudes towards women in uniform to exist within the Navy." Much of this culture derives from laws and regulations restricting women's assignment to

combat positions and harassment of military women.

First, the restrictions perpetuate the view that women are inferior and therefore may be treated as inferior. The Update Report on the Progress of Women in the Navy, issued in 1990, described the Navy's institutional character as the "warrior mentality," which, in extreme expression, "says women don't belong." It further reported that "there is a perception among most women and men of a causal relationship between the non-acceptance of women as equal members of the Navy team and the occurrence of sexual harassment." This pattern starts early in the military experience; a recently released General Accounting Office survey of the service academies in 1990 showed that almost two-thirds of female students at West Point reported being told at least twice a month that standards have been lowered or that women don't belong there.

Second, legal restrictions on the assignment of women have kept numbers of female military personnel to a mere eleven percent, which helps create an atmosphere hostile to women. Low numbers of women in the workplace, working in a nontraditional field, and having a male supervisor – all situations common to military women – have been correlated to high levels of sexual harassment and other types of sex discrimination.

Third, harassment problems and limited access to higher-level jobs usually awarded to those with combat experience, and related attrition of women, mean few women hold senior positions. As a result, those charged with enforcing the harassment policy are generally men, who may not take the problem seriously because of their difference experiences.

Laws barring gays and lesbians from serving in the military have also been linked to sexual harassment, as women who turn down sexual propositions or who report incidents of sexual harassment may be accused of being a lesbian in retaliation. Such an accusation may result in a woman's investigation.

Military Women Denied Title VII Coverage

Civilians are protected against employment discrimination, including sexual harassment, under Title VII of the Civil Rights Act of 1964. Title VII prohibits employment discrimination based on sex, race, color, religion, or national origin. In addition to policies and grievance procedures employers might already have in place to fight discrimination, Title VII, enforced by the Equal Employment Opportunity Commission, provides victims of employment discrimination with a legal avenue for seeking redress.

However, the protections provided under Title VII against employment discrimination do not apply to uniformed military personnel, according to the United States Courts of Appeals that have addressed this issues. Therefore, a uniformed member of the military is unable to bring an action under Title VII claiming discrimination against the military, even though a civilian working for the military could do so.

Military Relies on “Chain of Command” for Enforcing Sexual Harassment Bar

Although the military definition of sexual harassment is almost identical to the definition developed by the EEOC for purposes of Title VII, the similarity to the civilian system stops there. Unlike civilian victims of harassment seeking redress, uniformed military personnel must rely upon internal military channels that often involve no clear standards, use ad hoc procedures, and provide no right to an independent investigation or independent decisionmaker. Although civilian victims of sexual harassment have the right to pursue their cases in court after filing with the EEOC or another equal opportunity agency, military women’s access to the federal courts is extremely limited.

The Department of Defense has decreed that the chain of command is the “primary and preferred channel for correcting discriminatory practices,” and complaints are to be resolved at the lowest possible level of command. Although sexual harassment complaint procedures vary somewhat among the different armed services, generally a member of the armed forces who has been sexually harassed has two ways to pursue a grievance.

First, she may initiate an “informal procedure” by reporting the harassment to her superior, the equal opportunity officer or social actions officer for her command, the chaplain, or a medical officer. The individual receiving the report may investigate the complaint or refer it to the commanding officer for investigation and resolution. In the Navy or Marine Corps, sexual harassment victims are encouraged to ask for in writing a “commanding officer’s request mast,” which assures them the opportunity to present the complaint directly to the commanding officer. If these methods are unsatisfactory to the victim, she may ask for review of the claim by the Inspector General for the command. However, the commanding officer still makes the ultimate decision.

Second, a formal complain procedure is available, although use of this channel is much less common than the “informal” procedures described above. For example,. If a military member thinks the resolution of her sexual harassment complaint is unjust, a “complaint of

Definition of Sexual Harassment

Sexual harassment is a form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person’s job, pay, or career, or
- (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 interferes with an individual’s performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military or civilian employee who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

wrong” can be filed under Article 138 of the Uniform Code of Military Justice. The “complaint of wrong” may be prepared with legal assistance, and is forwarded through the chain of command to the person exercising general court martial authority over the commanding officer. The officer exercising jurisdiction conducts an inquiry, takes “proper measures for redressing the wrong,” and forwards a report of the complaint and proceedings to the Secretary of the service department for review and final action.

In the instances where sexual harassment may have resulted in the victim’s being discharged or given a negative military record, the victim may apply to the discharge review board of corrections of military records to change her military records as “necessary to correct an error or remove an injustice.” However, use of this channel is extremely rare, and generally provides limited or no relief to the victim.

As J. Daniel Howard, the former Acting Secretary of the Navy, recently observed, “sexual harassment in the armed forces has been a fuzzy legal concept that’s been dealt with through a patchwork of policies and indirect criminal provisions.” Because no uniform standards govern the system, victims of sexual harassment must rely on ad hoc procedures giving a great deal of discretion to individuals charged with investigating and resolving complaints. Thus, the effectiveness of these procedures often turns on the personality and leadership of the individual in command – who might himself be held responsible for any problems, and who therefore has an incentive to deny that sexual harassment has occurred; or he may be more inclined to believe an accused fellow officer over an enlisted woman. According to the Defense Manpower Data Center study, one out of ten women report that their own commanding officer has a “cynical, uninformed, or indifference attitude toward sexual harassment,”

The victim has no right to an independent investigation, hearing, written statement of findings, or guarantee that the complaint will not be dismissed at some point in the chain of command. She may also fear reprisals for reporting the harassment, as protections against retaliation are limited and often ineffective; her peers and superiors are likely to regard her as a troublemaker who is not a team player. For all of these reasons, as well as lack of knowledge of the process, few sexual harassment victims use the grievance procedures available.

Limited Redress Available for Military Sexual Harassment

Even when a military woman prevails in a sexual harassment case, the remedies available to her are much more limited than those available to a civilian victim of sexual harassment. Compensatory as well as punitive damages, up to statutorily set limits, are available to civilians under Title VII as a means to compensate the victim as well as punish the perpetrator; both individuals and the employer are held accountable. While internal military remedies do focus on disciplining the perpetrator, they provide extremely limited compensation for the victim and focus on accountability of individual behavior rather than responsibility of the organization as a whole.

A commanding officer has a wide latitude as to what actions will be taken against a

harasser:

- A commanding officer may take actions, such as ordering counseling or reprimanding the perpetrator, that do not go on the service member's official record.
- For minor offenses, a commanding officer can impose "nonjudicial punishment (Article 15, UCMJ) on a service member in lieu of a court martial, unless the member specifically demands trial by court martial. Some disciplinary punishments include: confinement, correctional custody, extra duties, restriction, forfeiture of pay and allowances, and detention.
- For particularly egregious behavior, a commander can charge a soldier with violation of the Uniformed Code of Military Justice before a court martial. Depending on the nature of the sexual harassment, a member might be charged with indecent assault (Article 134), rape (Article 120), extortion (Article 127), conduct unbecoming an officer (Article 133), provoking speech or gestures (Article 117), etc. Possible punishments include: confinement at hard labor, reduction in grade, dishonorable or bad conduct discharge, and forfeiture of pay and allowances.

The only type of redress available to military victims of sexual harassment, in limited circumstances, is injunctive and equitable relief, such as reinstatement and back pay. In the Marines, procedures for an "administrative separation" of the perpetrator from the victim may be followed after the first substantiated incident of serious sexual harassment. As discussed earlier, if sexual harassment has resulted in an unjust or incorrect military record, a service member may petition a board of correction of military records. The board is empowered to correct the record and may repay "the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or . . . a fine or forfeiture, if, as a result of correcting a record . . . the amount is found to be due the claimant." If a member had been unfairly discharged or dismissed, the discharge review board is empowered to "change a discharge or dismissal, or issue a new discharge to reflect its findings."

Because the military does not keep records, statistics are not available regarding how severely perpetrators of sexual harassment are punished or whether significant redress is awarded to victims. However, anecdotal evidence suggests that a slap on the wrist is much more common than severe punishment and that significant redress for victims is unusual; indeed, a military woman reporting sexual harassment may herself be transferred instead of the guilty party, with the perpetrator receiving no permanent mark on his record.

Military Women Unable to Pursue Rights in Court

As noted earlier, if a military woman is unsatisfied with the military's handling of her sexual harassment claim, she has no legally protected right of review by a federal court. She might be able to make out a constitutional claim under the equal protection clause or due process

clause. However, she will confront two legal obstacles:

- First, she must overcome significant procedural hurdles, including exhaustion of remedies within the military system, a showing of potential injury if review is refused, and demonstration that the claim is not one in which “military discretion or expertise is involved” – a hard test to meet, since courts have generally considered matters of personnel and discipline to be matters of military expertise.
- Second, even if the case is heard on the merits, courts grant great deference to the military position.

For these reasons, courts have prevented service members from suing the government to recover damages for “injuries to servicemen where the injuries arise out of or are in the course of activity incident to service” under the Federal Tort Claims Act or the Constitution. Generally, courts have also applied this bar to suits against individual service members for injuries arising out of military service.

Recent Steps to Address Sexual Harassment in the Military

In the aftermath of the Tailhook incident, the military has taken steps against sexual harassment:

- The Navy proposed to amend the Uniform Code of Military Justice explicitly to outlaw sexual harassment.
- All Navy units were ordered to devote a day for training over a two-month period and the Navy announced plans to open a toll-free “advice and counseling” hot line for victims of sexual harassment.
- Navy Secretary Sean O’Keefe announced a restructuring plan designed to end “the rivalries and jealousies between the key warfighting communities of the Navy,” as well as address “cultural problems” that create a climate for sexual harassment. He also announced plans to improve recruitment of women into non-traditional careers in the Navy, reevaluate the Navy’s definition of combat, and consider whether additional positions should be opened to women.
- Upon release of the Pentagon report on the Navy’s investigation of Tailhook, Secretary O’Keefe announced that the post of Naval Investigative Service commander would be filled by a civilian with law enforcement experience; that the authority and number of inspectors assigned to the Naval Inspector General would be increased; and that a special assistant would be appointed to coordinate investigations by difference Navy offices and other federal agencies.

- Army Chief of Staff Gordon Sullivan arranged for private consultants to evaluate soldiers' training in prevention of gender discrimination.
- The Marines are sending commanders video "packages" providing instruction in eliminating harassment.

Further Action Needed

Although reforms currently underway are welcome ones, additional changes are needed if officials are serious about ridding the military of sexual harassment. These should include:

- Individuals at the highest ranks of the military must take seriously the need to enforce policies against sexual harassment and commanding officers must be held consistently accountable for harassment that occurs in their command.
- Sexual harassment should also be addressed as symptomatic of a military culture that treats women as second class; laws and regulations keeping women from jobs for which they are qualified should be repealed and steps taken to promote equal treatment of military men and women.
- Military victims of discrimination should receive the same protections as civilian victims, including: the right to an independent investigation, a written record, and independent finder of fact and decisionmaker; standardized procedures, definitions, and recommended penalties for perpetrators; ability to obtain compensatory damages; and protection against retaliation.
- All military bases should provide appropriate counseling and medical services, including rape crisis treatment, for victims of sexual harassment and assault, and the military should ensure that military police, health care workers, and social workers are trained to respond to such cases.
- Congress should authorize appropriate judicial review of military decisions in discrimination cases, and legislate a clear standard against which such decisions should be measured.

**Comparison of Civilian and Military Systems
for Addressing Sexual Harassment**

	Title VII Non-Federal	Title VII Federal Employees	Military System
Sexual harassment prohibited?	yes	yes	yes
Legal standards clearly defined?	yes	yes	no
Procedures clearly defined?	yes	yes	no
Guaranteed independent investigation?	yes	yes	no
Written record provided?	yes	yes	no
Independent decision maker?	yes	yes	no
Ability to obtain compensatory damages?	yes	yes	no
Right of judicial review?	yes	yes	extremely limited