

Ask the Lawyer: What Charges Do I Face if Accused of Sexual Harassment?

By Mathew B. Tully Service members who engage in sexual harassment could be charged with failure to obey a regulation in violation of Article 92 of the Uniform Code of Military Justice. The list of potential offenses, however, does not end there, particularly for officers. As SECNAVINST 5300.26D states, “[e]ach member of the team is entitled to be treated fairly, with dignity and respect, and must be allowed to work in an environment free of unlawful discrimination.” Whether it occurs on duty or off duty, sexual harassment is prohibited. DoD Directive 1440.1 defines “sexual harassment” as “[a] form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” Such conduct qualifies as sexual harassment if a service member’s subjection to or rejection of it would impact a term or condition of a person’s job, pay, or career, or if it impacts employment decisions affecting the victim. Such conduct could also rise to the level of sexual harassment if it “interferes with an individual’s performance or creates an intimidating, hostile, or offensive environment.” As the U.S. Court of Military Appeals ruled in *U.S. v. William Dear* (1994), sexual harassment could qualify as maltreatment in violation of Article 93. This case involved an Army staff sergeant who repeatedly made offensive gestures and comments to a female subordinate. For sexual harassment to rise to the level of an Article 93 offense, the victim must be subject to the orders of the accused, whose conduct must have been cruel toward, oppressed, or maltreated him or her. The fact that the officer repeated his offensive comments and gestures over a two-week period constituted maltreatment, the court said. Further, the U.S. Army Court of Criminal Appeals ruled in *U.S. v. Claude Carson* (2001) that the sexual harassment does not have to result in “physical or mental pain or suffering” of the victim to qualify as maltreatment. This case involved an Army sergeant who repeatedly exposed himself to a female subordinate, who later said she was shocked and bothered by this conduct. The sergeant challenged his Article 93 conviction, claiming a maltreatment offense hinges on the victim suffering physical or mental pain. However, the court said a “nonconsensual sexual act or gesture may constitute sexual harassment and maltreatment without this negative victim impact.” More recently, the U.S. Navy-Marine Corps Court of Criminal Appeals ruled in *U.S. v. Dominic Altier* (2012) that a Navy mechanical technician could be convicted of both fraternization and sexual harassment in violation of Article 92 by making unwanted sexual advances to a subordinate. He challenged his conviction on the two Article 92 specifications, claiming they amounted to a multiplicity of charges. But the court found he engaged in two “separate, distinct, and discrete acts” that could be charged separately. More specifically, he was too familiar with the subordinate in a senior-subordinate relationship (i.e., fraternization), and he created a hostile work environment (i.e., sexual harassment). Service members who are facing Article 92 or Article 93 charges over alleged sexually harassing conduct should consult with a military law attorney.