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Douglas R. Kay

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RUNNING A GAUNTLET OF SEXUAL ABUSE: SEXUAL HARASSMENT OF FEMALE NAVAL PERSONNEL IN THE UNITED STATES NAVY

“Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.”

- Judge Vance from *Henson v. City of Dundee*¹

INTRODUCTION

It is unlikely that Judge Vance intended to be prophetic about the Navy when he spoke these words in 1982. Unfortunately, at the Tailhook symposium in October 1991, Navy women were forced to run just such a gauntlet. Navy and Marine Corps aviators used what they called a gauntlet to systematically sexually assault at least 26 women, over half of whom were female Navy officers. As a result of Tailhook, the Navy's reputation has been severely tarnished; and, more importantly, in the wake of tremendous political and public pressure, the Navy is taking a hard look at how it treats its female personnel.

Sexual harassment in the workplace is a serious problem for many working women.² The severity of this problem is amplified for women in the United States Navy. Public interest in sexual harassment intensified with the media spectacle of the Senate confirmation hearings of Supreme Court Justice Clarence Thomas in September 1991. More recently, the infamous “Tailhook '91” in October 1991 revealed to the public the extent of the problem in the Navy. One result of the Thomas confirmation hearings was to sensitize the public to the problem of sexual harassment. One conclusion of this article is that Tailhook '91 has alerted the Navy to its own sexual harassment problem.

Females comprise 10% of the active duty personnel of the Navy.³ According to a 1990 study by the Defense Manpower Data Center, 64% of

1. 682 F.2d 897, 902 (11th Cir. 1982).

2. Although legally either sex could be a victim of sexual harassment this article is limited to sexual harassment of females. Furthermore, this article will not discuss the problems facing homosexuals in the Navy.

3. NAVY PERSONNEL RESEARCH AND DEVELOPMENT CENTER, ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE SURVEY 4 (1992) [hereinafter NAVY PERSONNEL RESEARCH AND DEVELOPMENT CENTER]. (This article is confined to uniformed military personnel. Civilian employees of the Department of Defense have a separate system to remedy sexual harassment.)

the women surveyed had been victims of sexual harassment in the previous year.⁴ Compared to other workplaces this percentage is staggering. For example, a recent government study showed that 42% of females employed by the federal government had reported incidents of sexual harassment.⁵

Sexual harassment has numerous ill effects on the productivity of any organization. Victims of sexual harassment suffer frustration, anger and humiliation. Additionally, many victims often suffer debilitating illness which leads to medical expense, decreased productivity and absenteeism. Sexual harassment cost the federal government an estimated \$267 million for lost productivity between 1985 and 1987.⁶ In the Navy, sexual harassment probably has many of the same debilitating effects on readiness and moral.⁷

Scholars identify several reasons why women are victimized by sexual harassment at a statistically higher rate in the Navy than in the civilian workplace. First, the Navy is replete with history and culture. For hundreds of years the Navy has been a man's world, and many Navy men do not welcome women.⁸ Second, by law, women can only perform limited duties in the Navy.⁹ This limits opportunities for advancement and respect. Third, most Navy women are in lower status positions, and work with a predomi-

4. The sexual harassment reported ranged from jokes to actual assault while on duty. DEFENSE MANPOWER DATA CENTER, *SEXUAL HARASSMENT IN THE MILITARY: 1988* 11 (1990).

5. UNITED STATES MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 11 (1988). The United States Merit Systems Protection Board ("USMSPB") sent approximately 13,000 surveys to Federal employees in March 1987. The 8,523 responses received represented a cross-section of Federal employees. *Id.* at 9. The USMSPB relied upon the employees for the survey's definition used of sexual harassment. If a respondent claimed he or she had received "uninvited or unwanted sexual attention during the preceding 24 months, that was counted as an incident of sexual harassment even though not every incident, if fully investigated, would necessarily meet the legal definition of sexual harassment." *Id.* at 2.

6. *Id.* at 39-42.

7. Unfortunately, there have been no formal studies conducted to calculate losses due to sexual harassment. An informal study compiled by Kent State University estimated the loss to the Navy to be \$40 million in the year of the study. Dr. Kay Krohne, Sexual Harassment Seminar at NAS North Island (July 28, 1992).

8. Kay Krohne, *The Effect of Sexual Harassment on Female Naval Officers: A Phenomenological Study* at 158-175 (1991) (unpublished Ed. D. dissertation, University of San Diego).

9. "The Secretary of the Navy may prescribe the manner in which women officers, women warrant officers, and enlisted women members of the Regular Navy and the Regular Marine Corps shall be trained and qualified for military duty. The Secretary may prescribe the kind of military duty to which such women members may be assigned and the military authority which they may exercise. However, women may not be assigned to duty on vessels that are engaged in combat missions (other than as aviation officers as part of an air wing or other air element assigned to such a vessel) nor may they be assigned to other than temporary duty on other vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions." 10 U.S.C. § 6015 (1991).

nantly male work force. Female sexual harassment victims are typically in this position.¹⁰

Legally, sexual harassment denies women employment opportunities which are guaranteed by the Constitution and federal statutes.¹¹ The military is the single largest employer in the country.¹² The military offers tremendous opportunities during employment and after in the form of benefits and job opportunities.¹³ Sexual harassment effectively denies women access to those opportunities since women are denied their legal right to work in an environment free from discrimination.

The Secretary of the Navy issued an instruction, effective August, 1989, which revised the Navy's policy on sexual harassment.¹⁴ This instruction is a mirror of the Equal Employment Opportunities Commission ("EEOC") policy guidelines. In an attempt to redress the problem of sexual harassment, the Navy instituted a policy of "Zero Tolerance". The result of these orders and policies was to bring the Navy legally into line with the civilian workplace. Great discretion is entrusted to Navy personnel to carry out the policy. Unfortunately, statistics and Tailhook indicate that those charged with implementing zero tolerance have been remiss in their duty.

In October 1991, a month after the tumultuous Thomas confirmation hearings, at a convention of the Navy sponsored Tailhook Association, at least twenty-six women were sexually assaulted by Navy and Marine aviators. The Naval Investigative Service ("NIS") conducted an investigation which included interviews with 1,500 Navy and Marine officers and produced a 2,000 page report. Despite this extensive investigation, no prosecutions resulted. As a result of pressure from the public and Congress, the Navy turned the investigation over to the Department of Defense Inspector General.

10. "The profile of the typical female victim of sexual harassment was very similar to that of the typical Navy woman at the time: young, in a relatively low status position, and working with a predominantly male work force." NAVY PERSONNEL RESEARCH AND DEVELOPMENT CENTER, *supra* note 3, at 4 *citing* Carey's Sourcebook on Sexual Harassment (1982).

11. *See* discussion in Part I of this article.

12. MARTIN BINKIN & SHIRLEY J. BACH, *WOMEN IN THE MILITARY* 31 (1977).

13. SURVEY OF FEMALE VETERANS: OFFICE OF INFO., MGMT. & STATISTICS, VETERANS ADMIN., A STUDY OF THE NEEDS, ATTITUDES AND EXPERIENCES OF WOMEN VETERANS 162 (1985) cited in Robin Rogers, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment to Title VII*, 78 CAL. L. REV. 165, 167 (1990).

14. DEPARTMENT OF THE NAVY, OFFICE OF THE SECRETARY, SECNAVINST No. 5300.26A, DEPARTMENT OF THE NAVY POLICY ON SEXUAL HARASSMENT (1989) [hereinafter SECNAVINST 5300.26A]. SECNAVINST 5300.26A provides in part: "Sexual harassment is unacceptable conduct; it undermines the integrity of the employment relationship, debilitates morale, and interferes with the work productivity of an organization. Sexual harassment will not be tolerated at any level. Substantiated acts of or conduct which results in sexual harassment shall result in corrective administrative or disciplinary action."

A SECNAVINST (Secretary of the Navy Instruction) is binding as law on uniformed military personnel. Article 92 of the Uniform Code of Military Justice (UCMJ) allows a court-martial to punish violators of "any lawful order or regulation." 10 U.S.C. § 892 (1991).

The failure to deal adequately with Tailhook has had an enormous effect on the Navy. In the wake of Tailhook, the Secretary of the Navy resigned. The Senate Armed Services Committee halted all officer promotions in the Navy. Many valuable officers have lost their jobs; many more will probably follow. Morale is at a dangerous low. Commanding Officers around the country are scrambling to educate their people about sexual harassment. Congress, the President and top Navy brass are openly discussing abolishing all gender restrictions for duty assignments.¹⁵

It is the purpose of this article to discuss what the current state of sexual harassment law is in the civilian world and in the Navy, and what the Navy can do to eliminate sexual harassment from the workplace. Part I will discuss the current state of the federal civilian law and why this law does not apply to Navy personnel. Part II will discuss how the Navy currently deals with sexual harassment. Part III proposes three alternative ways to reduce sexual harassment in the Navy.

I. THE CURRENT STATE OF FEDERAL SEXUAL HARASSMENT LAW AND WHY IT DOES NOT APPLY TO THE NAVY

The confusion over what exactly sexual harassment is causes many problems in the workplace. This fact became painfully apparent during the confirmation hearings of Justice Clarence Thomas. Now that the public is more sensitive to sexual harassment, employers are anxious to have it accurately defined. Many employers are taking steps to reduce the costly effects of sexual harassment. They are often surprised to learn what constitutes sexual harassment.

A. *Why Sexual Harassment is Actionable and What Constitutes Sexual Harassment under Federal Statute*

Sexual harassment, a form of gender discrimination, is prohibited by federal law.¹⁶ Title VII of the Civil Rights Act of 1964 provides remedies for employees when the "compensation, terms, conditions, or privileges of

15. During a hearing of the House Armed Services Committee the highest officers from each branch were questioned by Committee members about sexual harassment and the combat exclusion. *See infra* note 225. President Bush assigned a commission to discuss the issue of the combat exclusion.

16. Title VII of the Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2 (1988). Subsection (a) of the statute provides:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(1).

employment” are affected by gender discrimination.¹⁷ Sexual harassment became illegal because the courts held it was discrimination on the basis of sex and therefore violated Title VII.¹⁸ Theories of sexual harassment have evolved slowly in the courts. Judicial evolution is necessary because there exists virtually no legislative history surrounding the gender discrimination element of Title VII.¹⁹

The EEOC clearly defines sexual harassment.²⁰ Generally, sexual harassment is unwelcome sexual conduct that affects a term or condition of employment. More specifically, it is divided into two general categories: (1) quid pro quo sexual harassment and (2) environmental sexual harassment. All sexual harassment necessarily begins with “[u]nwelcome²¹ sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”²² It is the reactions following the initial conduct or requests which distinguish quid pro quo and environmental sexual harassment.

1. Quid Pro Quo Sexual Harassment

Quid pro quo²³ sexual harassment is what many people think of when someone mentions sexual harassment. It generally occurs when an employer makes continued employment contingent upon sexual favors. More precisely, quid pro quo sexual harassment has occurred if (1) the employer makes it known (explicitly or implicitly) to the employee that submission to the sexual advances or conduct is a requirement for continued employ-

17. *Id.* Title VII also protects women from employers who make gender a consideration for employment or advancement. *See Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497, 1500 (11th Cir. 1985) (employer refused to promote female employee and attempted to have her resign after making it known that if it were his choice he would have no female employees). Discussion of this type of gender discrimination is beyond the scope of this article.

18. *See generally Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

19. *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991). *See* 110 Cong. Rec. 2,577-2,584 (1964) Congress apparently only added “sex” to the language of Title VII in the last minute of the floor debate just prior to voting on the Bill. By adding sex to Title VII Representative Smith hoped to keep the bill from becoming law. The only legislative history actually comes from the Equal Employment Act of 1972 which amended the 1964 Act.

20. EEOC Policy Guidance on Current Issues of Sexual Harassment, 29 C.F.R. § 1604.11 (1991) [hereinafter EEOC Guidelines] Although these guidelines are not binding upon the courts, they “do constitute a body of experience and informed judgment to which courts may properly resort for guidance.” *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The guidelines are continually referred to in sexual harassment cases. *See Meritor*, 477 U.S. at 65; *Ellison*, 924 F.2d at 876.

21. *See Meritor*, 477 U.S. at 69. The court notes that voluntary sex may still be unwelcome. Whether the sex is unwelcome is up to the trier of fact in its role of determining witness credibility.

22. EEOC Guidelines, *supra* note 20, at (a).

23. Translated from Latin to English, quid pro quo, literally means something for something. It is a term “used in law for the giving one valuable thing for another.” BLACK’S LAW DICTIONARY 1248 (6th ed. 1990).

ment,²⁴ or (2) submission to the sexual advances or conduct is a consideration affecting the employee's future in employment.²⁵

The evolution of sexual harassment can be seen in the cases that established quid pro quo sexual harassment law. In *Barnes v. Costle*,²⁶ an employer asked a newly hired female for sexual favors. He repeatedly asked her for dates, even though she always refused. He made numerous remarks to her with sexual content. Finally, he suggested that her cooperation in a sexual affair would lead to enhanced job status. As a result of her refusal to oblige her boss, the female employee endured constant harassment, poor job duties and eventually, loss of employment.²⁷

The District Court granted the employer summary judgment, holding that such allegations "are not the type of discriminatory conduct contemplated by [Title VII]."²⁸ The District Court's rationale was the employee was discriminated against because she would not date her employer, not because she was a woman. The Court of Appeals pointed out that a sexual affair would never have been solicited had the employee not been female. Absent a showing by the employer that he treated male employees in the same manner, the court found that gender was a factor in the employee's treatment and employment. By making gender a factor in employment, the employer violated Title VII by discriminating on the basis of gender.²⁹

2. Environmental Sexual Harassment

Environmental sexual harassment occurs where the sexual conduct by an employer or fellow employee unreasonably affects the individual's performance or creates an offensive or hostile working environment.³⁰ In *Meritor Savings Bank v. Vinson*,³¹ the Supreme Court held there is a remedy in

24. EEOC Guidelines, *supra* note 20, at (a)(1).

25. EEOC Guidelines, *supra* note 20, at (a)(2).

26. 561 F.2d 983 (D.C. Cir. 1977).

27. *Id.* at 985.

28. *Id.* at 986.

29. *Id.* at 992.

30. EEOC Guidelines, *supra* note 20, at (a)(3).

31. 477 U.S. 57 (1986). In *Meritor Savings Bank*, Vinson sued her boss, Taylor, for sexual harassment, that occurred over a four-year period while the two were employed at Meritor Savings Bank. While Vinson was his trainee at Meritor, Taylor asked her to dinner. At dinner, Taylor invited Vinson to go to a nearby hotel and have sex with him. Fearing she would be discharged, Vinson consented to sex with Taylor. Thereafter, Taylor made repeated demands for sex. Vinson estimated that the two had intercourse approximately 40 to 50 times. Additionally, Taylor repeatedly fondled Vinson at work, in front of other employees. Finally, Taylor raped her several different times. Vinson neither reported the harassment to any supervisor nor did she use Meritor's complaint procedure claiming fear of reprisal by Taylor. *Id.* at 60.

what have become known as "hostile work environment actions."³² Numerous post-*Meritor* cases provide further understanding of such actions.

Important to an understanding of hostile work environment actions is an understanding of the courts rationale for interpreting Title VII in this way. *Rogers v. EEOC*³³ was the first of several lower federal court cases holding that employment conditions with widespread racial, ethnic, or religious discrimination violate Title VII. In *Rogers*, the court adopted a much broader view of the "terms and conditions" language of Title VII. The court held the work environment is protected by Title VII since an "employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse. . . ." ³⁴ Prior to *Rogers*, courts had only protected the economic terms of employment. By protecting employees' environment, the courts have made Title VII an effective vehicle for eliminating discrimination and its ill effects from the workplace.

Drawing on *Rogers*, the *Meritor* court rejected the argument that Title VII reached only economic discrimination. Writing for the court, Justice Rehnquist, validated the EEOC's guidelines allowing environmental claims. The court noted these guidelines drew upon substantial precedent holding "that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult."³⁵ Justice Rehnquist also rejected the District Court's holding that voluntary sex was a defense to sexual harassment.³⁶ Instead the essential allegation is unwelcome sexual advances.

Behavior that will constitute a hostile work environment depends upon the totality of the circumstances.³⁷ Clearly, the alleged harassment must be sufficiently pervasive to affect employment conditions creating a hostile workplace.³⁸ It is not enough that the conduct complained of be simply offensive to the alleged victim.³⁹ To reiterate the EEOC guidelines, the conduct must "unreasonably interfer[e] with an individual's work performance, or creat[e] an intimidating, hostile, or offensive working environment."⁴⁰

32. The Supreme Court in *Vinson* recognized this type of sexual harassment six years after the EEOC first included environmental sexual harassment in its policy guidelines. The lower courts also began recognizing environmental sexual harassment prior to *Vinson*. See *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

33. 454 F.2d 234 (5th Cir. 1971), *cert denied*, 406 U.S. 957 (1972).

34. *Id.* at 238.

35. *Meritor*, 477 U.S. at 66.

36. *Id.* at 69.

37. *Id.*; EEOC Guidelines, *supra* note 20, at (b).

38. *Henson*, 682 F.2d at 904.

39. *Rogers*, 454 F.2d at 238.

40. EEOC Guidelines, *supra* note 20, at (b).

3. Reasonable Woman Standard

The perspective a court uses to examine sexual harassment can be crucial. In *Ellison v. Brady*, the court evaluated the pervasiveness of the alleged sexual harassment from the point of view of the victim and adopted a "reasonable woman" standard.⁴¹ The *Ellison* court replaced the reasonable person standard since such a standard propagates male-biased views towards sexual harassment. Viewing the harassment from a reasonable woman's standpoint may often be the only way to provide female victim's with a remedy. As the *Ellison* Court noted: "[C]onduct that many men consider unobjectionable may offend many women."⁴²

The Court of Appeals in *Ellison* carefully pointed out there are many sociological reasons for the different sensitivities of men and women.⁴³ That a man with innocent intentions can be guilty of sexual harassment is due to Title VII not being a fault-based tort scheme. Innocent intent will not keep a harasser from violating Title VII. Title VII instead focuses on the effects of discrimination in the workplace.⁴⁴

The reasonable woman standard does not focus its attention on the alleged victim alone. Rather, it is an objective standard which requires the fact finder to step into the shoes of a "reasonable woman" and decide if the conduct complained of is pervasive enough to alter the conditions of employment or create an abusive workplace. Such a standard protects an employer from a hyper-sensitive employee.⁴⁵

41. 924 F.2d 872, 878 (9th Cir. 1991)

42. *Id.*

43. In *Ellison*, the court pointed out that women are subject to a much higher frequency of sexual crimes, including sexual assault and rape. *Id.* at 879.

44. The facts of *Ellison* illustrate how a person need not be a malicious harasser. In *Ellison*, Kerry Ellison accepted an invitation from Sterling Gray to have lunch. Subsequently, Gray continually pestered Ellison with further similar invitations and unsolicited attention. Ellison turned down an invitation prompting Gray to write her a note. The note said, among other things, that he cried over her after her refusal. Ellison showed the note to a supervisor, who said it constituted sexual harassment. Shortly thereafter, Ellison went away for an extended training course. While Ellison was away, Gray sent her a lengthy letter professing his affections and admitting that he loved to watch her. Ellison was frightened by Gray's conduct. She sent a copy of the letter to her supervisor, who had Gray transferred. After two months, Gray's request to be returned to the office with Ellison was approved. When her frantic appeals to have Gray kept away were rejected, Ellison filed a lawsuit. "[F]rom the alleged harasser's viewpoint, Gray could be portrayed as a modern-day Cyrano de Bergerac, wishing no more than to woo Ellison with his words. There is no evidence that Gray harbored any ill will toward Ellison." *Id.*, 924 F.2d at 880. Yet to Ellison, Gray's conduct was bizarre and frightening. This is apparent in her appeals to her superiors not to let Gray return. This case shows the difference the "reasonable woman" standard can make. While a reasonable woman might consider Ellison's fear justified, an average male worker might find it simply an amusing story.

45. *Id.* at 879.

4. Liability of an Employer for Employee Acts

The liability of employers for the acts of their employees is founded on agency principles.⁴⁶ The EEOC distinguishes between harassment by a supervisor and harassment by a fellow employee. The Supreme Court in *Meritor*, rejected the EEOC's proposition that employers be held strictly liable for sexual harassment perpetrated by their agents or supervisors.⁴⁷ Other than rejecting strict liability, the *Meritor* Court left the lower courts free to determine employer liability according to agency law.⁴⁸ Despite the *Meritor* decision the EEOC guidelines still call for strict liability for employers where a supervisor is guilty of sexual harassment. In addition, there is some authority for the EEOC's position in the courts.⁴⁹

Employer liability for acts of co-workers depends upon whether an employer, or its agents or supervisory employees, knew of or should have known about the harassment, *and* failed to take immediate and appropriate corrective action.⁵⁰ An employer, or its agents, should have known, and are therefore liable, if evidence of a hostile environment could have been discovered through the exercise of reasonable care.⁵¹ If the hostile work environment is so pervasive and has existed for so long that the employer must have been aware of it, the employer will be held to have constructive knowledge of the situation and be held liable.⁵² The EEOC and the courts afford employers a valuable method of avoiding liability. If an employer takes "immediate and appropriate corrective action" it will have no liability for the acts of its non-supervisory employees.⁵³

46. *Meritor*, 477 U.S. at 71-73; *Ellison*, 924 F.2d at 881.

47. *Meritor*, 477 U.S. at 73.

48. "We therefore decline the parties invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area." *Id.*

49. *Id.* at 70-71 (citing *Anderson v. Methodist Evangelical Hospital, Inc.* 464 F.2d 723, 725 (6th Cir. 1972)).

50. See EEOC Guidelines, *supra* note 20, at (d), *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984).

51. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989).

52. *Taylor v. Jones*, 653 F.2d 1193, 1197-99 (8th Cir. 1981). This case involved a racially charged environment where the employer was held liable for the acts of its employees. See *Smolsky v. Consolidated Rail Corp.*, 780 F. Supp. 283, 292 (E.D. Pa. 1991) where employer was held to have constructive knowledge in a sexual harassment case.

53. The opportunity for employers to avoid liability is best illustrated by comparing cases where the courts applied this standard. In *Zabkowitz v. West Bend Company*, Mrs. Zabkowitz endured a workplace where she suffered "malicious, and brutal harassment" at the hands of her co-workers. Between the years of 1978 and 1982, Mrs. Zabkowitz witnessed constant abusive language, indecent exposure and drawings. She reported these incidents to her superiors dozens of times. The response of the superiors was oral reprimand and occasional employee meetings where company rules against such conduct was reiterated. The court held that the employer had knowledge of harassment and failed to take corrective action. The court pointed out that the actions taken by employer were ineffective to remedy the harassment. The failure to adopt effective corrective measures subjected employer to liability. *Zabkowitz v. West Bend Company*, 589 F. Supp. 780, 784-85 (E.D. Wis. 1984).

5. Remedial Steps by an Employer to Avoid Liability

To avoid liability for the conduct of its employees an employer should take remedial steps "reasonably calculated to end the harassment."⁵⁴ Individual perpetrators should be persuaded to discontinue the misconduct. The punishment should, of course, fit the crime; it is not necessary that all harassers be fired. The reasonableness of an employer's remedial action will depend on the employer's ability to deter future harassment. Remedial action making a workplace no longer hostile will be sufficient to prevent employer liability.⁵⁵

The EEOC notes that: "[P]revention is the best tool for the elimination of sexual harassment."⁵⁶ Strong work policy directives which outlaw sexual harassment are only a start. To successfully prevent sexual harassment in the workplace, an employer should clearly state: what constitutes sexual harassment, why it is prohibited, and what penalties an employee will suffer for not following the policy. In addition, an employer needs to provide employees with an adequate grievance system, which should be monitored carefully. Finally, an employer must provide a system to educate and sensitize its workforce.⁵⁷

In *Robinson v. Jacksonville Shipyards, Inc.*,⁵⁸ a federal District Court ordered an employer to adopt an extensive program to eliminate sexual harassment. In *Robinson*, Lois Robinson's complaints about a hostile work environment were based mainly on sexually explicit photographs and demeaning remarks by co-workers and supervisors.⁵⁹ The court granted her injunctive relief and ordered defendant Jacksonville Shipyards, Inc. ("JSI"), to eliminate the hostile work environment, which it concluded, discriminated against women on the basis of their sex. In addition, the court ordered JSI to remedy the sexual harassment by implementing an extensive sexual harassment program.⁶⁰

In *Barrett v. Omaha Nat. Bank*, Deanna Barrett attended a two-day loan seminar for work at which co-workers talked about sex and offensively touched her. She complained to her superior, and ONB conducted an investigation. As a result of the investigation, the offenders were reprimanded for "grossly inappropriate" conduct, put on probation for 90 days and warned that any further misconduct would result in discharge. The court held that ONB was not liable since it took "immediate and appropriate corrective action." *Barrett v. Omaha Nat. Bank*, 726 F.2d 424, 427 (8th Cir. 1984).

54. *Ellison*, 924 F.2d at 881 (quoting *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983)).

55. *Ellison*, 924 F.2d at 881-82.

56. EEOC Guidelines, *supra* note 20, at (f).

57. *Ellison*, 924 F.2d at 880.

58. 760 F. Supp. 1486, (M.D. Fla. 1991).

59. *Id.* at 1490.

60. According to the *Robinson* court, the policy statement should mirror the way the current EEOC policy guidelines define sexual harassment. Company policy should advise employees that prohibited conduct can subject, not only the company to expensive litigation, but also the employee. In addition, the policy statement should provide employees with a list of prohibited conduct. While such a list can never be exhaustive, it will at least provide employees with a

B. Why Title VII Does Not Apply to the Uniformed Military

In *Feres v. United States*,⁶¹ the Supreme Court interpreted the Federal Tort Claims Act as not available to uniformed military personnel injured in an activity incident to service. The Federal Tort Claims Act ("FTCA") was an attempt by Congress to provide a remedy⁶² for individuals injured by an officer or employee of the Government—previously, a remedy was unavailable due to sovereign immunity. The *Feres* court provided several reasons for its holding. First, the FTCA only allowed the federal government to be held liable "in the same manner and to the same extent as a private individual under like circumstances."⁶³ The court pointed out that soldiers in the U.S. military have never been permitted to recover for the negligence of their superiors.⁶⁴ Second, the military should not be sued

reference source. Finally, the policy statement should clearly outline the penalties an offender can suffer for violating company policy. All verified instances of misconduct should be recorded in the employee's file.

JSI should have had a "convenient, confidential and reliable" method of reporting sexual harassment. The court instructed JSI to designate at least two employees to serve in an investigative role for sexual harassment complaints. Names and availability of the investigators should be conspicuously posted so that a victim or witness could anonymously notify the investigator if she so desired. Anyone witnessing sexual harassment should report it even if not victimized.

The investigators are to receive training about sexual harassment and are to be responsible for thorough investigations. All complaints were to be investigated and written reports kept on file. The investigator was to have the power to recommend remedial actions to management, who will act upon those actions recommended. The records of the investigations will be made available to federal, state and local agencies as well as other complainants.

Since Title VII is not a fault-based tort scheme, the only way to avoid sexual harassment by an unintended harasser is to educate and sensitize. In *Robinson*, the court ordered that all supervisors attend an annual sexual harassment seminar, which the president of JSI attends and introduces. Supervisors who have attended the seminar must describe to employees at safety meetings what acts constitute sexual harassment, the company policy on sexual harassment and the method of complaining about sexual harassment. Women must also attend an annual seminar on how to resist and prevent sexual harassment. Investigators must also attend an annual seminar to learn techniques for investigating and stopping sexual harassment. *Id.* at 1541-44.

61. 340 U.S. 135 (1950).

62. The theory of public tort law has five primary social goals: (1) to deter official wrongdoing, (2) to encourage vigorous decisionmaking by officials, (3) to compensate victims of official misconduct, (4) to reflect society's mores and (5) to strive for governmental competence. All of these goals require a degree of balancing by the courts. Therefore, an underlying goal is a healthy mix of the five goals. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 16-25 (1983).

63. *Feres*, 340 U.S. at 141.

64. *Id.* See *Dinsman v. Wilkes*, 53 U.S. 389 (1852). In *Dinsman*, the Supreme Court allowed an enlisted seaman to sue his superior officer, who had ordered *Dinsman's* flogging. After noting the importance of military discipline, the court decided that "the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice." The court concluded that if a jury held *Wilkes* had acted with malice, he should be liable to *Dinsman* for damages.

The *Feres* court distinguishes *Dinsman* by pointing out that it involved an intentional tort. Justice Jackson clearly stated that no authority existed that would permit military personnel to recover for an act of negligence causing injury. Thus, by citing *Dinsman*, the *Feres* court left open the possibility for suits by military personnel against fellow military personnel and the

under 48 state law rules.⁶⁵ Third, the military already affords its personnel a uniform system of compensation.⁶⁶

Feres was a suit against the government for negligence. The courts have since interpreted it to bar recovery for claims by military personnel for intentional or negligent torts whether against the government (as in the case of *Feres*) or against an individual government official. In 1972, Congress amended Title VII to cover all federal government employees including those employed in military departments.⁶⁷ Although the 1972 amendment does not distinguish between civilian and uniformed military department employees, the courts did not interpret the 1972 amendment as applicable to uniformed employees of the Defense Department.⁶⁸ Instead, the only military department employees afforded Title VII remedies are civilians.⁶⁹

Thirty-three years passed before the Supreme Court heard another case by a military serviceman. In *Chappell v. Wallace*⁷⁰ Navy enlisted men sued their superior officers for racial discrimination.⁷¹ The Court held that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."⁷² In so holding, the Court noted again the military already had a compensation system. Additionally, the court held that military discipline could be jeopardized if such actions were permitted. The Court explained that in the military, orders must be obeyed by reflex, without debate or reflection, and argued that

government for injury caused by intentional torts. *Feres*, 340 U.S. at 141.

65. Under the FTCA, the law which applies depends upon where the injury occurred. *Id.* at 143.

66. *Id.* at 144, referring to Veterans' Administration benefits.

67. Act of 1972, Pub. L. No. 92-261, 86 Stat. 111, codified at 42 U.S.C. § 2000e-16(a) (1972) (current version at 42 U.S.C. § 2000e-16(a) (1991)). Section 102 of Title 5 states in full without any further definitions or explanations:

The military departments are:

Department of the Army.

Department of the Navy [includes the Marine Corps].

Department of the Air Force.

68. Though covered at greater length later, it should be noted that the Defense Department employs thousands of civilians in addition to military personnel. This article focuses on uniformed military personnel. This is mainly because civilian defense department employees have access to Title VII remedies.

69. See The DoD Civilian Equal Employment Opportunity (EEO) Program, 32 C.F.R. § 191 et. seq. (1991).

70. 462 U.S. 296 (1983). *Chappell* differs from *Feres* in that it involved military personnel suing their superior officers. *Feres* held that military personnel could not bring an action against the Government.

71. *Chappell*, 462 U.S. at 296. The enlisted men here sought a *Bivens*-type remedy. The *Bivens* claims are distinguishable from actions under the FTCA in that they are brought against individual government officials. The FTCA waives sovereign immunity, allowing individuals to sue the government but does not provide for suits against individual government officers or agents. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

72. *Chappell*, 462 U.S. at 305.

civilian courts should be reluctant to interfere with the relationship between military personnel and their superior officers.⁷³

The *Chappell* court cited two additional reasons for its holding. First, the Constitution assigns explicit authority in Congress “[t]o raise and support Armies,” “[t]o provide and maintain a Navy,” and “[t]o make Rules for the Government and [r]egulation of the land and naval [f]orces.”⁷⁴ Therefore, Congress, not the courts, should and does regulate military life. Second, the claimants did not pursue the provided military grievance procedure to exhaustion.⁷⁵ The court pointed out that a remedy for the claimants already existed within the military justice system.⁷⁶

The judiciary currently denies uniformed military personnel access to civil courts for redress of injury caused by conduct incident to service. To summarize, the *Feres* doctrine now has three basic rationales. First, the Constitution grants Congress plenary authority to regulate the military. Congress created the Uniform Code of Military Justice to regulate military activities. Second, military personnel are provided with alternative remedies. Veterans benefits and an internal grievance system are remedies to which all service members have access, thus eliminating the need for civilian courts. Third, the unique mission of the military requires a code of discipline that is foreign to civil judges and juries. Therefore, the judiciary has no business judging the conduct of military personnel.⁷⁷ The validity of these rationales will be discussed in a later part.

73. *Id.* at 303-04.

74. *Id.* at 302; U.S. CONST., art. I, § 8, cls. 12-14.

75. *Feres*, 462 U.S. at 304.

76. *Id.* 10 U.S.C. § 1552(a) (1991). For a case where Federal Court denied access for a sexual harassment victim, see *Stubbs v. United States*, 744 F.2d 58, 59-60 (8th Cir. 1984). In *Stubbs v. United States*, the administratrix of a dead enlisted woman brought suit “alleging wrongful death by sexual harassment and emotional distress.” *Id.* at 59. The court held the complaint was barred by the *Feres* doctrine. The administratrix alleged that Stubb’s drill instructor, Sergeant Sookdeo, ordered her into a latrine just prior to a holiday. In the latrine, Sookdeo told Stubbs that if she had sex with him, life would be easier for her, but if she did not life would be harder. Sookdeo also physically touched her in a sexual manner. Stubbs refused his advances. Several years prior to this incident, she had been raped. The two incidents combined to cause Stubbs great anxiety. She believed that complaining to military authorities would only get her branded a trouble maker. On the day Stubbs was due to report back to base, she took her own life.

The Eighth Circuit had developed its own method for deciding complaints such as *Stubbs*. First, the court asked if there was a relationship between the service member’s activity and the military service. The court found alleged sexual harassment occurred on base while the two were on duty. Furthermore, even though the incident served no military purpose, the time and space elements were enough to show the necessary military relationship.

Second, the court asked if a civil action would impede military discipline. A civil trial, said the court, would certainly examine the relationship between officer and subordinate. Additionally, the complaint alleged that Stubbs feared reprisals if she complained and claimed that military superiors knew of sexual harassment of female enlisted personnel, and yet did nothing about it. The court contended that such allegations directly question the disciplinary decisions of superior officers and that such inquiries are barred by *Feres*.

77. See generally Courtney W. Howland, *Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93 (1985); David Saul Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L.J. 992 (1986).

II. HOW SEXUAL HARASSMENT IS DEALT WITH IN THE NAVY

Congress designed Title VII to eliminate gender discrimination⁷⁸ from the workplace. Since they have no remedy available under Title VII, uniformed personnel must look to their own system of justice to remove sexual harassment from the workplace. The Uniform Code of Military Justice ("UCMJ") gives the Navy jurisdiction over its own personnel.⁷⁹ The UCMJ is used to enforce law and order by threat of criminal and administrative penalties.⁸⁰ Although no article specifically condemns sexual harassment, the Navy has a strong policy against sexual harassment.⁸¹ The Navy enforces its policy by using several articles of the UCMJ.⁸²

The Navy policy on sexual harassment is nearly a mirror image of the policy guidelines of the EEOC. In addition to this policy, effective August

78. The courts have interpreted gender discrimination to include sexual harassment. Therefore, sexual harassment is forbidden by Title VII.

79. See generally Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1991) [hereinafter UCMJ]. Article 36 of the UCMJ empowers the President to implement procedures by which the military can enforce the UCMJ. 10 U.S.C. § 836 (1991). The President has responded by establishing the Manual for Courts Martial [hereinafter MCM]. The military uses the laws of the UCMJ and the procedure of the MCM to enforce good order and discipline.

Military Justice has five means of enforcement depending upon the severity of the violation: (1) nonpunitive measures; (2) nonjudicial punishment; (3) summary court-martial; (4) special court-martial; and (5) general court-martial. EDWARD M. BYRNE, *MILITARY LAW* 15 (1981). Without resorting to formal proceedings, commanding officers have a wide variety of punishments at their disposal for minor breaches of conduct on the part of their subordinates. Punishments available to commanding officers are outlined in Rules for Court Martial [Hereinafter R.C.M.] 306.

More serious offenses are commonly handled via nonjudicial punishment. Article 15 of the UCMJ provides authority to a commanding officer to punish subordinates by using an administrative hearing. For further discussion see *infra* note 97.

Summary court-martials are designed to dispose of minor offenses through use of a simplified trial proceeding. Consent of the accused is a prerequisite, and confinement may not be imposed unless the accused has been afforded counsel. See generally R.C.M. 1301 *et. seq.* A single officer oversees the proceedings. 10 U.S.C. § 816(3) (1991).

Special courts-martials are the intermediate trial courts in the hierarchy provided by the UCMJ. 10 U.S.C. § 816(2) (1991). Personnel may be tried before a special court-martial for any non-capital crime. Counsel are assigned by the court to prosecute and defend. Punishments for conviction include six months hard labor, and, if procedural safeguards are met, punitive discharge. The fact-finder can be a military jury or a military judge.

General courts-martial is the highest trial level forum provided for in military law. It may impose any punishment permitted under the UCMJ or MCM including death. A full military jury of five or a military judge presides over this court. The defendant is guaranteed the right to counsel.

80. See *infra* for discussion of penalties available under the UCMJ.

81. See SECNAVINST 5300.26A, *supra* note 14.

82. Since no specific article prohibits sexual harassment in the UCMJ, several articles are used to enforce the Navy's policy. Among those used are: Article 92 (disobeying orders such as a SECNAVINST); Article 93 (maltreatment of subordinate); Article 128 (indecent assault); Article 133 (conduct unbecoming an officer); and Article 134 (conduct prejudicial to good order and discipline). One result of this is it is difficult to track sexual harassment prosecutions within the military justice system. This difficulty in tracking sexual harassment is compounded by the fact that some cases are disposed of through administrative measures such as Article 15 proceedings (Masts), special performance evaluations and formal counseling. No centralized reporting system exists to specifically collect data on sexual harassment.

1989, several administrative messages from the Chief of Naval Operations have further strengthened the policy. The Navy instituted a policy of "zero tolerance" for sexual harassment. The zero tolerance policy dictates mandatory administrative separation for certain aggravated acts of sexual harassment or for repeated commission of less aggravated acts of sexual harassment.⁸³

A. Administrative Actions

The first step in any sexual harassment case is a complaint by the victim or any other witness to the harassment.⁸⁴ A victim who wants to complain of sexual harassment has three options. First, she can report the problem up the chain of command.⁸⁵ This is the most common method of reporting grievances in the Navy. Second, she can call the Inspector General's ("IG") "hotline." Finally, she can file an Article 138 complaint with another superior officer if her commanding officer has denied her redress.⁸⁶

The IG hotline is actually entitled the "Fraud, Waste and Abuse Hotline." Only recently has it been employed for sexual harassment complaints. Until recently, it was not well known to service members that the hotline was available for such complaints.⁸⁷ The hotline can be an

83. Admiral Frank B. Kelso, Chief of Naval Operations, Administrative Message to Naval Operations No. 5354, Zero Tolerance of Sexual Harassment (Feb. 1992) (on file with the California Western Law Review). The message to naval personnel states in part that "sexual harassment affects our performance. It denies some of our people the chance to do their best. It demeans victims, and tarnishes our reputation as fair, hardworking professionals. We know from recent studies, in spite of our longstanding policy of zero tolerance of sexual harassment, there are some who have failed to uphold this standard. For that reason, I have directed that commencing 1 March 1992, processing for administrative separation will be mandatory for those found to have committed certain aggravated acts of sexual harassment. ADSEP [Administrative Separation] will also be considered for personnel who repeatedly commit less aggravated acts of sexual harassment."

84. Navy policy on harassment encourages, not only victims, but all witnesses to report violations of the policy. *Id.* There are a number of methods available to report instances of sexual harassment. Reports to the inspector general hotline will obviously not follow the same path as those reported up the chain of command.

85. Defined as the succession of officers through which command is exercised. NAVAL TERMS DICTIONARY 1977. The highest in the chain of command is the President of the United States who is commander-in-chief of all the armed forces. U.S. CONST. art. II, § 2, cl. 1. The lowest in the chain of command is the lowest enlisted personnel with least seniority.

86. Uniform Code of Military Justice, Art 138 provides: "Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon." 10 U.S.C. § 938 (1991).

87. As of 1988, statistics indicated that only 60% of women knew avenues for complaining about sexual harassment existed outside the chain of command. DEFENSE MANPOWER DATA CENTER, *supra* note 4, at 11. This statistic should be higher now. In the wake of Tailhook, Chief of Naval Operations Frank Kelso ordered all commands to stand-down and conduct sexual harassment training. Included among the slides shown during the training session was one listing

effective method of seeking redress for victims when the chain of command has been unresponsive.⁸⁸

Article 138 complaints are available for military personnel who seek relief when the wrong complained of has been committed by her commanding officer or the commanding officer has failed to act appropriately to remedy a wrong committed by a subordinate.⁸⁹ A complaint is made to any officer, who must forward the complaint to "[t]he officer exercising general court-martial jurisdiction over the officer against whom it is made."⁹⁰ The intermediate officer has no discretion on whether to forward it; he or she must forward it to the appropriate officer. The officer with general court-martial authority must investigate all complaints. After an investigation, if redress is warranted, the investigating flag officer carries it out.⁹¹

When sexual harassment is reported up the chain to a commanding officer, that officer has several options depending upon the severity of the allegations.⁹² According to Navy policy "instances of sexual harassment will be resolved at the lowest possible level within the organization."⁹³ Therefore, less serious allegations can be handled by counseling and verbal reprimands.⁹⁴ If the officer feels the allegation is serious enough, he or she will order an investigation.

Typically, the preliminary investigation is assigned to a junior officer.⁹⁵ The sophistication of these individuals as investigators of sexual harassment complaints varies tremendously. If the findings of the preliminary investigation warrant, the matter will be turned over to professional investigators such as the Naval Investigative Service (NIS).⁹⁶ The commanding officer has

the hotline number. Admiral Frank B. Kelso II, Memorandum for Commanders, Commanding Officers and Officers in Charge, Sexual Harassment Training (July 28, 1992) (on file with the California Western Law Review).

88. Krohne, *supra* note 8, at 150.

89. 10 U.S.C. § 938 (1991). *See generally* James Tompkins, *Article 138: A Resurrection*, 28 JAG JOURNAL 463 (1974).

90. 10 U.S.C. § 938 (1991). In the Navy this would be the lowest ranking Admiral in the commanding officer's chain of command.

91. Tompkins, *supra* note 89, at 472-81.

92. "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses." R.C.M. 303.

93. SECNAVINST 5300.26A.

94. For obvious reasons data on such cases is lacking. It is quite probable that many if not the majority of all reports of sexual harassment are handled in this manner. Krohne, *supra* note 8, at 158-75. *See also* R.C.M. 303. The discussion section points out that the preliminary inquiry is usually informal.

95. R.C.M. 405(d)(1).

96. The professionalism of the NIS investigators has been criticized recently. Lt. Paula Coughlin, a victim of Tailhook, has alleged that Agent Laney Spigener pressured her for a date and called her "sweet cakes." These incidents occurred as Coughlin reviewed photographs of Navy and Marine aviators in an attempt to identify who assaulted her at Tailhook. Spigener was suspended for seven days for unauthorized use of authority for an incident unrelated to Tailhook. Associated Press, *Tailhook Investigator Cited for Abusing Rank*, S.D. UNION-TRIBUNE, July 12,

considerable discretion as to what to do with the evidence produced by the investigation.⁹⁷

Under Article 15 of the UCMJ a commanding officer may punish any subordinate for violations of the UCMJ.⁹⁸ In certain situations, nonjudicial punishment authority may be delegated to a principal assistant.⁹⁹ Unless attached to or embarked on a vessel, the accused may demand trial by court-martial in lieu of Article 15 punishment.¹⁰⁰ The Article 15 hearing by the commanding officer is, in the Navy, called a "mast."¹⁰¹ Among other things, the accused is entitled to be present at the mast, to be advised of the charges and to present a defense. There are several drawbacks that an accused faces if he chooses this type of hearing.¹⁰² First, the accused has no right to counsel, only "advice."¹⁰³ Second, the rules of evidence do not apply at a mast.¹⁰⁴ Third, the commanding officer need only be convinced

1992, at A3.

97. Commanding officers are not bound to follow the findings of the preliminary investigation. R.C.M. 306(c)(1). Commanding officers presented with the results of the investigation have "prosecutorial discretion." BYRNE, *supra* note 79, at 88. Commanding officers have many more punishment options than a civilian district attorney. Unlike district attorneys, commanding officers' credibility with their subordinates depends upon how they handle punishment. Generally, commanding officers have legal counsel available for consultation. *Id.*

98. 10 U.S.C. § 815 (1991). In Article 15, commonly known as "nonjudicial punishment," Congress vested in commanders authority to dispose of "minor offenses" without resorting to court-martial. The Manual for Courts-Martial defines minor offense: "Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record, and experience; and the maximum sentence impossible for the offense if tried by general court-martial." *See* MCM, 1984, Part V, para. 1e.

The policy of nonjudicial punishment goes beyond punishment; it is designed to be rehabilitative. In order to decide whether to pursue nonjudicial punishment, a commander should address the same factors considered above to decide if an offense is minor. Nonjudicial punishment should only be employed where nonpunitive measures are inadequate. MCM, 1984, Part V, para 1d(1).

99. Authority may only be delegated by a "commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command." MCM, 1984, Part V, para. 2c.

100. 10 U.S.C. § 815(a) (1991).

101. Officers are tried by an admiral's mast which means only an officer with flag rank may judge an accused officer. Enlisted personnel are tried at Captains mast. Captains mast may be presided over by any officer; however, if the officer presiding at the mast is a Lieutenant Commander or above the penalties prescribable are considerably greater. 10 U.S.C. § 815 (b)(2)(H) (1991).

102. The hearing is not an adversarial proceeding. It is designed to strike a "balance between the requirements for legal protection from possible arbitrary action and the mandatory military necessity for prompt resolution of minor offenses." BYRNE, *supra* note 80 at 197.

103. The advice of counsel only relates to the decision of whether or not to accept nonjudicial punishment. JAG Manual, § 0101d(1)(c) *cited in* BYRNE, *supra* note 79, at 201. An analysis section of the Manual for Court Martial suggests that even this limited advice of counsel may be at the discretion of the nonjudicial punishment authority. MCM, 1984, Part V, para 4, (analysis section).

104. "The Military Rules of Evidence, (Part III) other than with respect to privileges, do not apply at nonjudicial punishment proceedings. Any relevant matter may be considered. . ." MCM, 1984, part V, para. 4(c)(3).

by a preponderance of the evidence.¹⁰⁵ Balancing their drawbacks is the tight circumscription on the punishment available.

When the commanding officer has heard the evidence, and is convinced that the accused is guilty, a wide variety of punishments are available. The punishments vary according to the rank of the accused *and* the rank of the commanding officer imposing punishment.¹⁰⁶ If the person punished considers his punishment unjust he may appeal to the next superior authority.¹⁰⁷ On appeal, the accused may seek counsel of an attorney in preparing materials for the appeal.¹⁰⁸

Because of the zero tolerance policy, enlisted Navy personnel convicted of sexual harassment must face an Administrative Discharge Board. The Board consists of three officers, and the senior member must be at least a Lieutenant Commander. The Board determines three things: first, did the accused commit the misconduct,¹⁰⁹ second, if yes, will the guilty party be separated from the Navy,¹¹⁰ third, if separation is chosen, how will the discharge will be characterized.¹¹¹

B. Judicial Action

If the offense is serious or the accused so requests, allegations of sexual harassment will go to a court-martial.¹¹² The accused must be charged with a violation of the UCMJ before the court-martial can hear the matter.¹¹³ Less serious charges (the equivalent of misdemeanors) will be heard by a summary court-martial. More serious charges (the equivalent of felonies) will be heard by a special or general court-martial. At a court-

105. Section 0101d(2), JAG Manual *cited in* BYRNE, *supra* note 79, at 198.

106. In the most typical case where a commanding officer holding the rank of commander punishes an accused seaman, the maximum punishments are: demotion one paygrade; fine of one-half pay for two months; forty-five days extra-duty (two hours); sixty days restriction (45 if combined with extra-duty); or, in lieu of restriction and extra duty, up to three days confinement on bread and water. 10 U.S.C. § 815(b) (1991).

107. 10 U.S.C. § 815(e) (1991).

108. *Id.* Additionally, certain punishments must be reviewed by a JAG Corps attorney.

109. There is a record of the masts kept for review by superior authority. *See* MCM, 1984, Part V, para 7f(2).

110. Navy policy only prescribes mandatory discharge where "certain aggravated acts" have been committed. A good performer guilty of a less aggravated act will not necessarily be discharged from the Navy. SECNAVINST 5300.26A.

111. There are three types of administrative discharges; (1) honorable; (2) general under honorable conditions; (3) general under less than honorable conditions. COMMANDER NAVY MILITARY PERSONNEL COMMAND MANUAL (1992) (COMNAVMIIPERSMAN).

112. Unless embarked or attached to a vessel, an accused may demand trial by court-martial. 10 U.S.C. § 815(a) (1991). Those embarked or attached to a vessel may be "taken to mast" without their consent.

113. R.C.M. 601(d).

martial the accused is guaranteed a fair trial.¹¹⁴ The accused is afforded military counsel if desired,¹¹⁵ and has the option to provide his own civilian counsel.¹¹⁶ The accused may request a trial by a jury.¹¹⁷ All allegations must be proved by the prosecutor beyond a reasonable doubt.¹¹⁸ The Military Rules of Evidence apply.¹¹⁹ The Navy's zero tolerance policy may not be entered into evidence by the prosecutor.¹²⁰

The punishments available to a court-martial are far more severe than those available at mast.¹²¹ A court-martial has the authority to punitively discharge Navy personnel.¹²² If a convicted harasser is not discharged by a court-martial, the accused must face an administrative board which may discharge the harasser with a non-punitive discharge.¹²³ All decisions of a court-martial are reviewable by the Court of Military Review and the Court of Military Appeals.¹²⁴

Since no single article of the UCMJ prohibits sexual harassment, it is difficult to monitor cases on this issue in the military courts.¹²⁵ Addition-

114. "Military due process, as it is applied today, recognizes that the protections of the Constitution generally apply with equal force to servicemembers and that the U.C.M.J., the Manual for Courts Martial, and service regulations may provide greater protections than the Constitution." DAVID SCHLUETER, *MILITARY CRIMINAL JUSTICE AND PROCEDURE* 7 (1992).

115. 10 U.S.C. § 838(a) (1991).

116. 10 U.S.C. § 838(b)(2) (1991).

117. In a courts-martial, the equivalent of civilian juries are called court members. Article 25 of the UCMJ define who may serve on a courts-martial. Included in the pool are active duty commissioned officers and warrant officers (unless the accused is a commissioned officer). Enlisted personnel may only serve on courts-martial if requested by an accused enlisted person. Where such a request is made, the jury must be made up of at least one third enlisted men not from the same command unit. In a special court-martial, the commanding officer appoints the court members. In a general court-martial, the members are appointed by the convening flag officer. 10 U.S.C. § 825 (1991).

118. SCHLUETER, *supra* note 114, at 504.

119. 10 U.S.C. § 815(a) (1991). The statute authorizes the President to establish rules of evidence which "apply . . . the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . ." The Military Rules of Evidence "clearly demonstrate, the drafters attempted to adopt the federal practice to the greatest extent possible, while still allowing for the necessities of a world wide criminal practice." *MILITARY EVIDENCE MANUAL* 1 (1988).

120. This would be clearly prejudicial although few officers are unaware of the policy.

121. Sentencing procedures in the military are vastly different from civilian courts. After a verdict of guilty, the sentencing phase of the trial begins. The accused is not sentenced by the judge unless the accused requested trial by judge. Instead, an adversarial evidentiary proceeding takes place with sentencing decisions made by the court members. Subject to the rules of evidence, prosecution and defense counsel introduce live and documentary evidence concerning such things as the accused's record of service, prior convictions, matters in aggravation and mitigation, and evidence concerning the accused's potential for rehabilitation. After another deliberation, the court members announce the sentence. SCHLUETER, *supra* note 114, at 446-47.

122. 10 U.S.C. §§ 818-820 (1991). "Bad Conduct" (special or general court-martial) or "Dishonorable" discharge (general court-martial only). Each carries with it a partial ("bad conduct") or complete ("dishonorable") loss of veteran's benefits.

123. *Supra* note 111.

124. 10 U.S.C. § 866 (1991).

125. S. REP. NO. 3295, 102nd Cong., 2nd Sess. (1992).

ally, sexual harassment is relatively new to the Navy; the current policy against it was adopted in 1989, and even the 1989 policy encourages remedying sexual harassment at the lowest possible level in the chain of command.¹²⁶ This means that less serious hostile environment issues will rarely, if ever, reach the military appeals courts. Lesser forms of sexual harassment will generally be resolved non-judicially. Serious acts of sexual harassment that include an assault may be litigated on those issues rather than sexual harassment. A review of several military appeals court cases involving sexual harassment reveals how sexual harassment is typically handled on appeal.

In *United States v. Roberts*,¹²⁷ the Navy-Marine Corps Court of Military Review¹²⁸ heard a joint appeal of a husband and wife who were tried for a nine month unauthorized absence. Fireman Apprentice¹²⁹ Susan Sutek had complained of verbal and physical sexual harassment to her division officer, to a chaplain, and to the Command Master Chief. In February 1982, when Sutek had nearly finished her training program, a group of sailors began an initiation ritual in which she was restrained and an oil hose was forced into a hole in her dungarees.¹³⁰ Sutek testified that she screamed and protested and feared the sailors were going to rip her clothes off. However, in the two days that followed, the sailors "assured" her that this incident was only a prelude to the true initiation that was imminent. Fearing the initiation ritual, Sutek absented herself from her ship.¹³¹

Seaman Apprentice¹³² Ronald Roberts and Sutek married during this harassment period. Roberts testified that Sutek suffered many symptoms of ill health as a result of the constant sexual harassment at work. He testified that his attempts to intervene on Sutek's behalf only caused him to be looked

126. "The chain of command shall be fully utilized, and instances of sexual harassment will be resolved at the lowest possible level within the organization." SECNAVINST 5300.26A.

127. 14 M.J. 671 (NMCMR 1982). The issues on appeal were whether there were adequate grounds for duress and whether no punishment was appropriate under the circumstances.

128. There are four Courts of Military Review: Army, Air Force, Navy-Marine Corps and Coast Guard. Each such court has one or more panels of three or more appellate military judges. Cases are referred to the Courts of Military Review by the Judge Advocate General of the respective branch of the armed forces. Unless waived, all cases in which the accused is sentenced to death, punitive discharge, dismissal or confinement for one or more years will be reviewed by these courts. 10 U.S.C. § 866.

129. Fireman Apprentice is paygrade E-2, the second lowest enlisted grade in an engineering specialty.

130. This initiation ritual was called a "greasing." It was inflicted upon every junior enlisted person when first assigned to an engineering space on a ship. It was understood by Sutek to include: (1) they tie you down and they pull your pants off and put a grease gun in your seat and pump you full with grease and coffee grounds and cigarette butts and anything that will fit through the tubing; and (2) they either hang you upside down by your ankles or they bend you over and pull your pants off and cover your crotch area with printers ink. *Roberts*, 14 M.J. at 672.

131. *Id.* at 673-75.

132. Seaman Apprentice is paygrade E-2, the second lowest enlisted paygrade in a deck specialty.

upon unfavorably. Robers testified that he only absented himself for nine months to protect his wife.¹³³

The two were tried separately before a special courts-martial. Sutek offered an unsuccessful duress defense and was sentenced to a bad-conduct discharge, reduction to pay grade E-1, restriction and hard labor without confinement for two months.¹³⁴ Roberts pled guilty and was given a bad-conduct discharge, reduction to pay grade E-1, restriction, and confinement at hard labor for four months. The appellate court upheld Roberts' conviction, but held that the threat of sexual harassment to his wife warranted a reduction of sentence to "no punishment." In the case of Sutek, relying on un rebutted evidence which showed that the immediate chain of command was not responsive to Sutek's complaints, the appellate court held that the fear of imminent sexual harassment was adequate duress to reverse the conviction and dismiss the charges against her.¹³⁵

In *United States v. Holt*,¹³⁶ the Air Force Court of Military Review upheld the conviction of an Air Force sergeant. Holt persuaded several female enlisted personnel to have sexual relations with him and to allow him to photograph them in various states of undress. Thereafter, Holt threatened to publish the photographs if his victims did not perform further sexual favors or personal services. Holt was convicted of extortion to obtain sexual favors and personal services, but was acquitted of rape, sodomy and sexually harassing a subordinate. The court-martial sentenced Holt to a dishonorable discharge, one year confinement, forfeiture of all pay and reduction to airman basic.¹³⁷

In *United States v. Breseman*,¹³⁸ the Court of Military Appeals affirmed the conviction of Coast Guard Commander Steven Breseman. In one specification,¹³⁹ Breseman was found guilty of making sexual advances to a female seaman apprentice during working hours. The remaining five specifications involved a female fireman.¹⁴⁰ Breseman permitted the fireman to sit in his lap in the presence of subordinates while he made sexually suggestive remarks to her. Breseman photographed the same woman in various poses of nudity, and used the photos to make threats such

133. *Id.* at 675.

134. On appeal Roberts' sentence was reduced to 60 days per a pre-trial agreement.

135. *Id.* at 673-76.

136. 21 M.J. 946 (AFCMR 1986). The issue on appeal was admissibility of character evidence to prove conduct and the other crimes exception to that rule of evidence.

137. *Id.* at 948.

138. 26 M.J. 398 (CMA 1988). The issue on appeal was the validity of a search warrant which produced the damning photographs.

139. Specifications are the military equivalent of civilian criminal counts. Each specification must allege only one offense. "Thus, a specification should not allege that the accused 'lost and destroyed' or that he 'lost or destroyed' certain property. However, if two acts or a series of acts constitute one offense or if an offense is committed by more than one means, they may be alleged conjunctively." MCM, Part VI, para. 28(b).

140. Paygrade E-3, the fifth lowest paygrade in an engineering specialty.

as "I could throw your pictures around and hurt you." For these actions, a court martial convicted Breseman of six specifications of conduct unbecoming an officer in violation of Article 133 of the UCMJ, and sentenced him to dismissal.¹⁴¹

In *United States v. Savage*,¹⁴² the Navy-Marine Corps Court of Military Review upheld the rape conviction of Dental Technician Second Class¹⁴³ Savage. The general court martial acquitted Savage of sexual harassment of a female service member under Article 93 of the UCMJ.¹⁴⁴ The trial court sentenced Savage to eleven years confinement, forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge.¹⁴⁵

In *United States v. Asfeld*,¹⁴⁶ the Army Court of Military Review dismissed all charges against Sergeant Gordan Asfeld. A special court-martial convicted Asfeld of violating a lawful general regulation, communicating indecent language, obstructing justice and soliciting adultery. Asfeld and the victim worked together in an Army hospital. In the course of their working relationship, Asfeld asked the victim to go out with him, to have a date with him and to have sex with him. One night at the hospital the victim answered the phone twice and heard someone she believed to be Asfeld in a whispered voice say that he wanted "to f___" her. All calls to the emergency room are recorded. The victim reported the incidents to her supervisor.¹⁴⁷

The appellate court dismissed the convictions because of several problems in the prosecutions action. With regard to the violations of general regulations the court pointed out that the regulations Asfeld was alleged to have violated were not punitive. Apparently, the Air Force has two regulations prohibiting sexual harassment. The prosecution charged Asfeld with violating a regulation that had no punitive enforcement element. The court held that use of the nonpunitive regulation undercut the prosecutions burden of proof and was therefore unfair.¹⁴⁸

In *United States v. Kroop*,¹⁴⁹ the court upheld Kroop's conviction by general court-martial of three specifications of conduct unbecoming an officer. While Lieutenant Colonel Ronald Kroop was commanding officer

141. *Id.* at 398-99.

142. 30 M.J. 863 (NMCMR 1990). The issue on appeal was the admissibility of post traumatic stress disorder diagnostic evaluation evidence.

143. Dental Technician Second Class is paygrade E-5, the fifth lowest enlisted grade.

144. Article 93 provides: "Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct." 10 U.S.C. § 893 (1991).

145. *Id.* at 864.

146. 30 M.J. 917 (ACMR 1990).

147. *Id.* at 920.

148. *Id.* at 921-23.

149. 34 M.J. 628 (AFCMR 1992). The issues on appeal included: (1) collateral misconduct for selecting members of the court-martial, (2) sufficiency of allegations for fraternization specification, (3) improvident guilty plea and (4) sentencing.

of an engineering squadron, he became acquainted with a female sergeant in the squadron. The relationship between the sergeant and Kroop developed into a sexual affair. After several months the sergeant broke off the affair, but Kroop continued to send her notes and to call her on the telephone. Kroop had a similar affair with a Second Lieutenant. When the lieutenant broke off relations, Kroop again continued to make sexual advances, and the Lieutenant complained to the security police.¹⁵⁰ For his conduct Kroop was found guilty of "wrongfully mak[ing] sexual advances and verbal comments of a sexual and intimate nature to ... a subordinate under [his] command, . . . which conduct created an intimidating, hostile, and offensive environment, and under the circumstances, was unbecoming an officer and a gentleman."¹⁵¹ The maximum sentence available was confinement for 2 years, a dismissal from service, total forfeiture, or a fine. The court sentenced Kroop to a dismissal and a \$5,000 fine, but on appeal the sentence was reduced to the fine only.¹⁵²

In a recent case reported by the *San Diego Union-Tribune*, a special court-martial at Camp Pendleton convicted Navy Commander Steven Tolan of conduct unbecoming an officer in violation of Article 133.¹⁵³ Several women alleged that Tolan made sexually explicit remarks to them at El Toro Marine Air Station. A former petty officer testified that Tolan spanked her on her birthday, made sexual remarks about her body, and wrote on her legs with a grease pencil. Another victim testified that Tolan grabbed her in a parking lot and put his hand up her shirt. The Navy also charged Tolan with indecent assault and maltreatment of a subordinate, but the court acquitted him of those charges. The court sentenced Tolan to a \$2,000 fine, reprimand and a loss of seniority.¹⁵⁴ This case raised questions about what conduct will qualify as an aggravated act of sexual harassment which requires immediate, mandatory separation according to the "zero tolerance" policy.

From these cases one can begin to understand how unpredictably sexual harassment is handled in the military courts. The wide variety of charges illustrates the inconsistency of sexual harassment enforcement and punishment. In addition, it is apparent that a body of consistent case law on sexual harassment has not been developed in the military courts. The above cases show that only the most serious offenses progress to a military courts-martial. The relatively mild cases of environmental harassment are almost always handled administratively. One result of this is the progressive redefining of sexual harassment that takes place in the civilian courts does

150. *Id.* at 633.

151. *Id.* at 635.

152. *Id.* at 630-31.

153. Gregory Vistica, *Navy Officer Guilty of Sex Harassment*, S.D. UNION-TRIBUNE, July 18, 1992, at B1.

154. *Id.* He was moved to the bottom of the commander seniority list. Such action essentially ended all possibility of promotion to Captain. Failure to promote to Captain often triggers an involuntary early retirement.

not occur in the Navy. Commanding officers are unlikely to monitor the civilian courts for new circumstances judged to constitute sexual harassment.

C. *Inadequacies in the Navy's System*

The military has a strong system in place to deter sexual harassment. In the civilian world, a harasser faces civil suits and possible job loss for most acts of sexual harassment. Military personnel face penal sanctions, fines, poor fitness reports¹⁵⁵ and discharges which could severely hinder future employment. With such high risks, harassers should be deterred. Unfortunately, studies show that the Navy has a higher rate of sexual harassment than civilian work places.

There are many possible explanations for the Navy's high rate of sexual harassment. One significant and difficult to counteract cause for the high incidence of sexual harassment in the Navy is its institutional culture. This culture has developed over time as a result of a series of shared experiences, development of myths and the exploits of organizational heroes. Over the years, the Navy has developed a unique culture which has established its own unique way of viewing the world.¹⁵⁶ Throughout training, Navy personnel are taught to behave and react in a certain way to stimuli. The goal is to increase consistency of behavior which is crucial during wartime. Navy personnel are taught to obey authority, not question it; Navy personnel swear to uphold the orders of those officers appointed over them.¹⁵⁷ The great majority of commanding officer billets are filled by men. When problems arise, such as an incident of sexual harassment by a coworker, victims are encouraged to go to the commanding officer for guidance. It may be difficult in such circumstances for the male commanding officer to divorce himself from a culture which views sexual harassment as unimportant. Additionally, severe problems arise when a superior officer is the perpetrator since the chain of command is the normal and preferred method of grievance.¹⁵⁸

Alcohol abuse and male chauvinism are two further cultural problems in the Navy. Indulgence in alcohol is a tradition in the Navy. A "wetting down" is one example of a tradition which encourages consumption of

155. Outstanding fitness reports become more and more important as the Navy trims its personnel due to Congressional budget constraints. A House defense bill recently proposed seeks to eliminate 10,000 administrative jobs at the Navy's major command headquarters. Associated Press, *House Punishes Navy With Job Cuts*, S.F. CHRONICLE, July 3, 1992, at A3. With more cuts on the way, poor fitness reports will have an increasingly greater deterrent effect on personnel. In addition, the fitness report is completed by the commanding officer without the need to resort to formal punishment remedies. This gives the commanding officer great leverage against an accused harasser. A single poor fitness report can end an officer's career. More latitude is given to enlisted members.

156. Krohne, *supra* note 8, at 178.

157. 10 U.S.C. §§ 891-898 (1991).

158. Krohne, *supra* note 8, at 178.

alcohol. It occurs upon promotion in rank. "Greenlighting" is another tradition promoting alcohol use. It is an impromptu meeting at an unsuspecting unit member's house. Such alcohol consumption often leads to poor judgement, and many instances of sexual harassment stem from drunkenness.¹⁵⁹ Male chauvinism in the Navy is a tradition which serves to make women unwelcome additions. Sailors have discussed women in pejorative terms while at sea for hundreds of years. Women on board ship were once considered bad luck. Sailing vessels used to have nude female figurines on the bow. Navy lectures have been known to have slides depicting nude females to keep audience attention.¹⁶⁰ Civil courts consider pervasive nude photographs in the workplace to be evidence of a hostile work environment.¹⁶¹

Finally, women are not permitted to perform what are considered the most important duties in the Navy, due to a congressional ban on women in combat.¹⁶² This restriction severely limits the ability of women to overcome the traditional stereotypes which encourages sexual harassment.¹⁶³ Until this limitation on duty assignments is eliminated, changing the Navy's culture will be very difficult. Without a change in culture, sexual harassment in the Navy will continue.¹⁶⁴

Another problem area concerns how sexual harassment complaints are handled in the Navy. The vast majority of them are channelled up through the chain of command. At each level of the chain, the superior officer has discretion concerning how to deal with the complaint. Additionally, each superior has a vested interest in what is termed in naval aviation parlance "covering your six." Each individual is held responsible for the personnel below them. Covering your six can lead to many complaints being hidden or ignored. Investigations into a complaint attract attention to the problem, and a problem looks bad for the superior responsible.¹⁶⁵

159. *Id.*

160. *Id.*

161. *Robinson*, 760 F. Supp. at 1542-43.

162. 10 U.S.C. § 6015 (1991). See *supra* note 9 for statutes terms.

163. See Robin Rogers, *supra* note 13 at 165. Women are denied opportunity for the best jobs in the Navy. This not only limits advancement in the Navy but also limits job opportunities in the civilian defense industry. However, such discrimination is beyond the scope of this article.

164. Another element of Navy culture is the reaction that Navy wives have toward female Navy personnel. Close quarters, long deployments and mixed crews put additional stress on already fragile marriages. Many Navy wives resent female crewmembers. DOROTHY SCHNEIDER & CARL SCHNEIDER, *SOUND OFF! AMERICAN MILITARY WOMEN SPEAK OUT* 50 (1988). One victim who reported an incident of harassment was telephoned by the harasser's wife who said "[y]ou flaming bitch, you brought this on yourself and I believe that you and my husband were maybe doing something on the side." Krohne, *supra* note 8, at 145.

165. "Usually the physical assaults servicewomen told us about were reported but handled semiofficially, at as low as level as possible, by people who wished to quiet the troubled waters or swim out of them." SCHNEIDER & SCHNEIDER, *supra* note 164, at 47.

In addition, the imbedded culture of the Navy may cause individuals to be insensitive. Since the handling of complaints is up to the discretion of superior officers, their personal sensitivity to sexual harassment will often determine whether or not a complaint is dealt with properly. Adequate sexual harassment training would go a long way toward remedying this problem. Prior to Tailhook, the only sexual harassment training occurred upon transfer to a new duty station.¹⁶⁶ How seriously sexual harassment training is taken is, once again, at the commanding officer's discretion. Punishment for substantiated complaints is also subject to the discretion of either the presiding officer at a Mast or the members of a court-martial.¹⁶⁷

A further problem, which is perhaps greater in the Navy than in the civilian sector, is retaliation.¹⁶⁸ The great discretion available to superior officers and the prevailing cultural attitude towards judicial harassment claims cause many victims to fear retaliation. Victims are often worried that their stories will not be believed and that their careers will be ruined.¹⁶⁹ Reporting sexual harassment can be especially difficult where the harasser is well respected and liked in the command.¹⁷⁰

Finally, Navy women face isolation and close quarters. Because women are vastly outnumbered in the service (10 to 1), the likelihood of male to female sexual harassment is higher.¹⁷¹ In addition, Navy personnel often face much closer working conditions than in the civilian sector. Navy living quarters and dining halls are two examples. The result is Navy women are less able to escape from a hostile environment. Even after reporting an incident there is often no relief.¹⁷²

D. The Tailhook Incident

The Tailhook incident is an excellent illustration of many of the Navy's problems in dealing with sexual harassment. Tailhook is a private organiza-

166. This limited training occurs during orientation to a new command. It is called "Navy Rights and Responsibilities Training" and is often a pro forma recitation of Navy policy. Second Interview with Dr. Kay Krohne, retired Navy Commander, and former commanding officer (July 27, 1992). Her doctoral dissertation focussed on sexual harassment in the Navy

167. The recent prosecution for sexual harassment of Commander Steven Tolan shows the discretion available to Navy officers. The court-martial sentenced the accused to far less than zero tolerance orders. Vistica, *supra* note 153.

168. Few women filed complaints in response to sexual harassment—only 12% of enlisted women and 5% of female officers. The main reason for not reporting incidents was fear their work situation would be more difficult. NAVY PERSONNEL RESEARCH AND DEVELOPMENT CENTER, *supra* note 3, at 17.

169. SCHNEIDER & SCHNEIDER, *supra* note 164, at 47.

170. Often victims who report sexual harassment will be shunned by the rest of the command. Additionally, victims report that they are constantly watched during the investigation. Krohne, *supra* note 8, at 145-48.

171. This is a problem for women in similar situations in the civilian sector who work in a male-dominated work place such as police officers, firemen and shipyard workers.

172. J.H. STIEHM, ARMS AND THE ENLISTED WOMAN 205 (1989).

tion of current and retired Naval and Marine Corps aviators that conduct annual conventions which include seminars on aviation safety and technology. Thousands of Navy aviators attended each year.¹⁷³ In September 1991, Tailhook was held in Las Vegas, Nevada. As per tradition, many squadrons operated "hospitality suites" where pornographic movies, strippers and alcohol were readily available. In a question and answer session with the head of naval aviation, a female aviator asked Vice Admiral Richard Dunleavy when women would be permitted to fly combat missions. This question was received by the mostly-male audience with a chorus of "boo's." Admiral Dunleavy initially ducked under the table as if he had been hit by a missile and then responded that women would fly combat missions if and when the Department of Defense told the Navy to let women perform this mission. This response by Dunleavy had two effects. First, because Dunleavy did not verbally support the abilities of women aviators, it left the audience with the impression that its highest officer did not personally believe women should fly in combat. Second, it told combat aviators that they might have to fly with women if outsiders said so.¹⁷⁴ During the next three nights, aviators assaulted 26 women in the hallway of the Las Vegas Hilton.¹⁷⁵ Of those assaulted, over half were female Navy officers.¹⁷⁶

173. An estimated 5,000 individuals attended Tailhook '91. REAR ADMIRAL GEORGE E. DAVIS, NAVAL INSPECTOR GENERAL, REPORT OF INVESTIGATION: DEPARTMENT OF THE NAVY/TAILOOK ASSOCIATION RELATIONSHIP PERSONAL CONDUCT SURROUNDING TAILHOOK '91 SYMPOSIUM, CASE NO. 920684 3 (1992).

174. Interview, *supra* note 166.

175. The story of one alleged victim of the Gauntlet from the NIS investigation details the severity of the sexual assaults that occurred. (The blank spaces are part of the report since the identities of those involved are still classified.) The victim reported to investigators that

she walked down the third floor hallway where the hospitality suites of various squadron were located, she was bumped by an individual approximately 6'2", dark with short dark hair, possibly hispanic or light skinned black with nice appearing white teeth. A white male with blonde hair standing in close proximity to the black hispanic male, began chanting _____ as _____ turned to look at the individual yelling _____ the black/hispanic male grabbed her buttocks with both hands. He then moved behind _____. Pressing his pelvis to her buttocks as he shoved her down the hallway. According to _____ this individual placed both of his hands down her shirt and bra, grabbing both her breasts. In an attempt to escape his grasp, _____ crouched over and grabbed his wrists, biting his left forearm and then his right hand between the thumb and index finger. The assault on _____ continued as other members of the gauntlet grabbed her breasts and buttocks. One individual reached under her skirt and grabbed her panties, apparently in an attempt to remove them. Her attempt to escape the gauntlet through an open door of a hospitality suite was blocked by two white males. According to _____ she solicited another unknown white male to help her. He responded by grabbing her breasts. _____ eventually escaped the Gauntlet by fleeing through an open door.

RADM George E. Davis, *supra* note 173.

176. John Lancaster, *Navy Probe Faults At Least 70 Officers*, WASH. POST, Jun. 3, 1992, at A1.

One of the victims was an admiral's aide. She allegedly told her boss what happened; he did nothing.¹⁷⁷ Several months later, the story broke in the press, and a full-scale Navy investigation followed.¹⁷⁸ The Naval Investigative Service interviewed approximately 2,100 witnesses.¹⁷⁹ Despite overwhelming evidence of sexual harassment, the investigation was largely ineffective, due to lack of cooperation by aviators at all levels.¹⁸⁰ In addition to lack of cooperation, NIS has been criticized for poor investigating.¹⁸¹ The Navy has now yielded to considerable congressional pressure by turning the investigation over to the Department of Defense Investigative Service.

All of the Navy's difficulties in dealing with sexual harassment can be seen when Tailhook is scrutinized. Overindulgence in alcohol and sexual stereotyping were commonplace at what should have been just a business meeting.¹⁸² By not supporting women aviators when he had the opportunity to do so, the top naval aviator made clear his continued adherence to the Navy tradition that women are second class members of the organization. Younger naval aviators raucously rebuked a challenge to Navy custom. After violent and outrageous assaults, a superior officer exercised his discretion by not initiating an investigation in an attempt to conceal the incident. An investigation was conducted by untrained and insensitive agents. The investigation was stymied by lack of cooperation and obfuscation.

177. Lt. Coughlin complained to Rear Admiral Snyder the day after she was assaulted in the gauntlet. (Lt. Coughlin was an aid for RADM Snyder.) After "some weeks" of inaction, Lt. Coughlin reported the assault to Vice Admiral Richard M. Dunleavy who initiated an investigation. In November 1991, the Chief of Naval Operations relieved RADM Snyder from his position due to his failure to respond to Lt. Coughlin's allegations. DEREK J. VANDER SCHAAP, DEPUTY INSPECTOR GENERAL, MEMORANDUM FOR ACTING SECRETARY OF THE NAVY, REPORT OF INVESTIGATION: TAILHOOK '91—PART 1, REVIEW OF THE NAVY INVESTIGATIONS 4 (1992).

178. *Id.* at 5. The NIS opened its criminal investigation of Tailhook on October 11, 1992. The NIS is the Navy criminal investigative and counter-intelligence agency. It has about 1,100 civilian investigators. The head of NIS reports directly to the Vice Chief of Naval Operations. The head of NIS is a flag officer in the Navy JAG Corps. *Id.* at 4.

179. *Id.* at 7.

180. Commanding officers refused to order subordinates to have pictures taken so that victims could identify the assailants. Lancaster, *supra* note 176. In his memorandum, the Deputy Investigator General cites two additional weaknesses in the NIS investigation. First, senior officers known to have attended Tailhook were not interviewed. Second, the scope of the investigation did not include nonassaultive criminal activity such as indecent exposure and conduct unbecoming an officer. Therefore, evidence of those offenses was not pursued. SCHAAP, *supra* note 177, at 8.

181. One NIS investigator was removed from the case after he harassed a Tailhook victim with requests for dates and name calling such as "sweet cakes." Gregory Vistica, *supra* note 153.

182. Many of the sponsors of Tailhook '91 set up exhibits in the pavilion area of the Las Vegas Hilton. The Tailhook Association served complimentary beer in this area from morning until the exhibits closed. In three days, ninety-seven half kegs of beer (16,000 twelve oz. glasses) were consumed in the exhibit area alone. Davis, *supra* note 173, at 5.

In the wake of the Tailhook debacle, many changes are taking place. The Senate Armed Services Committee held up promotions to facilitate future cooperation by the Navy.¹⁸³ Training programs on sexual harassment are being ordered by commanding officers throughout the Navy.¹⁸⁴ Complaints are being given more consideration as commanding officers seek to avoid the fate of officers who ignored the complaints of victims at Tailhook.¹⁸⁵ The Navy and Congress are openly discussing abolishing the combat exclusion for women.

IV. WHAT CAN BE DONE?

There are several things that can be done to reduce sexual harassment in the Navy. First, the Navy could strengthen its policy on sexual harassment. Currently, the Navy finally seems to have the will to impose an effective policy upon its personnel. The policy would ensure swift, sure punishment for sexual harassers. Second, Congress or the courts could reverse the *Feres* doctrine and open the door to government and personal liability for Title VII violations. This strategy would bring the Navy into line with the civilian community. Third, any branch of government could eliminate the combat exclusion. Elimination of the combat exclusion would change the culture that is at the core of the Navy's problem.

A. A New Navy Policy and Law Against Sexual Harassment

On August 2, 1989, Navy Secretary H. Lawrence Garrett, III, issued the Navy's policy on sexual harassment.¹⁸⁶ Garrett's instructions made several changes to the policy issued the year before. The new policy expanded the

183. All promotions must be approved by the Senate Armed Services Committee. That committee held up promotions of 4,900 officers until the Navy adequately investigated and punished those responsible for the sexual misconduct at Tailhook. Gregory Vistica, *Navy Kills Plans to Promote Admirals*, S.D. UNION-TRIBUNE, July 18, 1992, at A1.

184. Interview, *supra* note 166. (Dr. Krohne was employed by the Commander of Naval Air Forces in the Pacific to conduct a seminar on sexual harassment attended by 40 commanding and executive officers at the NAS North Island on July 28, 1992.)

185. Chief of Naval Operations Admiral Frank Kelso removed Admiral Jack Snyder from his command because he failed to take "timely action" in response to a complaint by his aide, an alleged victim of the gauntlet. Snyder now performs the job of a Captain but retains his rank. His career is effectively ended. Associated Press, *Officers "Stonewalled" Navy's Harassment Probe*, WASH. TIMES, Apr. 29, 1992, at A3.

At Miramar Naval Air Station, four top officers were removed after a skit performed by fighter pilots in the annual Tomcat Follies in June, 1992. The skit ridiculed Representative Patricia Schroeder, a member of the House Armed Services Committee, who has been particularly critical of the Navy's handling of Tailhook. Gregory Vistica, *Tailhook Has Submerged Navy Morale, Kelly Says*, S.D. UNION-TRIBUNE, July 16, 1992, at A1.

In a seminar attended by nearly 40 commanding and executive officers at NAS North Island, participants expressed concern over the fate of their compatriots. They clearly intend to take seriously any sexual harassment complaints by personnel in their command. Seminar, *supra* note 7.

186. SECNAVINST 5300.26A.

definition of sexual harassment to include a hostile or offensive environment. It added a requirement for periodic training, and made supervisors responsible for the prevention of sexual harassment. Finally, the new policy opened new channels for complaint and made administrative or disciplinary corrective action mandatory for substantiated complaints.

One thing that would make the Navy's goal of a harassment-free work place more attainable would be an addition to the UCMJ of a new article that makes sexual harassment a court-martial offense in its own right. This addition would help to clarify the elements of the offense and provide punishment tailored to fit that crime. Additionally, the new article is needed to make adequate tracking of progress possible. Furthermore, a new article would eliminate any misconception about whether the Navy was serious about eliminating sexual harassment from the workplace. The new article could serve as the cornerstone for the new policy.

Although the new Navy policy statement strongly condemns sexual harassment, it is inadequate in several respects. The Navy should adopt a policy similar to that ordered by the court in *Robinson*.¹⁸⁷ First, a statement of prohibited conduct should be added. The limited definition of sexual harassment is not enough. In *Robinson* the court detailed a list of prohibited actions.¹⁸⁸ Such a list could serve as a reference for the Navy. In addition to being conspicuously posted on ships and Navy bases, the prohibitory list could be added to the *Manual for Courts-Martial* as examples of what would constitute violations of a more generally worded sexual harassment article.

There are three important actions which should be prohibited by the new policy: (1) retaliation, (2) cover ups and (3) false complaints. A strong prohibition against retaliation would help to make victims come forward when they are harassed. Penalizing cover ups would encourage cooperation. cover ups would include administrative inaction as well as active obstruction.¹⁸⁹ And a prohibition on false complaints will discourage unscrupulous women from seeking advancement through fraud.¹⁹⁰

Second, a schedule of penalties needs to be published with the policy statement to emphasize the seriousness of the policy. This would help in two

187. The circumstances at the Jacksonville Shipyards is not at all unlike those in the Navy—male dockyard workers far outnumbered females who were subjected to a hostile environment. *Robinson*, 760 F. Supp. at 1542-43.

188. *Id.* at 1543.

189. Although there was overwhelming evidence that misconduct had occurred at Tailhook '91, Navy investigators were unable to conduct a complete investigation. The main reason for the incomplete investigation was "closing ranks and obfuscation" by aviators present at Tailhook. John Lancaster, *Navy Harassment Probe Stymied*, WASH. POST, May 1, 1992, at A1.

190. Servicewomen note that men are vulnerable to false accusations of sexual harassment. SCHNEIDER & SCHNEIDER, *supra* note 164, at 42. With the advent of Tailhook the opportunity for false complaints is especially high. Poor or low performing women have an excellent opportunity to ruin careers of men who give them poor fitness evaluations. Anonymous Navy Lieutenant, *supra* note 111. The low percentage of victims that reported harassment indicate that bogus complaints were likely a small percentage in the past; however, the new emphasis on sexual harassment since Tailhook opens the door for bogus complaints.

ways: (1) deterrence and (2) discretion. One of the most efficient ways to deter sexual harassment is to let would-be harassers know the severity of the penalties they will face for breaking the rules. In *Robinson*, penalties were outlined clearly for all employees to see;¹⁹¹ the Navy would profit from the same policy. Additionally, mandated punishments, upon conviction, would serve a second purpose of eliminating some of the discretion now available to superior officers to undercut the policy by imposing minimal penalties. Additionally, courts-martial would be similarly limited during the sentencing phase of the trial by the mandated punishments.

The current investigation and complaint system employed by the Navy is ineffective. The Navy should revamp its complaint and investigation procedure to encourage victims to come forward. If victims do not report sexual harassment, it will remain a serious problem. Studies show that many victims do not have confidence in the current grievance procedure.¹⁹² The *Robinson* court ordered JSI to designate at least two employees in a supervisory or managerial position to serve as Investigative Officers. The court required that these individuals be thoroughly trained in sexual harassment.¹⁹³ The Navy should require nothing less.¹⁹⁴ In addition to serving as investigative officers, these individuals could help with education and training.

To encourage victims to come forward, the names and locations of the investigative officers should be conspicuously posted in work areas. Recent studies show that only a little more than half of the duty stations publicize the availability of formal complaint channels for sexual harassment.¹⁹⁵ Many victims are reluctant to complain up the chain of command since they may be faced with complaining to the harasser or a close associate of the harasser. An independent investigator, outside the chain of command, would reduce this concern for victims. In addition, an anonymous complaint system needs to be developed for timid victims or witnesses to harassment.

The investigations should be carried out competently. All investigations should produce a written report which should be available to the complainant within a reasonable time.¹⁹⁶ Furthermore, the recommendations and conclusions of the investigating officer¹⁹⁷ should also become part of the permanent file. Finally, the files should remain available for inspection by a monitoring body.

191. *Robinson*, 760 F. Supp. at 1542-44.

192. 90% of women victims surveyed "did *not* take formal action against the perpetrators of their described experiences of sexual harassment." DEFENSE MANPOWER DATA CENTER, *supra* note 4, at 36.

193. *Robinson*, 760 F. Supp. at 1544.

194. Some leeway will obviously be needed for smaller commands.

195. DEFENSE MANPOWER DATA CENTER, *supra* note 4, at 47

196. *Id.*

197. R.C.M. 405(d)(1).

The Navy also needs to overhaul its current system of sexual harassment education and training. Currently, all recently inducted or transferred Navy personnel receive some sexual harassment training as part of the orientation procedure.¹⁹⁸ To improve this orientation, a copy of the new policy should be given to each individual. All supervisors and managers in the Navy should annually attend a training seminar in sexual harassment. This seminar should be attended by the commanding officer of the unit to show his or her support for the program. The newly trained managers should then conduct an oral briefing on sexual harassment for the Navy personnel in their commands every six months. All female Navy personnel should be given training in strategies for preventing and resisting sexual harassment. Investigative officers should attend annual training seminars to ensure adequate training in investigative techniques.¹⁹⁹

The Navy also needs to create a body to thoroughly monitor sexual harassment from within. A new UCMJ article prohibiting sexual harassment and the new system of investigators should facilitate monitoring. Careful monitoring of the complaints would reveal which units are taking the policy seriously and permit timely corrective action by Navy leaders. It would also allow timely congressional supervision of Navy compliance.

The Navy has the ability to change its current course on sexual harassment through aggressive prosecution of offenders. Not long ago the Navy had a serious drug problem; that problem has been substantially reduced. Not long ago the Navy had a problem with racism; that problem has been also been substantially reduced. In both cases, a strong, aggressive policy was largely successful in changing conduct. Sexual harassment is a problem that could be reduced with just such a policy.

B. *Opening the Door to Civil Liability*

In order to deter sexual harassment in the workplace in the civilian sector, victims may seek redress by suing the harasser, and often the employer as well, to recover damages. The courts currently deny uniformed military personnel access to this form of recovery. Some scholars have argued that this denial by the courts is wrong.²⁰⁰ These scholars point out several inconsistencies in the *Feres* doctrine.

One rationale the courts have employed to support the *Feres* doctrine is Congress has plenary authority to regulate the military.²⁰¹ In carrying out its duty Congress established the UCMJ.²⁰² The military justice system is

198.xx Recently, the acting Secretary of the Navy ordered that every command will conduct a "stand-down" to train personnel in sexual harassment. John Lancaster, *Navy Orders Training on Harassment*, WASH. POST, July 3, 1992, at A1.

199. See *Robinson*, 760 F. Supp. at 1546.

200. See Schwartz, *supra* note 77.

201. *Chappell*, 103 U.S. at 301. citing art. I, § 8, cls. 12-14.

202. 10 U.S.C. §§ 801-940 (1991).

effective in deterring military personnel inclined to depart from acceptable norms of conduct. There are problems, however, with this system when it comes to deterring widespread institutional problems, such as sexual harassment.²⁰³ The system allows wide discretion in answering complaints of sexual harassment. Since sexism is part of the culture imbedded in the Navy, handlers of complaints are often not sensitive to victims. Many senior officials do not take the problem seriously.²⁰⁴

Another rationale used to justify the *Feres* doctrine is the military offers other remedies for its injured employees. The *Chappell* and *Feres* courts pointed out that military personnel have Article 138, the Board of Correction and veterans' benefits to remedy any grievances that were not adequately dealt with by the chain of command.²⁰⁵ Each of these remedies is inadequate. Article 138 only provides remedies where a superior officer mistreats a subordinate or neglects to act when duty demands. In addition, few Navy personnel are aware of its existence, and discretion still remains for superior officers who receive such complaints. The Board of Correction only deals with correction of service records and provides no relief for physical injury. Veterans benefits are only available after receiving an appropriate discharge and the amount available is significantly less than damage recoveries in a tort suit.²⁰⁶

The final justification for the *Feres* doctrine is the civilian courts are ill-equipped to judge military affairs; that investigative intrusions would be disruptive to the military mission and lawsuits would inhibit vigorous decision-making. The Constitution makes the President, a civilian, Commander-in-Chief of the military,²⁰⁷ and grants power to a civilian Congress, to declare war and regulate the military.²⁰⁸ Similarly, Article III of the Constitution says nothing which indicates judicial review of military affairs should be restricted.²⁰⁹ The argument concerning disruption caused by factual investigations is weak in light of the fact that civilian defense employees can and do sue uniformed military personnel in civilian court.²¹⁰ The type of decision-making inhibited by civilian courts might not be a bad idea in cases of sexual harassment.

203. Schwartz, *supra* note 77, at 999.

204. Krohne, *supra* note 8, at 145.

205. See Chappell, 103 U.S. at 303-05; *Feres*, 462 U.S. at 144-46.

206. Howland, *supra* note 77, at 134-37.

207. U.S. CONST., art. II, §2, cl. 1.

208. U.S. CONST., art. I, § 8, cl. 12.

209. See U.S. Const. art. III.

210. See *Bledsoe v. Webb*, 839 F.2d 1357 (9th Cir. 1988) In *Bledsoe*, the commanding officer refused to allow a civilian female Navy department employee to board a Navy vessel to perform her job exclusively because of her gender. The court held that her Title VII action was justiciable. *Id.* at 1358. The court distinguished *Chappell* and its progeny by pointing out that the plaintiff was not a member of the military services, and that no policy was implicated which was unmistakably military in nature. *Id.* at 1360. In addition, the court held that her injury was compensable. *Id.* at 1361.

In *Hill v. Berkman*,²¹¹ Judge Weinberg rejected the *Feres* doctrine and ruled that "members of the armed forces are federal employees who share in all Americans' constitutional right to equal protection under the law."²¹² Judge Weinberg closely scrutinized the legislative history of Title VII and decided that no compelling evidence existed to suggest that Congress intended to exempt uniformed military personnel from coverage while allowing other defense employees redress. Furthermore, courts would be remiss in not granting the uniformed military equal protection under law. Title VII would provide a clear standard which may actually improve military effectiveness.²¹³

Though powerful arguments can be made that Title VII should apply to the uniformed military, opening the door to intramilitary torts is not the best solution. First, Navy personnel have a remedial system. Although the system has its shortcomings, those shorting can be repaired. Navy personnel need to know they can rely upon the Navy when problems arise. In addition, the need for monetary damages is reduced by free medical care available to Navy personnel. Recovery for pain and suffering is unavailable, but there will always be costs associated with military service.

Second, civilian investigators would be disruptive to the Navy's mission. It is true that civilian Navy personnel may sue under Title VII, but civilians make up a only a small part of the Navy. Opening the door to uniformed Navy personnel would certainly have adverse effects upon operational efficiency. Furthermore, uniformed Navy personnel are unlikely to cooperate with civilian investigators. Also, Navy personnel are deployed throughout the world and often at sea. Investigation by civilians would be costly, inefficient and potentially dangerous if hostilities broke out.

Third and most importantly, uniformed Navy personnel must have faith in their superiors. Navy personnel must be team-oriented and self-sufficient in order to be truly effective in their mission. Navy personnel should not be encouraged to try to seek large recoveries against their fellow workers and employer. The Navy's mission is dangerous. Personnel need to look inward for strength. If Navy personnel could sue one another for damages, morale would certainly suffer. National security depends upon a cohesive Navy. Civil lawsuits would weaken the Navy internally.

211. 635 F. Supp. 1228 (E.D.N.Y. 1986), (*disapproved by Roper v. Department of Army*, 832 F.2d 247 (1987)). In *Roper*, a uniformed employee of the Army sued for race and sex discrimination under Title VII. The plaintiff cited *Hill* as authority for her position. The court disagreed with Judge Weinberg's admittedly cogent arguments. The *Roper* court held the military differed greatly from the civilian workplace. In the absence of express indication the legislature intended to extend Title VII to uniformed military, the court declined to provide them a Title VII remedy. *Roper*, 832 F.2d at 248.

212. *Hill*, 635 F. Supp. at 1238.

213. *Id.* at 1236-38.

C. *Elimination of the Combat Exclusion for Women*

Although the aviators at Tailhook would shudder at the suggestion, the sexual misconduct there created an unprecedented impetus for eliminating the combat exclusion.²¹⁴ A change allowing women to perform combat missions would provide women with a substantially greater opportunity for service. If women were permitted this unrestricted duty, their second class status would be largely eliminated by deeds.²¹⁵

Those who advocate the combat exclusion ("exclusionists") provide four rationales. Each rationale is based on "military necessity"—the mission of the military is to wage war, and women will hinder this mission. First, exclusionists point out that women have "lesser physical capabilities."²¹⁶ Such an argument only accounts for the average woman compared to the average man. Additionally, modern warfare is less and less dependent upon physical strength. Second, exclusionists argue that women are less aggressive than men. Once again, this is a generalization which fails to account for passive men and aggressive women. Third, exclusionists contend male combat personnel will be negatively affected by the presence of women. Experiments in mixed combat teams have disproved this contention.²¹⁷ Finally, exclusionists assert that civilized society should not subject women to the dangers and horrors of combat. In past wars women were exposed to combat's horror, and, in the future, non-combatant military personnel cannot avoid combat's danger.²¹⁸

Exclusionists cannot reasonably justify the combat exclusion. Those who advocate change must remain careful to consistently argue that women can perform combat duties as well as men. Standards for combat positions must be upheld if the exclusion is abolished. Otherwise, the mission of the military will suffer, and national security will be in jeopardy.

The combat exclusion could be abolished by any of the three political branches.²¹⁹ The courts could subject the current rule to equal protection scrutiny.²²⁰ Given the weakness of the exclusionists argument, it would make sense that the combat exclusion rule would not survive equal protection

214. 10 U.S.C. § 6015 (1991). *See supra* note 9 for full description of statute.

215. *See Rogers, supra* note 13.

216. *Id.* at 172.

217. U.S. AIR FORCE PERSONNEL COMPOSITION STUDY: AN ANALYSIS OF THE EFFECT OF VARYING MALE AND FEMALE FORCE LEVELS, ANNEX 5, at 2-22, 23 *cited in Rogers, supra* note 13, at 174. The studies showed that varying the ratios of females to males in units did not have significant adverse effect.

218. *See Rogers, supra* note 13, at 175-76.

219. *See Michael Noone, Women in Combat: Changing the Rules*, 39 NAVAL L. REV. 187 (1990).

220. U.S. CONST. amend. XIV, § 2.

analysis.²²¹ However, the Rehnquist court is unlikely to disturb the combat exclusion rule; it is committed to the separateness of the military community and the exclusive power of the Congress to regulate the armed forces.²²²

President Truman demonstrated the executive branch's authority to interpret restrictive laws in the 1940's when he eliminated institutional racial discrimination established by *Plessy v. Ferguson's*²²³ separate but equal doctrine.²²⁴ Truman's order shows the president's power as Commander-in-Chief to effect change in the military. The political climate of the 1940's demanded the change that Truman ordered. Today's political climate is greatly affected by Tailhook.²²⁵ Tailhook revealed to the public some of the problems female Naval personnel face. President Clinton has expressed an keen interest in removing the military prohibition on homosexuals. It would not be altogether surprising for him to express a similar interest in the combat exclusion.

With the current political atmosphere, Congress seems the most likely branch to eliminate the combat exclusion. Representative Patricia Schroeder, a member of the Armed Services Committee, has advocated this change for years. The combat exclusion is under strong criticism in both the House and Senate Armed Services Committees.²²⁶ The 1992 election produced many new members of Congress. The final Tailhook investigation report released by the Department of Defense Investigator General will likely fuel interest in the combat exclusion with the new Congress.

221. Intermediate scrutiny requires that a statute must "serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

222. "[P]erhaps no other area has the Court accorded Congress greater deference. . . . Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). *Rostker* involved a dispute between the President and Congress over registration of women for the draft. The President urged Congress to amend the law to allow women to register. After lengthy debate, Congress declined to allow female registration. After a district court ruled the gender-based classification unconstitutional, the Supreme Court reversed.

223. 163 U.S. 537 (1896).

224. Exec. Order No. 9981 (1948) *cited in* Noone, *supra* note 175, at 193.

225. President Bush, under considerable political pressure due to the impending November 1992 election, convened a commission to study the combat exclusion. The commission recommended the current policy barring women ground fighting and combat missions in Air Force and Navy aircraft be upheld. However, the commission's chairman pleaded with the committee to not completely accept the status quo. Thus commission "recommended retaining the current ban on women aboard submarines and amphibious vessels but allowing them for the first time to serve on fighting ships that seek out the enemy, such as destroyers, frigates and aircraft carriers." John Abrams, Associated Press, *Military Women Recommended for Sea, Not Land or Air Combat*, BOST. GLOBE, Nov. 4, 1992, at National/Foreign 3.

226. In public hearings before the House Armed Services Committee on July 30, 1992 the top officers of all four services answered questions on sexual harassment and the combat exclusion. The military emphasized that sexual harassment should have nothing to do with the combat exclusion. Congressman Les Aspin questioned whether the sexual harassment problem would ever be solved while women were relegated to second class status. *Nightly News*, (CNN cabletelevision broadcast, July 30, 1992).

Whether it happens sooner or later, the combat exclusion seems doomed to extinction. When it finally is abolished, discrimination against women, of the type exemplified by Tailhook, will certainly wane. The culture in the Navy will accept women more readily if they are able to perform their full range of duties.²²⁷ In time, women will gain the respect needed to reduce incidences of sexual harassment.²²⁸ This process will be slow—old habits die hard. Title VII aims to *eliminate* gender discrimination—not reduce it. Changing the way people think is the most effective way to change conduct. The best chance for the Navy to eliminate sexual harassment is to remove the combat exclusion and retrain those currently in the Navy.

CONCLUSION

Sexual harassment is a serious problem for the Navy. Tailhook created an impetus for change in how sexual harassment will be dealt with in the Navy. The question remains as to the extent of the change to come. There are two ways the change can be effected. First, the Navy can change its policy from within and try to compel a change in the behavior of its personnel. Second, an end to the combat exclusion from without could slowly change the culture so connected to the conduct of Navy personnel.

Douglas R. Kay*

227. Lancaster, *supra* note 198.

228. A female Senior Chief Radioman pointed out in an interview with *Time Magazine* that “[w]orking together is more important than sexual-harassment training.” Women are still barred from combat ships, and only 8,800 of the 58,000 women in the Navy currently serve on the non-combat vessels. Jill Smolowe, *An Officer, Not a Gentleman*, *TIME*, July 13, 1992, at 36.

* This article is dedicated to my wife, Judi for her unending love and devotion. Special thanks to Dr. Kay Krohne for her invaluable assistance and insight.

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