FOREWORD

Today's work force due to necessity, societal changes, and legislative action has accommodated a significant increase in the number of working women and the gradual transition of both military and civilian women into non-traditional roles and occupations. Sexual harassment in the work place is not new. In recent times, however, there have been increasing reports of sexual harassment; and the associated problems have resulted in costly litigation, in national media attention, and in congressional hearings and numerous surveys focused on the rate of sexual harassment directed toward military and civilian men and women. Sexual harassment is detrimental to employee morale, productivity, unit cohesion, and to mission accomplishment; it is also a prohibited personnel practice, and it is unlawful. Policy statements and mandatory training and reporting requirements pertinent to the prevention of sexual harassment have been issued throughout the Department of Defense, including the National Guard. Under both the civilian and military personnel systems, legal and regulatory bases exist which prohibit sexual harassment. It is important to recognize that all commanders, managers, and supervisors of military, technician, and civilian personnel have the obligation and authority to take positive actions toward prevention of sexual harassment. This pamphlet was designed to assist commanders, managers, and supervisors in identifying and understanding issues associated with sexual harassment, and to provide guidelines for affirmative actions toward prevention of sexual harassment in the work place.

I. INTRODUCTION.

Sexual harassment in the workplace is not new. In more recent times, however, the percentage of women in the military and civilian work force has risen significantly. This increased participation by women in the world of paid employment has also increased the opportunities for men and women who spend a significant amount of their waking hours in the work place to have added personal interaction. If this personal interaction extends to unwelcome sexual attentions of an annoying, offensive, or abusive nature—in a military or civilian work environment—it is sexual harassment.

What is new, however, is that the courts, the Equal Employment Opportunity Commission (EEOC), and several of the States have begun to say that, under certain circumstances, this interpersonal conduct constitutes illegal sex discrimination. This means that the employer (agency) can now be found legally liable for acts of sexual harassment in the work place. Just as with other forms of discrimination, an employee claiming to be the victim of sexual harassment can file a complaint with the EEOC, and/or bring a lawsuit in court. Even if the employee's complaint is ill founded, a lot of money and valuable time can be expended in defending your actions and the reputations of yourself and your employer. In short, sexual harassment has become a serious legal matter.

We would probably all agree that we did not acquire our social behavior from the work place; we carried it with us. Differences in individuals' values, expectations, and backgrounds often cause behavior that while acceptable to one individual may be offensive to another. Thus, the first step in eliminating sexual harassment is gaining an understanding and awareness of what it is and when it occurs. The purpose of these guidelines is to assist in the necessary understanding and awareness of what may constitute sexual harassment, and to provide ideas and suggestions as to how sexual harassment allegations may be avoided.

The EEOC has recently issued new guidelines on sexual harassment for the public and private sectors. Guidelines are the agency's official interpretation of the law and are often used by courts to determine the scope of an employer's rights and responsibilities under the law. Guidelines do not have the force of law, however, and courts are not required to abide by their provisions. A copy of EEOC guidelines is attached at appendix A.

II. DEFINITION OF SEXUAL HARASSMENT.

Sexual harassment can be words, actions, or both. It includes obvious things, like an invitation to have sex, or unwanted touching, patting, or grabbing, but can also include more subtle things like repeated comments about a person's physical appearance, constantly brushing up against someone, displaying sexually explicit pictures or publications, or any other sexually oriented words or actions that make an employee's working atmosphere uncomfortable.

The EEOC guidelines define sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when combined with any of the following three sets of facts:

1. Submission to the conduct is made a condition of employment. For example, if a male or female employee is asked for sexual favors, refuses, and is subsequently subject to adverse performance evaluations, he/she may perceive himself/herself to be a victim of sexual harassment.

2. Submission to or rejection of the conduct is made the basis for an employment decision. This situation might exist where, for example, a man or a woman is told that he or she will get a certain position in exchange for sexual favors, but will not if he or she refuses.

3. The conduct seriously affects an employee's work performance, or creates an intimidating, hostile, or offensive working environment. An example of this situation would be presented where a female's male co-workers were constantly referring to her figure, touching her, giving her catcalls, or repeated derogatory comments regarding the ability of women to perform certain work.

A better idea of the kinds of conduct that amount to sexual harassment can be gotten from looking at some of the court cases.

In the case of Thompkins v. Public Ser-

vice Electric & Gas Co., 568 F.2d 1044 (ed Cir. 1977), a woman's supervisor invited her to lunch, telling her that they needed to discuss some work matters. Over lunch, he propositioned her, and said that the two of them could not have a "satisfactory" working relationship unless she had sex with him. She got up to leave the restaurant, and he threatened to "get her." He threatened to use physical force against her, and physically restrained her from leaving. He also told her that she would get no help from the company if she complained about his conduct.

The next day, the woman said she was going to quit because of what had happened. She was offered a transfer, instead, to another department; but it turned out that no comparable positions were available. Eventually, she was transferred to an inferior position, where she received false and negative evaluations of her work. She also had several disciplinary layoffs, and was threatened with demotion by other company employees. Finally, she was fired.

In court, the company tried to prove that the woman had been fired for poor work performance. The court refused to believe this, finding the sequence of events to be too coincidental. Based on all the facts, the court said that the employee had been the victim of sexual harassment.

In another case, Williams v. Saxby, 413 F. Supp. 654 (D.D.C. 1976), rev'd on procedural grounds, 587 F.2d 1240 (D.C. Cir. 1978), a woman was also the victim of sexual advances from her boss. When she refused his advances, he began to harass and humiliate her. He gave her unwarranted reprimands, refused to tell her things she needed to know to do her job properly, and ignored her proposals and recommendations. Here, too, the court said that the supervisor's conduct was illegal sexual harassment.

An even better example, Kyriazi v. Western Electric Co., 461 F. Supp. 894 (D.N.J. 1978), mandamus denied sub. nom. Western Electric Co. v. Stern, 21 EPD 30,301 (3d Cir. 1979), cert. denied, 21 EPD 30,302 (U.S. Sup. Ct. 1979), the woman, an industrial engineer, had been assigned to act as a liaison between two company departments in connection with a project then being run by three young male co-workers. Almost immediately, her three co-workers began teasing and tormenting her. They made loud remarks about her marital status, made bets about whether or not she was a virgin, and generally treated her with contempt and ridicule. Finally, they drew an obscene cartoon and put it on her desk.

The woman complained to her supervisors on several occasions. On one occasion, she was told by one supervisor that she was being silly and that she "should be complimented that these young men pay attention to you." On another occasion, he told her she should accept these incidents as just "cruel humor," and said that "these things are things that happen in a man's working world every day in the week."

It will come as no surprise that the court found this company to be guilty of sexual harassment. The court required the company to reinstate the woman, to pay her damages, and to pay her attorney's fees. It also required five individuals each (three young engineers and two supervisors) to pay her $1,500 out of their own pockets.

The key word in the definition of sexual harassment is "unwelcome." Harmless teasing and flirting is not sexual harassment, so long as the recipient does not find it offensive. Consensual sexual activity between two people is also not sexual harassment, unless it influences employment decisions, or otherwise has a bad effect on the work place. A word of caution, however: Many of the sexual harassment cases arise out of situations where a "good" relationship goes sour. Here's a typical example:

Both parties willingly engage in an affair. At some point the subordinate wishes to dissolve the relationship; the boss does not. The boss threatens the subordinate with a variety of adverse actions, making her working environment uncomfortable. The subordinate may initiate a charge of sexual harassment. That the employee was previously a willing participant in the affair is no defense for the employer; once the advances become unwelcome, the conduct becomes sexual harassment. There is the possibility that if the subordinate desires to continue the affair while the boss may not, that individual could find himself or herself in a position of defending false charges of sexual harassment.

NOTE: Although most of the cases deal with women who claim to have been sexually

harassed by men, the victim of sexual harassment does not have to be a woman. A man may also be the victim of sexual harassment by female supervisors, co-workers, or others; and one court has recently held that both men and women can be victims of sexual harassment by homosexual advances from individuals of the same sex.

Sexual harassment can also be claimed by individuals indirectly affected by improper conduct. For example:

Three employees, one man and two women, are eligible for a promotion, but only one position is open. The male supervisor responsible for making the promotion tells one of the women that she will get the job if she sleeps with him. She agrees, and gets the promotion. Since the employment decision was based on the granting of sexual favors, the man and the other woman may both claim that they had the right to be considered on an objective and equal basis for the promotion, and that giving the job to the first woman on the basis of sexual favors made that impossible.

In short, even though agreed-upon sexual conduct is not "sexual harassment," it can affect morale and cause other problems in the work place. It is impossible and undersirable to attempt to prohibit all personal contact between personnel; however, as a manager or supervisor you should be alert to the work environment and to potential problems which may arise from specific situations, and be prepared to take prompt and appropriate action should the situation require it.

III. EMPLOYER RESPONSIBILITY.

It is important to consider that an employer by virtue of the power inherent in his or her position is responsible for the work environment and personnel within it. Stated simply, EEOC guidelines outline employer liability for acts of sexual harassment. An employer is responsible

- for any sexual harassment by a supervisor or official (military/technician/civilian), whether or not he/she has any knowledge that it is going on.

- for any sexual harassment by co-workers or non-employees, if the manager or supervisor knows, or should know about it, and does nothing to stop it.

Supervisors

Definition of a supervisor for this purpose does not depend on his or her title. The supervisory capacity of an individual must be determined by examining the job functions performed by that individual. If the individual has any responsibility or authority for hiring, firing, promoting, or disciplining other employees, or participates in any of those kinds of decisions, he or she is considered to be a supervisor. Because a supervisor has these kinds of duties, he or she is considered to be acting for the employer when dealing with other employees. As a result, the employer is legally responsible for a supervisor's actions, even when the employer is not aware of them.

Co-workers and Non-employees

Co-workers and non-employees are viewed differently. They are not in positions of responsibility over other personnel, and so they are not considered to be "acting for the employer" in this area. The employer is legally responsible for the sexual harassment of a co-worker or non-employee (such as a salesperson or customer) only when the employer has knowledge, or should have knowledge, of misconduct. Even then, the employer can escape legal liability if prompt action is taken to correct the problem.

When should an employer have knowledge of sexual harassment by a co-worker or non-employee? One example would be when the harassed employee has complained to a supervisor about the problem. Another example might be where other individuals have complained about the person doing the harassing. You can never afford to take complaints or even idle gossip lightly. If any evidence of possible harassment comes to your attention, you should inquire into that situation immediately. Consult with your equal employment opportunity officials in matters concerning technician or civilian personnel; the equal opportunity and the social actions officials in matters concerning military personnel. Insure that your subordinates understand your policy that prohibits sex harassment and the disciplinary actions that result from prohibited personnel practices and inappropriate behavior.

IV. AFFIRMATIVE ACTIONS FOR COMMANDERS, MANAGERS, AND SUPERVISORS

There are positive steps that are recommended to be taken to avoid problems with sexual harassment. Make it very clear to all your personnel that sexual harassment is inappropriate and improper behavior and will not be tolerated. Let them know that you are anxious to insure them a dignified and professional working atmosphere, that you will be receptive and sympathetic to any complaint, and that you will investigate and take appropriate action with respect to any improper conduct. Following are the recommended immediate affirmative actions that should be taken in establishing a work environment free of sex harassment. A more specific checklist of "DOs" and "DON'Ts" for commanders, managers, and supervisors appears at appendix B for your convenience.

1. Prepare, distribute, and post a policy statement on sexual harassment. A sample statement appears in appendix C.

2. Prepare and distribute a memorandum to commanders/managers/supervisors advising them of the policy statement, and setting forth the disciplinary action which might result if they engage in sexual harassment. Appendix D contains a sample memorandum for distribution to commanders/supervisors/managers.

3. Establish a point of contact—a person to receive complaints of sexual harassment from personnel. The State EO officer (employment) for technician personnel and the equal opportunity or social actions officer for military personnel may be the proper person to serve this function. It is important that any complaint of sexual harassment receives serious listening and that a thorough inquiry be conducted into the facts associated with the complaint. If, after an investigation, the complaint is believed to be untrue, the complaining employee should be advised and given a chance to present additional facts.

4. If an investigation reveals that a commander, supervisor, or other employee is guilty of sexual harassment, impose some form of discipline. Keep a written record of the discipline taken and why, and let the victimized employee know what has been done to protect his or her rights and personal dignity.

V. CONCLUSION.

Half the battle in ridding the work place of sexual harassment is being aware of it. You can then take immediate action to correct it and to prevent future instances from arising, should it occur.

This information is meant to aid you in recognizing when, how, and why sexual harassment is illegal. By taking the few simple actions suggested, sexual harassment and the potential for its occurrence can be greatly reduced. Prevention of sexual harassment contributes to a comfortable, dignified, and professional environment in which to work.

One final word of caution. Sexual harassment is, by definition, an issue arising out of interpersonal relationships, and can therefore involve many different kinds of factors, including difficult problems of emotion. You will undoubtedly encounter many circumstances not specifically covered by this text, since it is impossible to project every possible situation. Always be alert to potential problems; initiate immediate action to confront inappropriate behavior where it occurs; and if you are uncertain about a situation, be sure to discuss it with your equal opportunity or social actions officials.

Your goal is to have a professional working atmosphere that will promote efficiency and the successful accomplishment of your mission. That goal can best be achieved by using common sense, following the few simple guidelines in this pamphlet, and striving to make sure that all personnel are treated in a fair and dignified fashion.

APPENDIX A

"EEOC Guidelines on Sexual Harassment"

Sec. 1604.11 Sexual Harassment.—(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. 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 substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee, or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the work place where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the work place, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit. (Sec. 1604.1 reads as amended, 45 F.R. 74677, effective November 10, 1980.)

APPENDIX B

Checklist of "DOs" and DON'Ts" for Commanders, Managers, and Supervisors

There are several very important DOs and DON'Ts in the sexual harassment area:

o DO take positive action to address issues of sexual harassment before they occur.

o DO make it clear to your commanders, managers, and supervisors, and other personnel what sexual harassment is, and that you will not tolerate it.

o DO designate a person or persons to whom military, technician, and civilian employees can bring their complaints about sexual harassment.

o DO publish the options available to personnel who feel they are victims of sexual harassment.

o DO promptly and thoroughly inquire into any complaint or other evidence of possible sexual harassment, and insure that retaliation does not occur as a result of a sexual harassment complaint.

o DO develop appropriate sanctions to be applied against any individual who engages in sexual harassment.

o DO take prompt and appropriate disciplinary action in instances where sexual harassment has occurred.

o DO establish written guidelines to be used in making personnel decisions, especially employment, promotion, award, disciplinary, and compensation decisions, and make sure they are followed.

o DO keep written records showing the reasons for personnel decisions.

o DO provide leadership by example in applying and promoting high standards—integrity, conduct, and concern for the public interest.

o DO insure a professional and healthy work environment.

o DO insure that all military, civilian, and technician personnel are trained in the prevention of sexual harassment.

o DON'T permit sexual jokes, teasing, and innuendoes to become a routine part of the work atmosphere.

o DON'T allow employment decisions to be made on the basis of reasons other than merit.

o DON'T allow social behavior to become confused with professional behavior.

APPENDIX C

POLICY STATEMENT ON SEXUAL HARASSMENT

FROM: (TAG/Office/Activity/Commanders)

TO: All Personnel

SUBJECT: Policy on Sexual Harassment

1. It is my policy that all personnel should be able to enjoy a work atmosphere free from all forms of discrimination, including sexual harassment. Sexual harassment infringes on an individual's right to a comfortable work environment, and is a form of misconduct which undermines the integrity of the employment relationship. No employee—male or female, technician, military, or civilian—should be subjected to unsolicited and unwelcome sexual overtures or conduct, either verbal or physical, overt or subtle.

2. Sexual harassment does not mean occasional compliments of a socially acceptable nature. Sexual harassment refers to conduct which is offensive to the individual, which harms morale, and which interferes with the effectiveness of our mission. (Such conduct is prohibited.) Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when:

a. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career;

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 interfering with an individual's performance or creating an intimidating, hostile, or offensive environment.

3. This includes repeated offensive sexual flirtations, advances, or propositions; continued or repeated verbal abuse of a sexual nature; explicit or degrading verbal comments about another individual's abilities based on his or her sex, or his or her physical appearance; the display of sexually suggestive pictures or objects; or any offensive or abusive physical conduct. It also includes the taking of or the refusal to take any personnel action on the basis of an employee's submission to or refusal of sexual overtures. No employee should so much as imply an adverse impact upon another individual's employment, assignment, compensation, advancement, career development, or any other condition of employment or service as a result of refusal of sexual advances.

4. Immediate disciplinary action will be taken against any employee engaging in sexual harassment. Such action may include, depending on the circumstances, suspension, demotion, or discharge.

5. Any questions regarding this policy should be addressed to the (State Equal Opportunity Officer (Employment), Equal Opportunity Officer, Social Actions Officer). Any person who believes that he or she has been the victim of sexual harassment, or who has any knowledge of that kind of behavior, is urged to report such conduct immediately through the chain of command or the State Equal Opportunity Officer (Employment), (name), (address), and (telephone no.).

APPENDIX D

SAMPLE MEMORANDUM

MEMORANDUM FOR ALL COMMANDERS, MANAGERS, AND SUPERVISORS

SUBJECT: Sexual Harassment

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1. Attached to this memorandum is a copy of my Policy on Sexual Harassment. A copy of this policy statement is being distributed to each National Guard civilian, technician, and military personnel, and will be posted on all bulletin boards.

2. The policy is self-explanatory. Acts of sexual harassment will not be tolerated. I am confident that you will conform with this policy, and will work to insure that the employees within your area of responsibility also comply with the policy. Specifically, I ask that you:

a. Make appropriate inquiry into any allegation of sexual harassment.

b. Take particular care to treat all personnel—civilian, military, or technician—consistently and fairly, regardless of their sex. It is sometimes easy to fall into a pattern of allowing an especially likeable individual to "get by" with things that would not be tolerated in other employees. Don't do it.

c. Take necessary action to insure that sexual joking and teasing, if allowed to take place at all, does not get out of hand. For example, be particularly alert to this when you have new employees.

d. Insure that your own well-meaning conduct is not misunderstood. Avoid physical contact with employees, even if it is nothing more than putting your arm around someone's shoulders.

3. Advise supervisors or other personnel that if anyone is found to have engaged in sexual harassment, he or she will be subject to discipline. Although each case will be judged on its facts, such discipline may include suspension, demotion, or discharge.

4. Understand that because of differences in values and backgrounds or for other reasons, some individuals may find it difficult to recognize their own behavior as sexual harassment. It is important that each of your personnel be made aware of unwelcome conduct which can be/may be construed as sexual harassment, so that you and the personnel under your supervision will be able to avoid problems.

5. Support a mutual goal of leadership by example in maintaining a dignified, professional, and comfortable work environment conducive to maximum efficiency and productivity. I believe that the elimination of sexual harassment is essential to accomplishing that goal.

LA VERN E. WEBER
Lieutenant General, USA
Chief, National Guard Bureau

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