SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 352 (Eggman)
Version: February 9, 2021
Hearing Date: April 6, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

The military: sexual harassment

DIGEST

This bill makes sexual harassment an offense for which members of the California state militia may be disciplined, requires the California Military Department to report aggregate, annual statistics regarding the prevalence of sexual harassment, and clarifies that members of the California militia on active duty can be held criminally or civilly liable for actions they take that are not in performance of their duty.

EXECUTIVE SUMMARY

Sexual harassment is an ongoing problem in the military. In addition to being a problem in and of itself, sexual harassment is often a precursor to sexual assault, according to a 2019 Department of Defense report. This bill proposes three measures intended to help eradicate sexual harassment within the California State Militia. First, the bill establishes that sexual harassment can be a basis for military discipline in California. Second, the bill clarifies that California militia members on active duty can be held criminally and civilly liable for acts they do that are not in the performance of their duty, such as sexual harassment and sexual violence. Finally, the bill seeks to shed light on the prevalence of sexual harassment in the California State Militia by requiring the California Military Department to include information regarding sexual harassment in specified annual reports.

The bill is author-sponsored. Support is from National Guard member advocates. There is no known opposition. The bill passed out of the Military and Veterans' Affairs Committee on a vote of 7-0.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Requires the California Military Department (CMD) to annually report the information regarding the Sexual Assault Prevention and Response (SAPR) Program, as specified, to the Governor, the Legislature, the Senate Committee on Veterans Affairs, the Assembly Committee on Veterans Affairs, the Attorney General, and the United States Attorneys in California. (Mil. & Vet. Code § 58.)

2) States that members of the militia in active service shall not be liable civilly or criminally for any act done by them in the performance of their duty. (Mil. & Vet. Code § 392.)

3) Requires a member of the active militia who, when subject to the Uniform Code of Military Justice (UCMJ) as incorporated by this code, violates a provision of the Penal Code for a sexual assault crime or an attempt of that offense, shall be subject to prosecution by the office of the district attorney or other equivalent civilian prosecutorial authority with appropriate jurisdiction. The CMD or California National Guard (CNG) may claim jurisdiction only under the UCMJ as incorporated by this code, if the district attorney, or other equivalent civilian prosecutorial authority, refuses to pursue a criminal prosecution of that member. (Mil. & Vet. Code § 470.5(a).)

4) States that a member of the active militia who is found guilty of a qualifying sexual assault offense, or an attempt of that offense shall be punished as the general court-martial may direct, subject to Section 456, and that punishment shall include, at a minimum, dismissal or dishonorable discharge. (Mil. & Vet. Code § 470.5(b)(3).)

5) States that any person who commits a sexual act upon another person, as specified, is guilty of rape and/or sexual assault and shall be punished as a court-martial may direct. (10 USC § 920 Art.120)

This bill:

1) Makes a series of findings and declarations about the negative impact of sexual harassment on military operations, the link between sexual harassment and sexual assault, and how making sexual harassment a standalone offense would help to combat it.

2) Directs the California Military Department to publish annual, aggregate data regarding the prevalence of sexual harassment in the state militia.

3) Clarifies that members of the California militia on active duty can be held criminally or civilly liable for actions they take that are not in performance of their duty.

4) Establishes that a member of the active militia who has been lawfully ordered to any type of state duty and who commits sexual harassment may be punished by specified military proceedings or by a court-martial.

5) Exempts from (4), above, offenses committed by members of the active militia who were not in a duty status or not ordered to a duty status at the time of the offense or omission, unless it is alleged that the member engaged in an affirmative act or omission that established a connection between the offense and service in the active militia. Jurisdiction shall exist in all circumstances regardless of where the offense was committed.

6) Defines "sexual harassment" to mean conduct that involves an unwelcome sexual advance, a request for sexual favors, or deliberate or repeated offensive comments or gestures of a sexual nature, towards, from, or in the presence of any person or persons, if any of the following apply:
   a) submission to the conduct was made either explicitly or implicitly a term or condition of a person's job, pay, or career;
   b) submission to or rejection of the conduct by a person was used, or threatened to be used, as a basis for career or employment decisions affecting that person;
   c) the conduct had the purpose or effect of unreasonably interfering with any person's work performance or created an intimidating, hostile, or offensive working environment for any person, and was so severe or pervasive that a reasonable person would have perceived that the work environment was hostile or offensive.

7) Does not preclude any other military or civilian authority from exercising its jurisdiction over any act or omission that violates any local, state, or federal law.

COMMENTS

1) The bill's intent and framework

The intent behind this bill is to try to cut down on incidents of sexual harassment and sexual violence within the California State Militia. To achieve that aim, the bill employs three distinct tools: (1) establishment of sexual harassment as a standalone basis on which a militia member may be disciplined; (2) clarification that militia members can be made civilly and criminally liable for acts of sexual harassment and sexual violence; and (3) the addition of information regarding incidents of sexual harassment into existing reporting requirements related to sexual violence more broadly.

Each of these components of the bill is discussed in turn in the Comments below.

2. Establishment of sexual harassment as a standalone basis for disciplinary action

This bill would establish that sexual harassment, by itself, can be the grounds upon which disciplinary action is taken against a member of the California state militia. According to a 2019 Department of Defense report, incidents of sexual harassment are often precursors to incidents of sexual violence.[1] By cracking down on sexual harassment, therefore, the author hopes not only to eliminate the hostile and discriminatory environment that sexual harassment creates, but also to head off conduct that might otherwise escalate into sexual violence.

To make clear exactly what kind of behavior will lead to discipline, the bill sets forth a definition of sexual harassment. Apparently modeled on a definition of sexual harassment in federal law governing the Armed Forces (10 U.S.C. 1561(e)), the definition used in the bill largely aligns with definitions of sexual harassment used in other areas of the law. The bill's definition includes both the *quid pro quo* and hostile environment forms of sexual harassment. *Quid pro quo* sexual harassment occurs when the harasser conditions the receipt of some benefit – a promotion, better conditions – or the avoidance of some punishment, on the victim's tolerance of, or acquiescence to, the harasser's sexual behaviors or requests. Hostile environment harassment takes place when the harasser engages in unwelcome, sexually-related conduct or expression that is sufficiently severe or pervasive that it both subjectively and objectively creates a hostile environment for the victim.

While most of this formulation aligns with how California law treats sexual harassment in other contexts, there is at least one nuanced, but important difference. For many years, jurisprudence interpreting the objective element of the hostile environment sexual harassment definition used the "reasonable person" standard. In other words, courts were supposed to ask themselves if a reasonable person would have found the behavior in question sufficiently severe or pervasive that it created a hostile environment. The "reasonable person" standard is written into the definition of sexual harassment contained in this bill.

For the past 30 years, however, law applicable in California has instead employed the "reasonable victim" standard to adjudicate the objective element in hostile environment sexual harassment claims. (*Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878. The reasonable victim standard is frequently also referred to as the "reasonable woman" standard in light of the fact that sexual harassment is most often perpetrated against

[1] *Sexual Assault Accountability and Investigation Task Force Report* (Apr. 30, 2019) U.S. Department of Defense https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF_REPORT.PDF (as of Mar. 19, 2021) at p. 18 ("Based on surveys conducted by the Department, there is a strong positive correlation between the occurrence of sexual harassment within military units and the occurrence of sexual assault.")

women. Under the reasonable victim standard, a court is supposed to consider not how a disembodied reasonable person would perceive what had happened, but how a reasonable person with the same protected characteristics as the victim would have perceived it. The idea is to take into account the fact that even perfectly reasonable people will perceive situations differently depending on who they are. Given the levels of sexual violence perpetrated against women, for example, a reasonable woman could be highly disturbed by commentary or behavior that a reasonable man might disregard as relatively harmless.

Given that the "reasonable victim" standard provides greater protection against sexual harassment and is already applied in other contexts of California sexual harassment law, the author proposes to offer an amendment in Committee that would incorporate the "reasonable victim" standard into the bill's definition of sexual harassment.

3. Clarification of civil and criminal liability for militia members on active duty

Existing law states that members of the militia in active service are not liable civilly or criminally for any act done by them in the performance of their duty. (Mil. & Vet. Code § 392.) This provision does not establish blanket immunity for militia members while they are on active duty. As the plain language states, the immunity is limited strictly to acts done "in the performance of their duty."

To the existing provision just described, this bill would add a second provision. The new provision would state that the immunity conferred by the existing provision "shall not apply to any act or acts by members of the militia in the active service of the state done by them outside the performance of their military duty, including, but not limited to, sexual assault […] and sexual harassment […]."

On one level, the proposed new provision really just expresses the logical inverse of the existing provision. In that sense, the new provision may be seen as merely making explicit what was already implicit in the law. On another level, the language in the new provision – and its mention of sexual harassment and sexual assault in particular – appear to be aimed toward addressing the fact that courts have sometimes ruled that militia members cannot be held liable for such behavior in civilian court.

The legal doctrine at the heart of the issue emanates from the U.S. Supreme Court case *Feres v. United States* (1950) 340 U.S. 135. In that case, the Court examined three scenarios in which a member of the military was harmed by the negligence of another member of the military, including an incident in which army doctors left a large towel marked "Medical Department U.S. Army" in a service member's abdomen after surgery. (*Id.* at 137.) The Court determined the U.S. government had not intended to waive immunity in such cases, and that no liability could be imposed. This principle became known as the *Feres* Doctrine.

The *Feres* Doctrine has been deeply and extensively criticized over the years. (*See, e.g.*, Johnson (1987) 481 U.S. 681, 700 (Scalia, J., dissenting) ("Feres was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.") Unfortunately, its application has also spread, under the eventual justification that courts should not interfere with matters involving military hierarchy and discipline. Courts have held that the *Feres* Doctrine applies not just to tort claims against the federal government, but constitutional violations as well. (*United States v. Stanley* (1987) 483 U.S. 669.) Courts have determined that state militias are immune from suit pursuit to the *Feres* Doctrine to the same degree as the U.S. military. (*Gilligan v. Morgan* (1973) 413 U.S. 1, 7.) And Courts have ruled that immunity pursuant to the *Feres* Doctrine applies to members of the military sued in their personal capacities as well. (*Wake v. United States* (2d Cir. 1996) 89 F.3d 53.).)

At the same time, many courts have taken an expansive – sometimes extraordinarily expansive -- view of what sorts of acts are "incident to service" and therefore subject to immunity under the *Feres* Doctrine. Ostensibly, the test for determining whether or not a particular soldier's actions are "incident to service" is:

> whether it occurred on a military facility, whether it arose out of military activities or at least military life, whether the alleged perpetrators were superiors or at least acting in cooperation with the military… whether the injured party was himself in some fashion on military service at the time of the incident. (*Day v. Mass. Air Nat'l Guard* (1st Cir. 1999) 167 F.3d 678, 682, (citing *U.S. v Johnson* (1987) 481 U.S. 681, 686.)

Of particular relevance to this bill, at least one court, though pleading with Congress and the U.S Supreme to overturn the *Feres* Doctrine, nonetheless applied it to dismiss a national guard members' lawsuit seeking damages for a superior officer's repeated acts of stalking, sexual harassment, and sexual assault over a ten year period (*Pérez v. P.R. Nat'l Guard* (D.P.R. 2013) 951 F.Supp.2d 279.) All of the superior officer's actions were, the court said, "incident to service." (*Id*. at 290).

This bill, and the statute it amends, use the phrase "in the performance of their duty" rather than "incident to service." Moreover, the bill applies to militia members on active state duty, not when they are in federal status. It does not, therefore, overturn the *Feres* doctrine. Nonetheless, emphasizing that militia members can be held criminally and civilly liable for actions taken outside of the performance of their duties, and mentioning the examples of sexual harassment and sexual assault in particular, should help to dissuade courts of the notion that such conduct is immune from liability. The phrase "in the performance of duties" would seem to be sufficiently clear on this point, since it is extraordinarily difficult to imagine any scenario in which sexual harassment or sexual violence would be necessary, helpful, or evenly vaguely related to the

performance of a militia member's duties, even if such behavior could somehow be seen as "incident to service."

4. Mitigation of privacy concerns through the use of aggregated data

Currently, the law requires the California Military Department to compile and report information regarding the number and status of sexual assault investigations taking place each year. This bill would extend the same reporting requirement to incidents of sexual harassment and require that the Department publish aggregate data for both sexual harassment and sexual assault on its website.

Among other things the Department is supposed to provide in these reports is a case synopsis for each investigation. This raises serious potential privacy and safety concerns. The number of government entities receiving the report is relatively small, but several of those entities have quite a large number of employees. Existing law accounts for the privacy concern by separating the cases into "restricted" and "unrestricted" categories. The reports on "restricted" cases are limited to aggregated statistical data to protect the privacy of victims, so presumably no case synopsis would be included to such cases. Upon completion, the Department is supposed to submit the report to a number of relevant government entities: the Governor, the Legislature, the Senate Committee on Military and Veterans Affairs, the Assembly Committee on Veterans Affairs, the California Attorney General, and the United States Attorneys in California.

Under the bill, the Department is also to publish this information on its website. This dramatically raises the risks surrounding privacy and safety. The bill contemplates this concern and makes it clear that the public report is to contain aggregate data only. The case synopses must be omitted entirely. Provided that the Department strictly adheres to these provisions, they should be sufficient to protect the privacy and safety of sexual harassment victims.

5. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- apply the "reasonable victim" standard to the definition of sexual harassment based on the creation of a hostile environment; and
- add coauthors.

A mock-up of the amendments in context is attached to this analysis.

6. Arguments in support of the bill

According to the author:

> The devastating murder of 20-year-old Private First Class Vanessa Guillen brought national attention to the ongoing issue of sexual harassment within the military. Reportedly planning to lodge a formal complaint against a military colleague for sexual harassment, she was tragically slain by the individual before she could do so. The 'I am Vanessa Guillen Act' was introduced in Congress to increase protections for military personnel. However, that act has yet to pass, requiring that California lead the nation by enhancing protections for military personnel under our state jurisdiction.

In support, the National Guard Association of California writes:

> Sexual assault prevention needs to have the proactive tools necessary to send a strong message that sexual harassment and sexual assault will not be tolerated within California's military ranks.

SUPPORT

National Association of Social Workers, California Chapter
National Guard Association of California
Nexgen California

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 1274 (2020, Hill) would have deemed that acts of sexual harassment, sexual assault, retaliation in response to a whistleblower complaint, as specified, and felony criminal offenses are not done in the performance of a militia member's duty and could therefore form the basis for civil or criminal liability. SB 1274 died in the Senate Military and Veterans Affairs Committee.

SB 1422 (Padilla, Ch. 228, Stats. 2014) required the California Military Department to annually report specified information regarding the federal government's activities

relating to sexual assault prevention and response to the Governor, Legislature, Senate Committee on Veterans Affairs, Assembly Committee on Veterans Affairs, Attorney General, and the United States Attorneys in California. The bill restricted the authority of the CMD or the California National Guard to assert jurisdiction over assault offenses, by a member of the active militia when subject to the Uniform Code of Military Justice and required a member of the active militia recommended for court-martial pursuant to a specified hearing for a qualifying sexual assault offense, or an attempt of that offense, to be tried by general court-martial. The bill also prohibited a convening authority from overturning a conviction of a qualifying sexual assault offense issued by a general court-martial and required the convening authority to dispose of cases on appeal in accordance with the decision of the Courts-Martial Appellate Panel.

ACR 158 (Yamada, 2010) made findings regarding the ongoing prevalence of sexual violence in the military.

PRIOR VOTES:

Senate Military and Veterans' Affairs Committee (Ayes 7, Noes 0)

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Amended Mock-up for 2021-2022 SB-352 (Eggman (S))

Mock-up based on Version Number 99 - Introduced 2/9/21

CALIFORNIA LEGISLATURE— 2021–2022 REGULAR SESSION

SENATE BILL No. 352

Introduced by Senator Eggman
(Principal coauthor: Assembly Member Christina Garcia)
(Coauthor: Senator Newman)
February 09, 2021

An act to amend Sections 58 and 392 of, and to add Section 475 to, the Military and Veterans Code, relating to the military.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) Sexual harassment is detrimental to good order and discipline within our military, erodes operational readiness, and is in direct conflict with the core values of the Department of Defense: duty, integrity, ethics, honor, courage, and loyalty.

(b) The Department of Defense's 2019 Sexual Assault Accountability and Investigation Task Force recognized that sexual harassment often is precursor behavior to sexual assault.

(c) Creating a standalone offense of sexual harassment within the military justice system provides commanders with the tools needed to send a strong message that this immoral behavior will not be tolerated within California's military ranks.

(d) Eradicating sexual harassment within our military forces is the next step in ensuring that California remains the leader in providing unparalleled protections to members of the military.

(e) The California Military Department is among the best in the nation at implementing a robust Sexual Assault Prevention and Response program. Making sexual harassment a standalone offense will allow Commanders in the California National Guard to lead the nation in proactive sexual assault prevention by giving them a tool to discipline or remove from the ranks service members guilty of sexual harassment before their misconduct can escalate to sexual assault.

SEC. 2. Section 58 of the Military and Veterans Code is amended to read:

58. (a) Notwithstanding Sections 9795 and 10231.5 of the Government Code, on or before July 1 of each year, the department shall report the following information to the Governor, the Legislature, the Senate Committee on Veterans Affairs, and the Assembly Committee on Veterans Affairs, the Attorney General, and the United States Attorney for each district in California:

(1) For the previous federal fiscal year:

(A) The policies, procedures, and processes in place or implemented by the Sexual Assault Prevention and Response (SAPR) Program during that federal fiscal year in response to incidents of sexual assault and sexual harassment.

(B) An assessment of the implementation of the policies and procedures on the prevention, response, and oversight of sexual assaults and sexual harassment in the military to determine the effectiveness of SAPR policies and programs, including an assessment of how service efforts executed federal Department of Defense SAPR priorities.

(C) Matrices for restricted and unrestricted reports of the number of sexual assaults and sexual harassment involving service members, that includes case synopses, and disciplinary actions taken in substantiated cases and relevant information. Reporting on restricted cases shall be limited to aggregated statistical data so that the privacy of victims is protected. Reporting on unrestricted cases shall be limited to aggregated statistical data, but shall include, at a minimum, the following subcategories:

(i) Types of crimes.

(ii) Types of victims.

(iii) Status of investigations.

(iv) Status of prosecutions.

(v) Status of department administrative actions.

(D) Analyses of the matrices of the number of sexual assaults and sexual harassment allegations involving service members. The analyses shall include analysis of data and trends in comparison to state data from previous years and, to the degree possible, comparisons of state data and trends and data and trends from other branches and components of the United States Armed Forces, including both active and reserve components, including the National Guard of other states and territories.

(2) For the current federal fiscal year, any plans for the prevention of and response to sexual assault and sexual harassment, specifically in the areas of advocacy, healthcare provider and medical response, mental health, counseling, investigative services, legal services, and chaplain response.

(b) The department shall also make the information described in subdivision (a) available on its public internet website in the form of aggregated statistical data. In order to protect victims' privacy, this information shall not include case synopses.

SEC. 3. Section 392 of the Military and Veterans Code is amended to read:

392. (a) Members of the militia in the active service of the state shall not be liable civilly or criminally for any act or acts done by them in the performance of their duty.

(b) Subdivision (a) shall not apply to any act or acts by members of the militia in the active service of the state done by them outside the performance of their military duty, including, but not limited to, sexual assault, as defined in Section 470.5, and sexual harassment, as defined in Section 475.

SEC. 4. Section 475 is added to the Military and Veterans Code, to read:

475. (a) Any person described in subdivision (b) who is guilty of sexual harassment may be punished pursuant to Section 450.1 or as a court-martial may direct.

(b) (1) This section applies to all members of the active militia who have been lawfully ordered to any type of state duty pursuant to this code or any type of duty pursuant to Title 32 of the United States Code. For purposes of jurisdiction of this section, receipt of a lawful verbal or written order to report shall constitute sufficient evidence for purposes of establishing jurisdiction, however, jurisdiction may be contested as provided in the Manual for Courts-Martial, United States, or the Manual for Courts-Martial, California.

(2) This section does not apply to offenses committed by members of the active militia who were not in a duty status or not ordered to a duty status at the time of the offense or omission, unless it is alleged that the member engaged in an affirmative act or omission that established a connection between the offense and service in the active militia. Jurisdiction shall exist in all circumstances regardless of where the offense was committed.

(3) Nothing in this section precludes any other military or civilian authority from exercising its jurisdiction over any act or omission that violates any local, state, or federal law. Pursuant to Sections 100, 101, 102, and 103, and Article 36 of the Uniform Code of Military Justice, the Governor as Commander-in-Chief of the State Militia may promulgate regulations for this section, which may include guidance similar to that which is provided for the punitive articles of the Uniform Code of Military Justice in Part IV of the Manual for Courts-Martial, United States. Unless otherwise specified, the statute of limitations for the offenses in this section is as provided for in Section 843(b)(1) of the Uniform Code of Military Justice.

(c) For purposes of this section, "sexual harassment" means conduct that involves an unwelcome sexual advance, a request for sexual favors, or deliberate or repeated offensive comments or gestures of a sexual nature, towards, from, or in the presence of any person or persons, if any of the following apply:

(1) Submission to the conduct was made either explicitly or implicitly a term condition of a person's job, pay, or career.

(2) Submission to or rejection of the conduct by a person was used, or threatened to be used, as a basis for career or employment decisions affecting that person.

(3) The conduct had the purpose or effect of unreasonably interfering with any person's work performance or created an intimidating, hostile, or offensive working environment for any person, and was so severe or pervasive that a reasonable person or a reasonable victim would have perceived that the work environment was hostile or offensive.