

Domestic Violence and the Military

by
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I. Introduction

Military families are subject to increased stress with the demands of military readiness and frequent deployments. With the increased number of deployments since 2002, this stress has increased on servicemembers and their families. Complicating matters and increasing family stress is the prevalence of post-traumatic stress disorder (“PTSD”) felt by servicemembers returning from numerous deployments to Iraq and Afghanistan.¹ Unfortunately, one way this stress often manifests itself is through incidents of family violence.

The Department of Defense (“DoD”) has recognized that domestic violence is an issue. Consequently, on August 21, 2007, the DoD issued DoD Instruction Number 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel.² It is DoD policy to prevent and eliminate domestic abuse in the Department of Defense and to provide for the safety of victims; to hold abusers appropriately accountable for their behavior; and to coordinate the response to domestic abuse with the local community.³ This Instruction establishes that each commander has the duty and authority to take action and to respond to domestic violence situations.

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¹ The effects of PTSD can inhibit the service member’s ability to reintegrate himself or herself post deployment, sometimes resulting in family issues and even criminal issues for the service member. It is not uncommon for the service member to seek ways to self-medicate for symptoms of PTSD through drugs and alcohol, compounding family issues.

² U.S. DEP’T OF DEF., INSTRUCTION NO. 6400.06 Domestic Abuse Involving DoD Military and Certain Affiliated Personnel (Aug. 21, 2007) [hereinafter DoD Instr. 6400.06].

³ DoD Instr. 6400.06 at 4.

II. Remedies if the Abuser Is the Servicemember

The military has multiple responses for dealing with domestic violence, ranging from criminal punishments to administrative remedies to services to treat victims of domestic violence to compensation for victims. Some of these responses are detailed further below.

A. Military Justice

Commanders have the authority to punish servicemembers under the Uniform Code of Military Justice (“UCMJ”).⁴ Punishment under the UCMJ includes both judicial and non-judicial punishment.⁵

Judicial punishment is for criminal offenses with criminal penalties. Offenses under the UCMJ may include: Article 92. *Failure to Obey Order or Regulation*; Article 128. *Assault*; Article 133. *Conduct Unbecoming an Officer and a Gentleman*; and Article 134. *General Article*. Article 134 provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.⁶

Sentences under the UCMJ can include confinement, reduction in pay grade, forfeiture of pay, and discharge.⁷ Each and all of these may impose further difficulties upon the family unit.

On the other hand, non-judicial punishment is for minor offenses and includes non-criminal penalties.⁸ The guidelines for non-judicial punishment are found under Article 15 of the UCMJ. This Article outlines methods for which Commanders can administer punishment for minor offenses. Article 15(b) of the UCMJ provides that “any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor of-

⁴ UCMJ (2012), available at www.ucmj.us.

⁵ UCMJ art. 15 (2012), available at www.ucmj.us.

⁶ UCMJ art. 134 (2012), available at www.ucmj.us.

⁷ UCMJ art. 55-58(a) (2012), available at www.ucmj.us.

⁸ UCMJ art. 15 (2012), available at www.ucmj.us.

fenses without the intervention of a court-martial” for judicial punishment: 1) restriction to post; 2) restriction to quarters; 3) forfeiture of pay; 4) reduction in grade; and 5) extra duties.⁹

The administration of non-judicial punishment can have unintended consequences on the family unit. A zealous commander may believe that harsh punishment under Article 15 will remedy a situation, when in practice a forfeiture of the service member’s pay and allowances and assignment of extra duty may worsen the tensions at home or take funds away from an already financially strapped family.

B. Military Protective Orders

Unit commanders may issue Military Protective Orders (MPOs) to an active duty service member to protect a victim of domestic violence or child abuse (the victim could be another service member or a civilian).¹⁰ To qualify, the individual seeking the MPO must be the spouse or ex-spouse, current or former intimate partner, or have a child in common with the accused.¹¹ A victim, victim advocate, installation law enforcement agency, or Family Advocacy Program clinician may request a commander to issue an MPO.¹²

Pursuant to DoD Instruction 6400.06, a Commander “shall issue and monitor compliance with an MPO when necessary to safeguard a victim, quell a disturbance, and maintain good order and discipline while a victim has time to pursue a protection order through a civilian court, or to support an existing [civilian protective order] CPO.”¹³ This implies that it is not the DoD’s intent that an MPO stand alone without a CPO; rather the MPO should supplement the CPO. The duration of an MPO is until it is terminated or the commander issues a replacement order.¹⁴

The consequence of violating an MPO is punishment as a criminal offense under the UCMJ. Section 1567(a) of article 10 of the U.S. Code provides that military authorities shall notify local civilian law enforcement agencies of the issuance of an

⁹ UCMJ art. 15(b) (2012), available at www.ucmj.us.

¹⁰ DoD Instr. 6400.06.

¹¹ DoD Instr. 6400.06 at E2.8.

¹² DoD Instr. 6400.06 at 6.4.3.9, E4(3)(A)(6).

¹³ DoD Instr. 6400.06 at 6.1.2.1.

¹⁴ 10 U.S.C. § 1567 (2009).

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MPO. The Commander is required to notify regarding the existence of the MPO, the individuals involved, any changes to the MPO, and the termination of the MPO.¹⁵ However, there is no requirement that local law enforcement enforce an MPO. Therefore, as already noted, it is often advisable that the victim not only get an MPO, but also a CPO. Section 1561(a) of article 10 of the U.S. Code provides that “a civilian order of protection shall have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order.”¹⁶

MPOs may order the abuser (referred to as “the subject”) to:

- have no contact or communication (including face to face, by telephone, in writing, or through a third party) with you or members of your family or household;
- stay away from the family home (whether it is on or off the installation);
- stay away from the children’s schools, child development centers, youth programs and your place of employment;
- move into government quarters (barracks);
- leave any public place if the victim is in the same location or facility;
- do certain activities or stop doing certain activities;
- attend counseling; and,
- to surrender his or her government weapons custody card.¹⁷

Commanders may further tailor the order to meet the specific needs and circumstances of the situation.

An MPO is only enforceable while the service member is assigned to the unit that issued the order. When the service member is transferred to a new unit, the order shall no longer be valid. If the victim still believes that the MPO is necessary to keep him or her safe, the victim, a victim advocate, or a FAP staff member may ask the commander who issued the MPO to contact

¹⁵ 10 U.S.C. § 1567(a).

¹⁶ 10 U.S.C. § 1561(a).

¹⁷ DD Form 2873 eff. Feb. 2004. See also Directive for Military Protective Orders issued on March 10, 2004 by Undersecretary of Defense for Personnel and Readiness.

the new commander to advise him or her of the MPO and to request the issuance of a new one. The commander who issued the MPO is supposed to recommend to the new command that a new MPO is issued when the service member is transferred to a new command and an MPO is still necessary to protect the victim.

Commanders can only issue MPOs against the service member; civilian abusers cannot be subject to MPOs. They may only be subject to a civil protection order issued by a state or tribal court. However, a commanding officer may order that the civilian abuser stay away from the installation.

C. Family Advocacy Programs

The DoD Directive 6400.1 provides that each of the services shall establish Family Advocacy Programs at each of the installations.¹⁸ In turn, each of the services has established its own regulations establishing Family Advocacy Programs.¹⁹ The purpose of the Family Advocacy Programs is to “promote public awareness within the military community and coordinate professional intervention at all levels within the civilian and military communities, including law enforcement, social services, health services, and legal services.”²⁰

The FAPs provide assistance to victims and military families through prevention of domestic violence, education, and counseling.²¹ Every installation has a victim advocacy office. The victim advocate will assist the abused individual in seeking MPOs and CPOs as well as getting access to or information about other assistance that may be locally available whether it is military provided or through a civilian agency. The victim advocate is also

¹⁸ DoD Directive 6400.1, FAMILY ADVOCACY PROGRAM (Aug. 23, 2004).

¹⁹ U.S. DEP'T OF AIR FORCE, INSTR. 40-301, FAMILY ADVOCACY PROGRAM; U.S. DEP'T OF NAVY, OPNAV INSTRS. 1740.4D, 1752.2B, 1752.3B U.S. NAVY FAMILY CARE POLICY; U.S. DEP'T OF NAVY, MARINE CORPS ORDER NO. 1754.11, MARINE CORPS FAMILY ADVOCACY AND GENERAL COUNSELING PROGRAM.

²⁰ Taken from Army Regulation 608-18, § 1-5(b). *See also* DOD Instrs. 6400.06, 6490.06; Air Force Instr. 40-301; U.S. Dep't of Navy, OPNAV Instrs. 1740.4D, 1752.2B, 1752.3B; U.S. Dep't of Navy, Marine Corps Order No. 1754.11.

²¹ DoD Directive 6400.1 at Enclosure 3(1)

available to help the command develop safety plans as the situation requires.

D. *Transitional Compensation*

Section 1059 establishes transitional compensation as an *extreme* remedy available for dependents of certain active duty service members who have been abused by the service member.²² It is important to *always* remember that transitional compensation is only available under certain, very specific circumstances. These are:

- (1) The offending service member must be serving on active duty for thirty (30) or more days;
- (2) The offending service member must have been discharged pursuant to court martial or administrative separation²³; and,
- (3) The basis for the service member's separation must result from the abuse of the dependent.²⁴

Section 1059 establishes transitional compensation rates as defined by 38 U.S.C. § 1311 (Dependency and Indemnification Compensation), which for 2014 were as follows:

- (1) \$1,254.19 paid to a spouse;
- (2) \$310.71 paid to a child age less than 18;
- (3) \$263.23 paid to a child age 18 – 23 and enrolled full-time in post-secondary education;
- (4) \$529.55 to a disabled child.²⁵

Transitional compensation is generally paid for 36 months unless the service member's remaining active duty service obligation was less than 36 months at the time of discharge. In this event, transitional assistance shall be paid for the remaining months of active duty service obligation or for twelve months if the remaining obligation is less than twelve months. Transitional

²² 10 U.S.C. § 1059 (2014); Section 1059 is implemented by DoD through DoD Instr. 1342.24, "Transitional Compensation for Abused Dependents."

²³ This shall also include a pre-trial agreement.

²⁴ 10 U.S.C. § 1059(b).

²⁵ It is important to note that Dependency and Indemnity Compensation rates typically change each year. The current and historical DIC rates can be found at *Compensation*, U.S. DEP'T VETERANS AFFAIRS (Dec. 1, 2014), http://www.benefits.va.gov/COMPENSATION/current_rates_DIC.asp.

compensation payments are not subject to income tax. During the period of transitional compensation payments, the recipient shall be authorized to use military commissary and post exchange facilities. Recipients are also eligible for Tricare medical, dental, and mental health treatment during the applicable period. Transitional compensation shall be forfeited by the abused spouse if, during the period of payments, that spouse later cohabitates with the offending service member or if the spouse remarries.

There are many intricate details to the transitional compensation program. Consequently, the family law practitioner need only identify the possibility of transitional compensation and review 10 U.S.C. § 1059 and 38 U.S.C. § 1311 or consult with a military family law practitioner, local Judge Advocate, or the transitional compensation point of contact at the service member's assigned post/base.

E. Interim Family Support

The prior sections discussed the establishment of MPOs, CPOs, and safety plans, all of which may require the separation of a service member from his or her spouse and/or family. When this separation occurs, it may be necessary to ensure that there is some temporary financial support provided by the service member to the spouse and/or family. There is no single, cohesive DoD standard for interim or temporary family support in the absence of a court order or consent agreement between the parties. Instead, each of the branches of military service and the U.S. Coast Guard have published administrative regulations that address family support matters.²⁶

As a prerequisite, it is important for the practitioner to recognize that these regulations apply only under the following conditions:

²⁶ *AR 608-99*, PERSONAL AFFAIRS: FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (Oct 29, 2003), http://www.apd.army.mil/pdf/r608_99.pdf; *MCO P5800.16a*, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (Aug. 31, 1999), <http://www.marines.mil/Portals/59/MCO%20P5800.16A%20W%20CH%201-7.pdf>; *Navy MILPERSMAN 1754-030*, SUPPORT OF FAMILY MEMBERS (Apr. 26, 2006), <http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1700Morale/Documents/1754-030.pdf>; *COMDTINST M1000.6A*, COAST GUARD PERSONNEL MANUAL, Ch. 8.M. (Jan. 8, 1988), <http://isddc.dot.gov/OLPFiles/USCG/010564.pdf>.

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- (1) the service member must be on active duty, not in reserve status;
- (2) there must be no existing court order addressing child support or alimony; and,
- (3) there must be no existing consent agreement addressing child support or alimony between the parties.²⁷

III. Remedies if the Abuser Is a Civilian

Naturally, the commander has no authority over civilians (including the dependents of service members). However, in some cases, where the dependent has received benefit of travel expenses and on-installation housing in overseas locations under the command's "sponsorship" of dependents abroad, the commander may revoke such command sponsorship for abuse. Otherwise, the commander may bar the offending civilian from the installation or pursue criminal charges against the civilian if the abusive conduct occurs on the installation.

A. Bar to the Installation

The installation commander has authority to ban from the installation any civilian (including a service member's dependent or spouse) whom the commander deems to be a threat to the service member, other service members, or persons residing or working on the installation.

B. Coordination with Civil Authorities

If the installation commander bars the civilian from the installation, the commander may coordinate with local civil authorities to notify them of the ban. In addition, on many military installations local civil authorities have concurrent jurisdiction with the military authorities. Even on those where civil authorities do not have concurrent jurisdiction, federal jurisdiction extends over civilians on the installations not subject to the UCMJ.

C. Federal Criminal Jurisdiction

As stated above, in cases where the military installation or a part of the installation has no concurrent state court criminal ju-

²⁷ See AR 608-99, *supra* note 17.

risdiction, the only remedy for criminal violations committed by the non-military abuser is referral to the federal magistrate court which has jurisdiction over the installation. In cases where non-military abusers have committed criminal acts on military installations, the family law practitioner should inquire of the local Staff Judge Advocate whether the local Office of the United States Attorney (Department of Justice) and the Federal Magistrate Court will exercise jurisdiction over the offense.

IV. Lautenberg Amendment

Section 922 of article 18 of the U.S. Code establishes that it shall be a felony for any of the following persons to possess a firearm, ammunition or explosives.²⁸ Any person who has (or is):

- (1) been convicted of any crime punishable by more than one (1) year in prison;
- (2) been convicted of a misdemeanor for domestic violence; or
- (3) subject to a court order that finds that person “represents a credible threat to the physical safety of an intimate partner or child of that partner” and restrains that person from “harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.”²⁹

Paragraph (3) of Section 922 can apply to the issuance of temporary protective orders or temporary restraining orders, which are not uncommon in family law matters. Also, it is not uncommon for domestic violence felony offenses to be pled to

²⁸ 18 U.S.C. § 922(a) (2012).

²⁹ Note that to invoke 18 U.S.C. § 922 (2012), the court order cannot merely be an ex parte temporary order; rather, the order must have resulted from actual notice to the service member and the opportunity for the service member to participate in the hearing from which the order arises. Also, the court order must include “a finding that such person represents a credible threat to the physical safety of such intimate partner or child” or by its terms explicitly prohibit “the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.” § 922(d)(8)(b)(ii).

lesser misdemeanor offenses, i.e. battery, which was the purpose for the inclusion of paragraph (2). Much of the litigation regarding the Lautenberg Amendment has revolved around what qualifies as a “misdemeanor crime of domestic violence” under the statute.³⁰ The statute defines a misdemeanor as an offense that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”³¹

Obviously, the mandate of 18 U.S.C. § 922 is designed to protect the past victims of an offender and society at large. Section 922 makes no exception for those whose daily employment requires their ability to carry and use firearms (e.g. service members or police officers). If the abuser is the sole financial provider for the family, the application of the Lautenberg Amendment may very well impose financial hardship upon the family.

In some cases, it is possible for a service member with a court order sufficient, i.e. a temporary restraining order, to invoke the mandate of 18 U.S.C. § 922 to continue to serve in some capacities. In reality, most military commanders who are made aware of service members subject to a court order invoking 18 U.S.C. § 922 will begin administrative separation proceedings. If a service member is administratively separated from the military, the service member and his or her family will lose medical benefits, retirement benefits, and potentially Veterans Administration benefits, depending on the characterization of the discharge. As a result, family law practitioners should carefully counsel their clients regarding the consequences for the family that may arise from a temporary restraining order or conviction invoking 18 U.S.C. § 922.

³⁰ § 921(a)(33)(A).

³¹ § 921(a)(33)(A)(ii). See also Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173 (2015).