SECRETARY OF THE ARMY
WASHINGTON

30 OCT 2015

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Directive 2015-40 (Implementing Procedures for Anti-Harassment Policy)

1. Reference Memorandum, SASA, 27 April 2011, subject: Equal Employment Opportunity Policy and Anti-Harassment Policy for the Workplace.

2. This directive provides guidance and implementing procedures for maintaining a workplace free from unlawful harassment in accordance with the reference. The enclosed procedures establish a system of accountability and will ensure that we provide the appropriate officials with the opportunity to promptly correct harassing conduct.

3. To make sure the Army is a model workplace for its civilian employees, post these procedures to command Web sites and distribute them to every employee.

4. The provisions of this directive are effective immediately and remain in effect until superseded or rescinded.

John M. McHugh

Encl

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SUBJECT: Army Directive 2015-40 (Implementing Procedures for Anti-Harassment Policy)

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DEPARTMENT OF THE ARMY
IMPLEMENTING PROCEDURES FOR ANTI-HARASSMENT POLICY

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DEPARTMENT OF THE ARMY
IMPLEMENTING PROCEDURES FOR ANTI-HARASSMENT POLICY

Introduction

The Department of the Army (DA) is firmly committed to ensuring and maintaining a model workplace that is free of unlawful discrimination and harassment. Every Army leader has a duty to provide and maintain an environment of trust and respect for human dignity. Leaders at all levels must guard against harassment and proactively ensure that the work environment is free from all forms of harassment.

Discrimination and workplace harassment based on race, religion, color, sex, national origin, age, disability, genetic information, reprisal or other impermissible basis is not acceptable. Any Soldier or Army employee who encounters workplace harassment should report the incident through appropriate channels. All Army leaders must ensure that they immediately and thoroughly investigate every reported incident and take corrective action as appropriate. In addition, the law prohibits reprisal against any Soldier or Army employee for reporting workplace harassment.

Purpose

These written procedures are based on Federal laws and are in accordance with the U.S. Equal Employment Opportunity Commission's Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors. The intent of the Army's anti-harassment policy and these procedures is to eliminate harassment. The procedures:

- define harassing conduct,
- establish a system of accountability for ensuring a workplace free from unlawful harassment,
- outline employee rights and responsibilities,
- provide procedures for reporting harassment, and
- require periodic anti-harassment training.

These procedures will also ensure the notification of appropriate officials and give them the opportunity to promptly correct harassing conduct that is or could become severe or pervasive. Finally, these procedures are part of the Army's ongoing efforts to provide a model workplace for its employees.

Applicability

These procedures apply to all DA appropriated and nonappropriated fund employees and applicants for employment. With the exception of military supervisors of Army employees, these procedures do not apply to uniformed members of the military, persons employed or applying for positions in the Army and Air Force Exchange Service, Army National Guard technicians or uniformed members of the military working part-time off-duty for nonappropriated fund activities or the Army and Air Force Exchange Service. It also does not apply to non-U.S. citizens the Army employs outside of the United States or to U.S. citizens working as indirect hire employees outside of the United States.

Authority

- Title VII of the Civil Rights Act of 1964, as amended, Title 42, United States Code (U.S.C.), section 2000e-16 (42 U.S.C. § 2000E-16).
- Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a.
- Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791(g).
- Americans with Disabilities Act, as amended, 42 U.S.C. § 12101.
- Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b) (10).
- Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881.
- Executive Order 11478 (Equal Employment Opportunity in the Federal Government), as amended.

Effective Date

This document is effective immediately.

Expiration Date

These procedures will remain in effect until rescinded or superseded.

Originator

The Office of the Deputy Assistant Secretary of the Army (Diversity and Leadership), Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) originated this document. Submit requests to modify or change these procedures to the Deputy Assistant Secretary of the Army (Diversity and Leadership), 111 Army Pentagon, Washington, DC 20310-0111.

Proponent and Exception Authority

The proponent of these procedures is the Assistant Secretary of the Army (Manpower and Reserve Affairs). The proponent has the authority to approve exceptions that are consistent with overall Army policy, controlling laws, regulations and Executive orders.

Supplementation

Supplementation of this guidance is prohibited without the prior approval of the Assistant Secretary of the Army (Manpower and Reserve Affairs).

Labor Relations Obligations

Where these procedures have an effect on bargaining unit employees, activities must satisfy their statutory labor relations obligations before implementation. Address questions concerning labor relations obligations to the servicing Civilian Personnel Advisory Center (CPAC) and servicing agency attorney/labor counselor.

Section 1. Unlawful Harassment

1. Unlawful harassment includes, but is not limited to, unwelcome conduct, intimidation, ridicule, insult, offensive comments or jokes, or physical conduct based on race, color, religion, sex (whether or not of a sexual nature), national origin, age (over 40), disability, genetic information or reprisal when:

- an employee's acceptance or rejection of such conduct explicitly or implicitly forms the basis for a tangible employment action affecting the employee, or
- the conduct is sufficiently severe or pervasive as to alter the terms, conditions or privileges of the employee's employment or otherwise create a hostile or abusive work environment. This type of harassment does not involve discrete personnel actions such as a denial of promotion.

2. The harasser can be a person's supervisor, a supervisor in another area, a coworker or someone who is not an employee of the agency, such as a contractor or customer.

3. Under Federal anti-discrimination laws, the agency is automatically liable for unlawful harassment by a supervisor that results in a tangible (negative) employment action, such as termination or a failure to promote. If the supervisor's harassment results in a hostile work environment but not in a tangible employment action, the agency can avoid liability only if it can prove that:

- it reasonably tried to prevent and promptly correct the harassing behavior, and
- the employee unreasonably failed to take advantage of any preventive or corrective opportunities the agency provided.

4. The agency will be liable for harassment by nonsupervisory employees or nonemployees it has control over (for example, independent contractors or customers on the premises), if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action.

Section 2. Prohibited Bases of Unlawful Discrimination and Harassment

1. Race/Color

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race. Race discrimination involves treating someone (an applicant or employee) unfavorably because the individual is of a certain race or has personal characteristics associated with race (such as hair texture, skin color or certain facial features). Color discrimination involves treating someone unfavorably because of the complexion of their skin color. Race/color discrimination can involve treating someone unfavorably

because the person is married to (or associated with) a person of a certain race or color, or has a connection to a race-based organization or group or an organization or group that is generally associated with people of a certain color. Discrimination can occur when the victim and the person who inflicted the discrimination are the same race or color.

2. National Origin

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on national origin. National origin discrimination involves treating applicants or employees unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not). National origin discrimination can involve treating people unfavorably because they are married to (or associated with) a person of a certain national origin or have a connection to an ethnic organization or group. Discrimination can occur when the victim and the person who inflicted the discrimination are of the same national origin.

3. Sex

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex. Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex. Sex discrimination can involve treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex.

a. Transgender: Discrimination against an individual because that person is transgender is discrimination based on sex. This is also known as gender/sexual identity discrimination. In addition, lesbian, gay and bisexual individuals may file sex discrimination claims. These claims may include allegations of sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person's nonconformance with gender stereotypes.

b. Sexual Harassment: Discrimination based on sex includes sexual harassment. Sexual harassment involves unwelcomed sexual advances, requests for sexual favors and other verbal or physical harassment of a sexual nature between the same or opposite genders, when:

- submission to the conduct is explicitly or implicitly a term or condition of employment; or
- submission to or rejection of the conduct is the basis for employment decisions; or

- the conduct has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile or offensive working environment.

Sexual harassment may be verbal, nonverbal or physical. Examples of behaviors that could constitute sexual harassment are touching; sexual innuendo; suggestive comments; threats; and nude or sexual pictures, cartoons or calendars.

4. Religion

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on religion. Religious discrimination involves treating a person (an applicant or employee) unfavorably because of his or her religious beliefs. The law protects not only people who belong to traditional, organized religions (such as Buddhism, Christianity, Hinduism, Islam and Judaism), but also others who have sincerely held religious, ethical or moral beliefs. Religious discrimination can involve treating someone differently because that person is married to (or associated with) an individual of a particular religion or has a connection to a religious organization or group. The law requires an agency to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations of the agency's business. This means the law may require an agency to make reasonable adjustments to the work environment that will allow an employee to practice his or her religion.

5. Reprisal

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on reprisal. Reprisal occurs when management treats employees differently because they are, or were, involved in a protected equal employment opportunity (EEO) activity. Protected activities include seeking or participating in EEO counseling, providing testimony in an EEO investigation or at an EEO hearing, filing a discrimination complaint or speaking out against discriminatory activities.

6. Age

Discrimination based on age involves treating someone (an applicant or employee) less favorably because of their age. The Age Discrimination in Employment Act forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40. Age discrimination can happen even when the victim and person who inflicted the discrimination are both over 40.

7. Genetic Information

It is illegal to discriminate against employees or applicants because of genetic information. Title II of the Genetic Information Nondiscrimination Act of 2008 prohibits the use of genetic information in making employment decisions; restricts Federal

agencies and other entities covered by Title II from requesting, requiring or purchasing genetic information; and strictly limits the disclosure of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (that is, family medical history).

8. Disability

The Rehabilitation Act of 1973, as amended and the Americans with Disabilities Act, as amended prohibit discrimination based on disability. Disability discrimination can occur when:

a. management treats a qualified individual with a disability unfavorably in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits and any other term or condition of employment because of their disability.

b. management fails to make a reasonable accommodation (modifications or adjustments to the work environment) for a known disability. The law requires a Federal agency to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the agency ("undue hardship").

c. management treats an applicant or employee with a disability less favorably because they have a history of a disability (such as cancer that is controlled or in remission), or because management believes they are physically or mentally impaired.

Section 3. Responsibilities of Supervisors and Management Officials

1. Supervisors and managers—both civilian and military supervisors of Army employees—have a responsibility to maintain a workplace free of harassment. Supervisors must show a reasonable effort to promptly prevent, respond to and correct harassing behavior in the workplace. When an employee makes a complaint to a management official about alleged harassment, the law obligates management to investigate the allegation regardless of whether the harassment rises to the level of being severe or pervasive as required under Federal anti-discrimination laws. Complaints of harassment also do not need to conform to any particular format or be in writing.

2. Management must promptly address allegations of harassment with the employees directly involved in the incident, along with any witnesses who might have firsthand information. It is very important to demonstrate that management takes the allegations seriously and will not condone offensive behavior. Management must take prompt

preventive and corrective action, including discipline, as appropriate, in consultation with the servicing CPAC, Labor Management Employee Relations (LMER) division.

3. Supervisors and managers of Army employees are responsible for ensuring that employees successfully complete the Army's mandatory "EEO, Anti-Harassment and NoFEAR Act Training" for nonsupervisory personnel annually and that they are aware of the anti-harassment policy and procedures and their role in the complaint process.

4. Supervisors also must complete the Army's mandatory "EEO, Anti-Harassment and NoFEAR Act Training" course for supervisors annually.

Section 4. Responsibilities of Employees

1. The law prohibits employees from engaging in any conduct that is discriminatory or harassing. Such conduct goes against the Army's core values and will not be tolerated. Any employee engaging in any such actions is subject to appropriate corrective action, including discipline.

2. Employees must report any behavior they view as harassment before it becomes severe or pervasive. Although isolated incidents of harassment generally do not violate Federal law, a pattern of incidents may be unlawful. DA expects employees to take advantage of any preventive or corrective opportunities the agency provides and to otherwise avoid or limit any further harm. Supervisors and managers cannot correct harassing conduct if they are not aware of it. When an employee unreasonably fails to report harassing conduct, the agency has the right to raise this as a defense against a claim of harassment.

3. All Army employees (supervisors and nonsupervisors) are responsible for completing the mandatory "EEO, Anti-Harassment NoFEAR Act Training" course to gain an understanding of the Army's anti-harassment policy and procedures and their role in the complaint process.

Section 5. How to Report Harassment

1. DA expects any person who believes another person has subjected them to unwelcome harassing conduct to inform the person(s) responsible for the conduct that it is unwelcome and offensive and request that it cease.

2. If the conduct continues, or if the employee is uncomfortable confronting the responsible person(s) about the conduct, he or she should immediately report the matter to his or her immediate supervisor, the supervisor of the harasser or any other management official in the chain of command. The employee may also report the

matter to other officials, including The Inspector General, EEO or CPAC LMER personnel, union officials or chaplains. If using these alternative options to report harassing conduct, the employee should give the official permission to notify the employee's supervisory or management chain.

3. DA encourages employees who witness or become aware of harassing conduct directed at another employee(s) to report the matter to the supervisor of the offending employee(s) or other management officials in their chain of command.

Section 6. Inquiries Into Allegations of Harassing Conduct

1. Initial Response. A supervisor or management official who receives notice of an allegation or witnesses harassing conduct will immediately:

a. make sure they conduct a prompt, thorough, impartial and appropriate inquiry even in the absence of a complaint.

b. contact the servicing EEO office, CPAC and servicing legal office within 1 business day for consultation and guidance, as appropriate.

c. document the efforts to promptly address and resolve the matters at issue. After consulting with the EEO, CPAC and legal offices, the supervisor or management official will promptly take appropriate corrective action.

2. Deciding If the Issue Requires Further Investigation. If the results of the initial inquiry are insufficient to determine whether the issue requires corrective action, the supervisor or management official responsible for taking disciplinary action against the alleged harasser may request a further investigation in accordance with Army Regulation (AR) 15-6 (Procedures for Investigating Officers and Boards of Officers). Management should make such requests on a case-by-case basis. After completion and approval of the AR 15-6 investigation, management may use the information obtained, including the findings and recommendations, in taking corrective action against the alleged harasser, including disciplinary action, if appropriate.

3. Confidentiality. DA will maintain all reported information, including results of inquiries and investigations, on a confidential basis to the greatest extent possible. The identity of the employee alleging the violation will remain confidential, except as necessary to conduct an appropriate investigation into the alleged violations or when the law or regulation requires otherwise. Management cannot guarantee complete confidentiality because it cannot conduct an effective investigation without disclosing certain information to the alleged harasser and potential witnesses. Management may have to disclose information to the employee being disciplined as a result of an inquiry or investigation. Also, the agency may have to disclose the information as part of any

litigation for which the information may be relevant and necessary. However, the maintenance of investigative records and any disclosures of information from those records will be in compliance with the Privacy Act (5 U.S.C. § 552a).

Section 7. Action to Take After an Inquiry

1. Upon completion of the inquiry or investigation, the management official who is responsible for taking disciplinary action against the alleged harasser will promptly evaluate the evidence and determine the appropriate action to take in consultation with the LMER specialist in the servicing CPAC. This responsibility normally rests with the first-line supervisor of the employee alleged to have engaged in the harassing conduct, unless the supervisor is involved in the allegation. In those cases, the record of the investigation will be provided to the senior management official in the supervisor's chain of command.

2. In cases of alleged severe and pervasive harassing conduct, the management official must consult with the agency's attorney/labor counselor and EEO and LMER specialist within 1 business day regarding recommendations on appropriate corrective action.

3. When the inquiry establishes that an employee engaged in harassing conduct, that employee is subject to appropriate disciplinary or other corrective action in accordance with AR 690-700 (Personnel Relations and Services (General)), Chapter 751 (Discipline). When the inquiry establishes that a manager or supervisor did not properly carry out their responsibility as provided in these procedures, the manager or supervisor is subject to appropriate disciplinary or other corrective action in accordance with AR 690-700, Chapter 751.

4. No further action is necessary under these procedures once management is satisfied that its corrective action has stopped the harassing conduct and deterred its recurrence.

Section 8. Filing a Complaint of Discrimination or Harassment in Other Forums

1. Filing a report under the DA Anti-Harassment Policy Implementing Procedures does not replace or satisfy the requirements for filing EEO complaints, union grievances or complaints in other forums and obtaining remedies available through these forums. Filing a report also does not delay or waive the time limits for initiating claims in these forums. An employee who chooses to pursue monetary and nonmonetary remedies for unlawful harassment can file in one of the following forums.

a. EEO. Employees may file an EEO complaint through their servicing EEO office. The employee must, however, file an EEO complaint within 45 calendar days of the alleged incident or when the employee knew or should have known of the discriminatory or harassing conduct. To the greatest extent possible, EEO officials must adhere to an aggrieved person's right to anonymity during the informal processing of the complaint unless the aggrieved employee waives his or her right to anonymity. AR 690-600 (Equal Employment Opportunity Discrimination Complaints) outlines the Army EEO complaint process. See also Title 29, Code of Federal Regulations, Part 1614 (Federal Sector Equal Employment Opportunity).

b. Negotiated Grievance Procedure. Employees covered by a collective bargaining agreement may be able to file a grievance under their negotiated grievance procedure instead of an EEO complaint if the agreement provides for the option. Bargaining unit employees should contact their union steward or appropriate union official for information about their rights and responsibilities under the negotiated grievance procedure.

c. Merit Systems Protection Board (MSPB). Eligible Federal employees may appeal an adverse agency personnel action (such as a removal or suspension of more than 14 days) with the MSPB if the personnel action is within the jurisdiction of the MSPB. The employee must file an appeal within 30 days of the effective date of an appealable adverse action or within 30 days of the date of receipt of the agency's decision, whichever is later. Title 5, Code of Federal Regulations, Part 1201 outlines the procedures for filing appeals, including appeals that include a claim of discrimination or harassment.

2. If an employee pursues a claim of harassment through the EEO process, the negotiated grievance procedure or an MSPB appeal, the EEO/LMER official who receives notice of the claim will promptly notify the appropriate responsible management official. The management official will treat the notification as a report and follow the procedures outlined in Sections 5 and 6 of these procedures.