

## When sexual harassment becomes sexual misconduct

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Q. What's the difference between sexual harassment and sexual misconduct such as indecent language, and is one worse than the other?

A.

Troops can face stern punishments for sexually offensive comments, gestures and actions. But when such sexual misconduct impacts the workplace, the offense escalates to the level of sexual harassment. And the potential punishments escalate, too. Sexual harassment is a violation of Article 92 of the Uniform Code of Military Justice. Under Department of Defense Directive 1440.1, it's defined as "unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" under certain circumstances. DoD 1440.1 adds that sexual harassment occurs when the conduct impacts the "term or condition of a person's job, pay, or career," has bearing on career or employment decisions, or "interferes with an individual's performance or creates an intimidating, hostile, or offensive environment." Other offenses, such as maltreatment in violation of Article 93 or indecent language in violation of Article 134, can similarly involve such verbal or physical conduct of a sexual nature, but are not limited to the workplace. "It is the requirement of a negative impact upon the work environment that differentiates sexual harassment from other sexual misconduct" prohibited in the Manual for Courts-Martial, the U.S. Navy-Marine Corps Court of Criminal Appeals said in *U.S. v. Michael T. Balcarczyk* (2010). So if a service member's sexual misconduct has no impact on the workplace, he or she may face up to six months of confinement if convicted of indecent language or up to one year for maltreatment. But if there is workplace impact, the sexual misconduct could qualify as sexual harassment and violate Article 92 — which could result in longer jail time. Balcarczyk, a Marine Corps lance corporal, was convicted at general court-martial of, among other things, violating a lawful general order by engaging in sexual harassment, committing indecent acts and communicating indecent language in violation of Articles 92 and 134. He was sentenced to a bad-conduct discharge, total forfeitures and 18 months' confinement. He appealed, claiming that had there been no violation of a general order, he would have faced maximum confinement of only six months for his indecent language and indecent exposure. The workplace impact, the court ruled, was the essence of his "many offenses," and the reason he was "properly subjected to the greater maximum punishment authorized under Article 92."