

Staff summary of reading materials for JPP members in preparation for April 10, 2015 public meeting

A. Legislation and Reports Pertaining to Retaliation in the Military

1. Summary of Legislation Pertaining to Retaliation (8 pages)

This document, prepared by the JPP staff, includes a two-page summary of legislation that pertains to retaliation and the full text of section 1709 of the FY14 NDAA and 10 U.S.C. §1034 (The Military Whistleblower Protection Act).

2. DoD Report on Prohibiting Retaliation Against an Alleged Victim or Other Member of the Armed Forces Who Reports a Criminal Offense, June 2014 (9 pages)

As required by section 1709(c) of the FY14 NDAA, this report considered whether a new UCMJ punitive article should be enacted to prohibit retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense. The DoD concluded that retaliation is best addressed through the enhanced protections under 10 U.S.C. §1034 and Service regulations rather than adoption of a new UCMJ punitive article.

3. Excerpts on Retaliation from the DoD Report to the President on Sexual Assault Prevention & Response (17 pages)

The DoD's December 2014 POTUS report found that 62 percent of Service members who reported sexual assault also suffered from some form of retaliation. To that end, the report notes that combatting social and professional retaliation after reporting sexual assault will remain a focus area for the DoD, along with other potential barriers to reporting.

4. DoD IG Semiannual Reports for FY 2014 (25 pages)

DoD IG is required to submit a report to Congress every six months. This document contains excerpts from both semiannual reports for FY14 that specifically address whistleblower reprisal investigations and the DoD Hotline. The reports address military reprisal complaints, but they do not distinguish complaints of retaliation for making a sexual assault report.

5. GAO Report to the Ranking Member, Committee on the Judiciary, U.S. Senate, "Whistleblower Protection: Actions Needed to Improve DoD's Military Whistleblower Reprisal Program," February 2012 (85 pages)

In whistleblower complaints involving reprisal, the GAO found that DoD IG generally did not meet statutory requirements to report on investigations within 180 days and did not provide alternative notification. The report found DoD IG and the Service BCMRs did not consistently identify and track data on action taken to undo reprisal damage done to whistleblowers, thereby potentially not affording whistleblowers full protection and resolution.

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B. Articles on Retaliation in the Workplace

- 6. Retaliation: When Whistleblowers Become Victims, A Supplemental Report of the 2011 National Business Ethics Survey © 2012 Ethics Resource Center (23 pages)**

Dr. Harned, CEO of the Ethics Resource Center, will participate in the 11:00 panel.

The 2011 National Business Ethics Survey® (NBES®) revealed that nearly half of employees observe misconduct each year. The majority (65 percent) of those who observe misconduct in the workplace report it, and more than one in five employees who reports perceives retaliation for doing so. This report found that employees who feel more secure and supported (who are more likely to report misconduct) are more likely to experience retaliation, and the more an employee persists in reporting a concern, the more likely he/she is to experience retaliation.

- 7. Lilia M. Cortina and Vicki J. Magley, Raising Voice, Risking Retaliation: Events Following Interpersonal Maltreatment in the Workplace, JOURNAL OF OCCUPATIONAL HEALTH PSYCHOLOGY (2003) (19 pages)**

Professors Cortina and Magley will participate in the 11:00 panel.

Examines workplace deviance, addressing retaliation victimization in the context of interpersonal mistreatment. 1,167 public-sector employees were surveyed and experiences of work retaliation victimization and social retaliation victimization among employees was examined, finding that those suffering from retaliation demonstrated lower professional, psychological, and physical well-being.

- 8. Michael F. Noone, Chimera or Jackalope? Department of Defense Efforts to Apply Civilian Sexual Harassment Criteria to the Military, 6 DUKE J. GENDER L. & POL'Y 151-172 (Spring 1999) (22 pages)**

Professor Noone will participate in the 11:00 panel.

Explains the smaller, peculiar community of the Armed Forces as it pertains to workplace relations and "climatic" situations in the workplace that may be quid pro quo or hostile work environment. Title VII of the Civil Rights Act of 1964 governs civil liability for sexually harassing, discriminatory behavior in commercial (not social) situations. The article addresses aspects of Title VII law that focuses on sexual harassment in the workplace, including incivility that may be rude and inhospitable, but falls outside the statute's reach.

C. DoD and Service Memoranda, Policies and Regulations Regarding Retaliation

- 9. Summary Chart of Service Regulatory Provisions Pertaining to Retaliation (9 pages)**

This chart, prepared by the JPP staff, summarizes the Service's punitive regulations prohibiting retaliation, the definition of retaliation, reprisal, and personnel action, whistleblower protection and IG complaint regulations, and implementation guidance.

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10. Excerpts from Service Punitive Regulations Pertaining to Retaliation (11 pages)

- **Army Directive 2014-20 “Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense” (June 19, 2014).**

Directs that no Soldier may retaliate against a victim, alleged victim, or any member of the Armed Forces based on that individual’s report of a criminal offense. The directive is punitive, and violations may be punished under Article 92 of the UCMJ.

- **Air Force Instruction 36-2909 “Air Force Guidance Memorandum to AFI 36-2909, “Professional and Unprofessional Relationships””(June 19, 2014).**

Prohibits retaliation against alleged victims or other military members who report a crime. Instructs that violations of this provision can be prosecuted under Articles 92 or 134 of the UCMJ, or both, as appropriate.

- **ALNAV 030/14 “Retaliation Against Members of the Armed Forces Reporting a Criminal Offense” (April, 2014).**

Prohibits retaliation against alleged victims or other members of the Armed Forces who report a criminal offense. Identifies this prohibition as a lawful, general order. If violated, is punishable under Article 92 of the UCMJ.

11. Recent SECDEF Directive Memoranda Relating to Retaliation Against Sexual Assault Victims (14 pages)

- **December 3, 2014 SECDEF Memorandum**

Directs the Secretaries of the Military Departments to implement (by January 30, 2015) installation sexual assault prevention studies, training curriculum for first-line supervisors of Service members to address retaliation, & procedures for installation-level commanders to assess & refer all reports of retaliation, ostracism, maltreatment, & reprisal.

- **February 2, 2015 SECDEF Memorandum (2 pages)**

Directs USD(P&R), in collaboration with the Office of General Counsel, the Inspector General, and the Secretaries of the Military Departments, to conduct a comprehensive review of the means available to address both social and professional retaliation.

- **March 12, 2015 Under Secretary of Defense Data Call (2 pages + attachments)**

Requests the Secretaries of the Military Departments provide two types of data on retaliation allegations associated with unrestricted sexual assault reports: (1) Alleged Retaliation Case Synopses, which captures info about cases of retaliation/ostracism and any action taken; (2) Case Management Group (CMG) Retaliation Allegations Snapshot, which captures info about instances of retaliation (as defined by Service regulations) discussed at each Service’s monthly command CMG. Requires data to be submitted to DoD SAPRO by April 3, 2015 for consolidation in support of the DoD SAPRO Annual Report to Congress in April 2015.