



**WISCONSIN LEGISLATIVE COUNCIL
ACT MEMO**

2013 Wisconsin Act 201
[2013 Assembly Bill 641]

**Stalking and Sexual Offenses
Under the Military Code of Justice**

The Wisconsin Code of Military Justice (“the code”) sets forth procedures, responsibilities, and penalties for actions involving members of the state military forces¹ that may result in a court-martial. [ch. 322, Stats.] This code parallels the federal code of military justice, which applies to active members of the U.S. Armed Forces. [10 U.S.C ch. 47.] These codes establish the members of and procedures for a court-martial, as well as the types of behavior that may result in being subject to a court-martial. 2013 Wisconsin Act 201 makes several modifications to the code, specifically relating to stalking and sexual offenses, qualifications of military judges, and redress for injuries to property.

SEXUAL OFFENSES; ELEMENTS AND DEFENSES

The code establishes only two sexual offenses: “rape” and “carnal knowledge.” As described in detail below, the Act replaces those offenses with the following four offenses: sexual assault against an adult; sexual assault against a child; other sexual misconduct; and stalking. The Act also specifies the defenses that are available to a defendant and provides that punishment for each offense is determined by the members of a court-martial.² These changes make the Wisconsin code consistent with changes made in the federal code in 2011.

¹ “State military forces” means the Wisconsin army and air national guard, the national guard, as defined in 32 U.S.C 502, 503, or 904, the state defense force, the organized naval militia of the state, and any other military force organized under the Wisconsin Constitution and laws of the state, and does not include the unorganized militia, state guard, or home guard, when not in a status subjecting them to exclusive jurisdiction under 10 U.S.C ch. 47. [s. 322.001, Stats.]

² The punishment which a court-martial may direct for an offense may not exceed 10 years confinement. [s. 322.056, Stats.] The Act does not change this provision of the current code.

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature’s Web site at: <http://www.legis.wisconsin.gov>.

Prior Code

The prior code provides as follows:

- Any person who commits an act of sexual intercourse, by force and without consent, is guilty of **rape** and must be punished as a court-martial may direct. [s. 322.120 (1), Stats.]
- Any person subject to the code who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person who is not that person's spouse, and who has not attained the age of 16 years is guilty of **carnal knowledge** and must be punished as a court-martial may direct. [s. 322.120 (2), Stats.]

The code also provides an affirmative defense for a person accused of committing the offense of carnal knowledge. To assert this defense, the accused person has the burden of proving all of the following by a preponderance of the evidence:

- The person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense, attained the age of 12 years.
- The accused reasonably believed that the person had, at the time of the alleged offense, attained the age of 16 years.

[s. 322.120 (4) and (5), Stats.]

Act 201

The Act replaces the provisions described above with new provisions that establish the offenses of: rape and sexual assault, including sexual contact; rape and sexual assault of a child; other sexual misconduct; and stalking. The elements of and defenses to each of those offenses is described below.

Rape and Sexual Assault of an Adult

Under the Act, any person subject to the code who commits a sexual act³ upon another person without the consent of that person by doing any of the following is guilty of **rape**:

- Using unlawful force against that person.
- Using force causing or likely to cause death or grievous bodily harm to any person.
- Threatening or placing that person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.
- Rendering that person unconscious.
- Administering to that person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby

³ "Sexual act" means any of the following: (a) contact between the penis and the vulva or anus or mouth; or (b) the penetration of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

substantially impairing the ability of that person to appraise or control his or her conduct.

The Act provides that any person subject to the code who does any of the following is guilty of **sexual assault**:

- Commits a sexual act upon another person without consent by doing any of the following:
 - Threatening or placing that person in fear.
 - Causing bodily harm to that person.
 - Making a fraudulent representation that the sexual act serves a professional purpose.
 - Inducing a belief by any artifice, pretense, or concealment that he or she is another person.
- Commits a sexual act upon another person he or she knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.
- Commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to any of the following:
 - Impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person.
 - A mental disease or defect or a physical disability, and that condition is known or reasonably should be known by the person.

The Act also creates two offenses related to sexual contact. Specifically, any person subject to the code who commits or causes sexual contact upon or by another person is guilty of **aggravated sexual contact** if the sexual contact would constitute rape had the act been a sexual act instead. Any person subject to the code who commits or causes sexual contact upon or by another person is guilty of **abusive sexual contact** if the sexual contact would constitute sexual assault had the act been a sexual act instead.

For the offenses of rape, sexual assault, aggravated sexual contact, and abusive sexual contact, in proving that a person made a threat, the Act provides that it is not necessary to prove that the person actually intended to carry out the threat or had the ability to carry out the threat.

The Act permits an accused person to raise any generally applicable defense available under the code or the rules for court-martial. Marriage is not a defense.

Rape and Sexual Assault of a Child

The Act creates the following offenses against children:

- Any person subject to the code who does any of the following is guilty of **rape of a child**:

- Commits a sexual act upon a child who has not attained the age of 12 years.
- Commits a sexual act upon a child who has attained the age of 12 years by doing any of the following: (a) using force against any person; (b) threatening or placing the child in fear; (c) rendering the child unconscious; (d) administering to the child a drug, intoxicant, or other similar substance.
- Any person subject to the code who commits a sexual act upon a child who has attained the age of 12 years is guilty of **sexual assault of a child**.
- Any person subject to the code who commits a lewd act upon a child is guilty of **sexual abuse of a child**.

For the offenses of rape of a child, sexual assault of a child, and sexual abuse of a child, the Act specifies that it is not necessary for the prosecution to prove any of the following:

- That the accused person knew the age of the other person engaging in the sexual act or lewd act.
- In a proving that a person made a threat, that the person actually intended to carry out the threat or had the ability to carry out the threat.
- Lack of consent. A child not legally married to the person committing the sexual act, lewd act, or use of force cannot consent to such acts under the Act.

Under the Act, as noted above, the prosecution is not required to prove that the accused person knew that the other person engaging in the sexual act or lewd act had not attained 16 years. In addition, the Act provides that it is not a defense that the accused person reasonably believed that the child had attained the age of 12 years. However, it is a defense to the offenses of sexual assault of a child and sexual abuse of a child if the accused proves by a preponderance of the evidence that he or she reasonably believed that the child had attained the age of 16 years, if the child had in fact attained the age of 12 years.

Other Sexual Misconduct

The Act creates the following additional sexual misconduct offenses:

- Any person subject to the code who, without legal justification or lawful authorization, does any of the following is guilty of **sexual misconduct**:
 - Knowingly and wrongfully views the private area of another person, without that person's consent and under circumstances in which that person has a reasonable expectation of privacy.
 - Knowingly photographs, videotapes, films, or records by any means the private area of another person, without that person's consent and under circumstances in which that person has a reasonable expectation of privacy.
 - Knowingly broadcasts or distributes any recording that the person knew or reasonably should have known was made under the circumstances proscribed above.

- Any person subject to the code who compels another person to engage in an act of prostitution with any person is guilty of **forcible pandering**.
- Any person subject to the code who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of **indecent exposure**.

Stalking

Under the Act, any person subject to the code who does all of the following is guilty of stalking:

- Wrongfully engages in a course of conduct⁴ directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family.
- Has knowledge or should have knowledge that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family.
- Commits acts that induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family.

REQUIRED QUALIFICATIONS FOR MILITARY JUDGES

Prior Code

A military judge must be assigned to each general and special court-martial. [s. 322.026 (1), Stats.] Under prior law, with certain exceptions, a military judge must have met all of the following qualifications:

- Be a commissioned officer of an organized state military force.
- Be an attorney licensed to practice in this state or be a member of the bar of a federal court for at least five years.
- Be certified as qualified for duty as a military judge by the senior force judge advocate⁵ of the same force as the accused.

[s. 322.026 (2), Stats.]

⁴ "Course of conduct" means either of the following: (a) repeated (two or more occasions) maintenance of visual or physical proximity to a specific person; or (b) repeated conveyance of oral threats, written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a specific person.

⁵ "Senior force judge advocate" means the senior judge advocate of the commander of the same force of the state military forces as the accused and who is that commander's chief legal advisor. [s. 322.001 (21), Stats.]

The Act

In addition to commissioned officers of an organized state military force, the Act also allows a commissioned officer of the U.S. armed forces to preside over a court-martial involving a member of the state military forces.

INVESTIGATIONS RELATING TO REDRESS OF INJURIES TO PROPERTY

Prior Code

The prior code provided that whenever a commanding officer receives a complaint that damage has been done to the property of a person, or that a person's property has been wrongfully taken, by a member of a state military force, the person whose property has been taken may convene a board to investigate the claim. The board must consist of one to three commissioned officers. Any assessment of damages made by the board is subject to the approval of the commanding officer and the amount of the damage assessment approved by that officer must be charged against the pay of the offender. [s. 322.139 (1), Stats.]

The Act

The Act removes the requirement that a board of one to three commissioned officers be convened to investigate certain complaints of injury to property. Instead, the Act allows the commanding officer to investigate the complaint and determine the amount, if any, that must be paid to an injured party.

Effective date: Act 201 took effect on April 10, 2014 and first applies to offenses committed on that day.

Prepared by: Michael Queensland, Staff Attorney

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