

# State of Wisconsin



2023 Senate Bill 166

Date of enactment: **December 6, 2023**

Date of publication\*: **December 7, 2023**

## 2023 WISCONSIN ACT 47

AN ACT *to repeal* 322.001 (16) and 322.120 (1) (a); *to renumber and amend* 322.120 (3) (b); *to amend* 322.001 (15), 322.036, 322.056 (2), 322.056 (5), 322.120 (3) (a) (intro.) and 322.133; and *to create* 321.04 (1) (sm), 321.04 (1) (t), 322.0935, 322.120 (3) (b) 1., 322.1325 and 322.1345 of the statutes; **relating to:** punitive articles in the Wisconsin Code of Military Justice prohibiting certain activities; procedures applicable to courts-martial cases under the Wisconsin Code of Military Justice; treatment of victims of an offense under the Wisconsin Code of Military Justice; defining military offenses under the Wisconsin Code of Military Justice; punishments for violations of the Wisconsin Code of Military Justice; and the removal of gender-specific language from the Wisconsin Code of Military Justice.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill was prepared for the Joint Legislative Council Study Committee on Wisconsin National Guard Sexual Misconduct Procedures. Under current law, members of the Wisconsin National Guard on state status are subject to the Wisconsin Code of Military Justice (WCMJ), which codifies offenses that may be punished under the code and establishes procedures for enforcing the code. If on federal status, National Guard members are subject instead to the federal Uniform Code of Military Justice (UCMJ).

The bill makes a number of changes to the WCMJ. Specifically, the bill clarifies the offenses over which courts-martial have primary jurisdiction; specifies the limits of punishment under the WCMJ; directs the Adjutant General to prescribe rules of procedure for courts-martial arising under the WCMJ; codifies offenses related to retaliation, sexual harassment, and engaging in prohibited sexual activity with a recruit or trainee to reflect the inclusion of those offenses in the UCMJ; modifies the elements of sexual assault to reflect changes to the elements of that offense under the UCMJ; and removes certain gender-specific language from the WCMJ. The bill also requires the Adjutant General to prescribe and

implement a policy that ensures that any victim of an offense under the WCMJ is treated with dignity, respect, courtesy, sensitivity, and fairness.

**Jurisdiction of Courts-Martial**

Under the WCMJ, courts-martial have primary jurisdiction of military offenses, while civilian criminal courts have primary jurisdiction of nonmilitary offenses when an act or omission violates both the WCMJ and civilian criminal law. When a civilian court has primary jurisdiction over an offense, the National Guard may initiate a court-martial proceeding only after the civilian authority has declined to prosecute or dismissed the charge, provided that jeopardy has not attached. The National Guard may, however, take administrative disciplinary actions against a person for violating an offense over which a civilian court has primary jurisdiction regardless of whether the civilian authority prosecutes the offense.

The WCMJ defines "military offense" by enumerating the offenses that satisfy this definition. It defines "nonmilitary offenses" as offenses that are in the state's civilian penal statute and are not offenses under the WCMJ. Under current law, the definition of "military offense" includes several offenses that are offenses under both the WCMJ and civilian criminal law, which appears to give courts-martial, rather than civilian criminal courts, primary jurisdiction over those

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\* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

offenses. The bill clarifies that civilian authorities have primary jurisdiction over the offenses of rape and sexual assault; stalking; rape and sexual assault of a child; sexual misconduct; larceny and wrongful appropriation; robbery; forgery; maiming; arson; extortion; assault; burglary; house-breaking; and perjury.

#### Rules of Procedure

Under current law, the Governor may prescribe pretrial, trial, and post-trial procedures, including modes of proof, for courts-martial cases arising under the WCMJ. These procedures shall apply the principles of law and the rules of evidence generally recognized in military criminal cases in the courts of the armed forces but which may not be contrary to or inconsistent with the WCMJ. The bill modifies this provision to require the Adjutant General to prescribe pretrial, trial, and post-trial procedures for courts-martial cases arising under the WCMJ in writing and make these procedures publicly available on the department's website.

#### Limits of Punishment

Under current law, the limits of punishment for violating an offense under the WCMJ shall be prescribed by the Governor, but may not exceed ten years of confinement or constitute cruel or unusual punishment. This bill adopts, by incorporation, the limits of punishment under the UCMJ, unless the Governor prescribes other limits. These limits still may not exceed ten years of confinement or constitute cruel or unusual punishment.

#### Prohibited Activities with a Military Recruit or Trainee by a Person in a Position of Trust

The bill creates a punitive article that prohibits an officer, noncommissioned officer, or petty officer who is in a training leadership position from engaging in a prohibited sexual activity with a specially protected junior member of the armed forces. It also prohibits a military recruiter from engaging in prohibited sexual activity with an applicant for military service or a specially protected junior member of the state military forces who is enlisted under a delayed entry program. This article parallels an article incorporated into the UCMJ.

Under the bill, prohibited sexual activity means any sexual act or sexual contact or any attempt or solicitation to commit a sexual act or sexual contact. A specially protected junior member of the armed forces is a member of the state military forces who is of the following: (1) assigned to or awaiting assignment to basic training or other initial active duty for training; (2) a cadet, midshipman, an officer candidate, or student in any other officer qualification program; or (3) in any program that, by regulation of the secretary of the army or air force, is identified as a training program for initial career qualification. Consent is not a defense for any conduct at issue.

#### Sexual Assault

The bill prohibits committing a nonconsensual sexual act or sexual contact against another person and makes changes to the elements of sexual assault to match recent changes to the UCMJ.

Under current law, a person is guilty of sexual assault under the WCMJ if he or she commits a sexual act upon another person under a variety of different types of circumstances. One way the elements of sexual assault are satisfied under the WCMJ is if a person commits a sexual assault upon another person without the other person's consent by doing any of the following: (a) threatening or placing that other person in fear; (b) causing bodily harm to that other person; (c) making a fraudulent representation that the sexual act serves a professional purpose; or (d) inducing a belief by any artifice, pretense, or concealment that the person is another per-

son. Another way the elements of sexual assault are satisfied is if a person commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring. A third way the elements of sexual assault are satisfied is if a person commits a sexual act upon another person who is incapable of consenting for various specified reasons.

The bill modifies the elements of sexual assault under the WCMJ to align with the elements of the offense under the UCMJ. Specifically, with respect to a sexual assault that occurs when a person commits a sexual act upon another person by doing certain enumerated acts, such as by threatening or placing the other person in fear, the bill removes the issue of consent from the offense and removes from the list of other actions "causing bodily harm to that other person," consistent with the UCMJ. The bill also provides that, as under the UCMJ, a person is guilty of sexual assault if he or she commits a sexual act upon another person without the consent of the other person.

Under current law, a person who commits or causes sexual contact on another person, under circumstances that would violate the offense of sexual assault had the contact instead been a sexual act, is guilty of abusive sexual contact under the WCMJ. The changes the bill makes to the elements of sexual assault, therefore, also apply to the offense of abusive sexual contact.

#### Retaliation

The bill prohibits wrongfully taking or threatening to take an adverse personnel action against any person or wrongfully withholding or threatening to withhold a favorable personnel action with respect to any person, if done with intent to do any of the following: (1) retaliate against any person for reporting or planning to report a criminal or military offense; (2) retaliate against any person for making or planning to make a protected communication; or (3) discourage any person from reporting a criminal or military offense or making a protected communication.

Under the bill, a communication qualifies as a protected communication under two circumstances. The first is if it is a lawful communication to a member of Congress, member of the Wisconsin Legislature, the Governor, or an inspector general. The second is if it satisfies both of the following conditions: (1) the communication is to a member of the U.S. Department of Defense, a member of the National Guard Bureau, a law enforcement officer, a state agency, a legislative service agency, a person in the chain of command, or a court-martial proceeding; and (2) in the communication a member of the state military forces complains of, or discloses evidence that, the person reasonably believes constitutes evidence of, a violation of a law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

#### Sexual Harassment

The bill creates a punitive article in the WCMJ that prohibits sexual harassment and parallels an article recently incorporated into the UCMJ. Under the bill, any person who either knowingly makes an unwelcome sexual advance, demand, or request for a sexual favor or knowingly engages in other unwelcome conduct of a sexual nature is guilty of sexual harassment, if the conduct meets two conditions.

First, the sexual advance, demand, request, or conduct of a sexual nature must do either of the following:

(a) Under the circumstances, cause a reasonable person to believe, and actually cause at least one person to believe, that submission to or rejection would be made, either explicitly or implicitly, a term or condition of that person's job, pay,

career, benefits, or entitlements or would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements.

(b) Be so severe, repetitive, or pervasive that a reasonable person would perceive, and at least one person actually perceived, an intimidating, hostile, or offensive working environment.

Second, the sexual advance, demand, request, or conduct of a sexual nature must be to the prejudice of good order and discipline in the state military forces or of a nature to bring discredit upon the state military forces, or both.

Conduct Unbecoming an Officer

Article 133 of the WCMJ prohibits any commissioned officer, cadet, candidate, or midshipman from engaging in conduct unbecoming of an officer and a gentleman. The bill removes the language referring to "and a gentleman" to parallel a similar modification to the UCMJ to remove gender-specific language.

Policy on Treatment of Victims

The Wisconsin Constitution and Wisconsin Statutes grant crime victims a variety of rights, including the right to be treated with dignity, respect, courtesy, sensitivity, and fairness. For these purposes, "crime victim" is defined, generally, as a person against whom a crime has been committed. A victim of an offense under the WCMJ may satisfy this definition of crime victim under some, but not all, circumstances.

The bill requires the Adjutant General to prescribe in writing, publish on the department's website, and implement a policy that ensures that any victim of an offense under the WCMJ is treated with dignity, respect, courtesy, sensitivity, and fairness.

**SECTION 1.** 321.04 (1) (sm) of the statutes is created to read:

321.04 (1) (sm) Prescribe in writing and make publicly available on the department's website the procedures required under s. 322.036.

**SECTION 2.** 321.04 (1) (t) of the statutes is created to read:

321.04 (1) (t) Prescribe in writing, make publicly available on the department's website, and implement a policy that ensures that any victim of an offense under the Wisconsin code of military justice is treated with dignity, respect, courtesy, sensitivity, and fairness.

**SECTION 3.** 322.001 (15) of the statutes is amended to read:

322.001 (15) "Military offenses" means those offenses prescribed under articles 77, principals; 78, accessory after the fact; 80, attempts; 81, conspiracy; 82, solicitation; 83, fraudulent enlistment, appointment, or separation; 84, unlawful enlistment, appointment, or separation; 85, desertion; 86, absence without leave; 87, missing movement; 88, contempt toward officials; 89, disrespect towards superior commissioned officer; 90, assaulting or willfully disobeying superior commissioned officer; 91, insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer; 92, failure to obey order or regulation; 93, cruelty and maltreatment; 93a, prohibited activities with military recruit or trainee by a person in a position of special

trust; 94, mutiny or sedition; 95, resistance, flight, breach of arrest, and escape; 96, releasing prisoner without proper authority; 97, unlawful detention; 98, non-compliance with procedural rules; 99, misbehavior before the enemy; 100, subordinate compelling surrender; 101, improper use of countersign; 102, forcing a safeguard; 103, captured or abandoned property; 104, aiding the enemy; 105, misconduct as prisoner; 107, false official statements; 108, military property — loss, damage, destruction, or wrongful disposition; 109, property other than military property — waste, spoilage, or destruction; 110, improper hazarding of vessel; 111, drunken or reckless operation of a vehicle, aircraft, or vessel; 112, drunk on duty; 112a, wrongful use, or possession of controlled substances; 113, misbehavior of sentinel; 114, dueling; 115, malingering; 116, riot or breach of peace; 117, provoking speeches or gestures; ~~120, rape and sexual assault generally; 120a, stalking; 120b, rape and sexual assault of a child; 120c, sexual misconduct; 121, larceny and wrongful appropriation; 122, robbery; 123, forgery; 124, maiming; 126, arson; 127, extortion; 128, assault; 129, burglary; 130, house-breaking; 131, perjury;~~ 132, frauds against the government; 132a, retaliation; 133, conduct unbecoming an officer ~~and a gentleman; and~~; 134, general; and 134h, sexual harassment; of this code.

**SECTION 4.** 322.001 (16) of the statutes is repealed.

**SECTION 5.** 322.036 of the statutes is amended to read:

**322.036 Article 36 — Governor may prescribe regulations Pretrial, trial, and post-trial procedures.** Pretrial, trial, and post-trial procedures not specified in this code, including modes of proof, for courts-martial cases arising under this code; and for courts of inquiry; ~~may shall~~ be prescribed by the governor by regulations, or as otherwise provided by law, which shall apply the principles of law and the rules of evidence generally recognized in military criminal cases in the courts of the armed forces but which may not be contrary to or inconsistent with this code adjutant general in writing and made publicly available on the department of military affairs' website.

**SECTION 6.** 322.056 (2) of the statutes is amended to read:

322.056 (2) A conviction by a general court-martial of any ~~military~~ offense for which an accused may receive a sentence of confinement for more than 1 year is a felony offense.

**SECTION 7.** 322.056 (5) of the statutes is amended to read:

322.056 (5) The limits of punishment for violations of the punitive sections under Subch. X shall be those under the Uniform Code of Military Justice, unless oth-

erwise prescribed by the governor according to ss. 322.018 to 322.020, but under no instance shall any punishment exceed that authorized by this code.

**SECTION 8.** 322.0935 of the statutes is created to read:

**322.0935 Article 93a - Prohibited activities with military recruit or trainee by a person in a position of special trust.** (1) In this section:

(a) "Applicant for military service" means a person who, under regulations prescribed by the secretary of the relevant military branch, is an applicant for original enlistment or appointment in the state military forces.

(b) "Military recruiter" means a person who, under regulations prescribed by the secretary of the relevant military branch, has the primary duty to recruit persons for military service.

(c) "Prohibited sexual activity" means any sexual act, as defined in s. 322.120 (1) (e), or any sexual contact, as defined in s. 322.120 (1) (f), or any attempt or solicitation to commit a sexual act or sexual contact.

(d) "Specially protected junior member of the state military forces" means any of the following:

1. A member of the state military forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program.

2. A member of the state military forces who is a cadet, candidate, or midshipman, or a student in any other officer qualification program.

3. A member of the state military forces in any program that, by regulation prescribed by the secretary of the relevant military branch, is identified as a training program for initial career qualification.

(e) "Training leadership position" means, with respect to a specially protected junior member of the state military forces, any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers' training corps unit, a training program for entry into the state military forces, or any program that, by regulation prescribed by the secretary of the relevant military branch, is identified as a training program for initial career qualification.

(2) Any officer, noncommissioned officer, or petty officer who is in a training leadership position and engages in prohibited sexual activity with a specially protected junior member of the state military forces shall be punished as a court-martial may direct.

(3) Any person who is a military recruiter and engages in prohibited sexual activity with an applicant for military service or a specially protected junior member of the state military forces who is enlisted under a delayed entry program shall be punished as a court-martial may direct.

(4) Consent is not a defense for any conduct at issue in a prosecution under this section.

**SECTION 9.** 322.120 (1) (a) of the statutes is repealed.

**SECTION 10.** 322.120 (3) (a) (intro.) of the statutes is amended to read:

322.120 (3) (a) (intro.) Commits a sexual act upon another person ~~without consent~~ by doing any of the following:

**SECTION 11.** 322.120 (3) (b) of the statutes is renumbered 322.120 (3) (b) (intro.) and amended to read:

322.120 (3) (b) (intro.) Commits a sexual act upon another person ~~when~~ under one of the following circumstances:

2. When the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.

**SECTION 12.** 322.120 (3) (b) 1. of the statutes is created to read:

322.120 (3) (b) 1. Without the consent of the other person.

**SECTION 13.** 322.1325 of the statutes is created to read:

**322.1325 Article 132a - Retaliation.** (1) In this section:

(a) "Protected communication" means any of the following:

1. A lawful communication to a member of Congress, a member of the Wisconsin legislature, the governor, or an inspector general.

2. A communication to a member of the U.S. department of defense or the U.S. national guard bureau, a law enforcement officer, a state agency, a legislative service agency, a person in the chain of command, or a court-martial proceeding in which a member of the state military forces complains of, or discloses information that the member reasonably believes constitutes evidence of, a violation of a law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) "Unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin.

(2) Any person who, with intent to retaliate against any person for reporting or planning to report a criminal or military offense or for making or planning to make a protected communication, or with intent to discourage any person from reporting a criminal or military offense or making a protected communication, does any of the

following shall be punished as a court-martial may direct:

(a) Wrongfully takes or threatens to take an adverse personnel action against any person.

(b) Wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person.

**SECTION 14.** 322.133 of the statutes is amended to read:

**322.133 Article 133 — Conduct unbecoming an officer and a gentleman.** Any commissioned officer, cadet, candidate, or midshipman who is convicted of conduct unbecoming an officer ~~and a gentleman~~ shall be punished as a court-martial may direct.

**SECTION 15.** 322.1345 of the statutes is created to read:

**322.1345 Article 134h - Sexual harassment.** Any person who knowingly makes an unwelcome sexual advance, demand, or request for a sexual favor or knowingly engages in other unwelcome conduct of a sexual nature shall be punished as a court-martial may direct if all of the following apply:

(1) The sexual advance, demand, request, or conduct of a sexual nature satisfies any of the following conditions:

(a) It would, under the circumstances, cause a reasonable person to believe, and at least one person did believe, that submission to or rejection of such an advance, demand, request, or conduct would be made, either explicitly or implicitly, a term or condition of that person's job, pay, career, benefits, or entitlements or would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements.

(b) It was so severe, repetitive, or pervasive that a reasonable person would perceive, and at least one person did perceive, an intimidating, hostile, or offensive working environment.

(2) The sexual advance, demand, request, or conduct of a sexual nature was to the prejudice of good order and discipline in the state military forces or of a nature to bring discredit upon the state military forces, or both.

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