IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20240538
Specialist (E-4) **FRANK J. BARBOSA,** United States Army,	Appellant	Tried at Fort Cambell, Kentucky, on 10 June, 5 September, and 7 November 2024, before a general court-martial appointed by the Commander, Headquarters, Fort Campbell, Colonel John R. Maloney, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error I

WHETHER SPECIFICATION 1 OF CHARGE II IS LEGALLY SUFFICIENT.

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S PLEA TO SPECIFICATION 1 OF THE CHARGE II WHEN THERE WAS A SUBSTANTIAL BASIS IN LAW TO QUESTION THE PLEA.

PANEL NO. 3

Statement of the Case

On 7 November 2024, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of sexual harassment and two specifications of assault consummated by a battery, in violation of Articles 134 and 128, Uniform Code of Military Justice, 10 U.S.C. § 934, 928 (2019) [UCMJ].[1] (Charge Sheet; R. at 113-14).[2][3] The military judge sentenced appellant to a total of ten months of confinement and a bad conduct discharge. (R. at 148). The military judge credited appellant with 253 days of Article 13 credit for pre-trial confinement. (R. at 115).

On 20 November 2024, the convening authority approved the findings and sentence. (Action). On 25 November 2024, the military judge entered judgment. (Judgment).

Statement of Facts

Appellant and the victim met in January of 2023. (Pros. Ex. 1; R. at 42). Appellant and the victim were in the same battalion while stationed at Mihail

[1] All references to the UCMJ and Rules for Courts-Martial [R.C.M.] are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*] with 2020 amendments.
[2] For Specification 1 of Charge II, appellant pled guilty to sexual harassment by excepting the word "pictures" and thus substituting "picture." (R. at 86).
[3] Specification 1 of Charge I was originally charged as a violation Article 120. (Charge Sheet). Appellant pled not guilty to the original charge and guilty to the violation of Article 128 by constructive referral. (R. at 86).

Kogalniceanu Airbase in Romania. (R. at 50). The victim was a medic for the battalion and appellant was an infantryman. (Pros. Ex. 1; R. at 50). As a medic, the victim serviced all companies within the battalion, including appellant's company. (R. at 50–51). It was routine for SPC L.R. to be within appellant's company area and around other members of his company. (R. at 51).

Out of the blue, appellant sent the victim a photo of his erected penis. (R. at 44, 48). Once appellant sent the unwelcomed photo to the victim, she told him to never send anything like that again. (R. at 49). Approximately six days after sending the photo, appellant assaulted the victim. (Pros. Ex. 1).

During the providence inquiry, the military judge asked appellant very specific questions regarding the creation of an intimidating, hostile, or offensive working environment. (R. at 50). Appellant admitted that since the victim was the battalion medic, "it would cause issues when he needed any medical assistance." (R. at 50). Appellant stated that while it was not his intention for the victim to perceive the image as hostile, he believed that was the result of the image. (R. at 52). The military judge specifically asked appellant if he believed the image he sent to L.R. created an offensive work environment— the appellant stated, "Yes, your honor." (R. at 53). In appellant's reasoning of why he thought the image created a hostile or offensive work environment, he explained, "[T]he picture is shocking in nature…especially to a female…it would create issues in the

battalion." (R. at 49). Appellant stated that the photo he sent to the victim was all three: hostile, intimidating, and offensive. (R. at 51).

The military judge explained the meaning of "severe" to appellant. (R. at 49–50). The military judge then asked appellant whether receiving something traumatic, such as an unsolicited photo of an erect penis, could be severe, to which appellant agreed. (R. at 50).

The military judge explained to appellant that he must have actual knowledge of engaging in conduct that's sexual in nature, but actual knowledge is not required for the other elements of the offense. (R. at 40).

The appellant's testimony and the stipulation of fact both produced evidence that appellant's act was prejudicial to good order and discipline and was service discrediting. (R. at 56; Pros. Ex. 1). To convince the military judge that his act was service discrediting, appellant defined his act as "going against the policies and regulations that help maintain our unit cohesion and ability to fight." (R. at 56). Appellant furthered with "the public would look down on this…knowing that military members are doing this." (R. at 56). The military judge addressed good order and discipline next. (R. at 57). Appellant's act went against good order and discipline because it harmed morale. (R. at 57). The victim's ability to provide medical support to appellant's company was impacted. (R. at 57).

Assignment of Error I

WHETHER SPECIFICATION 1 OF CHARGE II IS LEGALLY SUFFICIENT.

Standard of Review

This court reviews questions of legal sufficiency de novo. *United States v. Mendoza*, 85 M.J. 213, 217 (C.A.A.F. 2024).

Law

The test for legal sufficiency is whether—after viewing the evidence in the light most favorable to the government—any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (citations omitted). The standard for legal sufficiency involves a very low threshold to sustain a conviction. *Id*.

Reasonable doubt "does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *United States v. King*, 78 M.J. at 221. In analyzing both legal and factual sufficiency, this court's superior court "has long recognized that the government is free to meet its burden of proof with circumstantial evidence," and "recognize[s] that the ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private." *Id.*

To convict appellant of sexual harassment under Article 134, UCMJ, the

government was required to prove: (1) appellant knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature; (2) that such conduct was unwelcome; (3) such conduct was severe, repetitive, or pervasive that a reasonable person would perceive, and that SPC L.R. did perceive, an intimidating, hostile, or offensive working environment; and (4) under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces and of the nature to bring discredit upon the armed forces.

Argument

Appellant solely contends there is insufficient evidence of the third and fourth elements of Article 134 sexual harassment; namely, that the victim perceived an intimidating, hostile, or offensive working environment and the terminal element. (Appellant's Br. at 6–12). But appellant's testimony satisfied each.

A. Appellant's Detailed Admissions Fully Support Each Element of the Offense.

A provident plea requires that the accused's own statements "objectively support the plea." *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994).

1. Sexual nature and unwelcome conduct

Appellant admitted that he knowingly sent an unsolicited photo depicting sexual content; namely, his erect penis. (R. at 49). He acknowledged the image was

unwelcome because the victim told him never to send anything like that again. (R. at 49). These admissions satisfy the first two elements beyond question.

2. Creation of an intimidating, hostile, or offensive work environment

The military judge addressed intimidating, hostile, or offensive work environment by starting with the nature of the work environment between appellant and the victim (R. at 50). The victim was the battalion medic who frequently provided support to appellant and his battalion. (R. at 50). The military judge then addressed why appellant thought the work environment was intimidating, hostile and offensive, separately. Appellant's responses to each were: "It would be intimidating [because] the shock of getting a picture that was unwanted and out of the blue, which would cause her to have just (sic) issues with me coming around." (R. at 51). "That was not my intention [to cause a hostile work environment], Your Honor, but I believe that was the result of the picture." "[T]o just out of the blue, sending it to a female that was unwarranted. (R. at 52). I believe that created a male and female offensive work environment." (R. at 53). After each of appellant's responses, the military judge asked follow-up questions that summarized his understanding of what appellant told him. (R. at 49–53). These admissions confirm not only appellant's awareness of the impact but also corroborate the victim's perception of the environment as hostile and/or offensive.

The record establishes that the victim perceived the work environment

appellant's conduct created as hostile and offensive. After receiving the unsolicited photo, the victim immediately told appellant never to send anything like that again. (R. at 49). This reaction demonstrates that she found the image unwelcome and offensive. Her ability to function in her role as battalion medic was directly affected because the victim was required to continue interacting with appellant's company, including appellant himself. (R. at 51, 57).

The military judge was very thorough in his colloquy with appellant. The military judge explained every element, allowed appellant to give detailed responses, and summarized appellant's answers before moving on. (R. at 37–84). The military judge explained the meaning of "severe" to appellant and verified appellant believed his action was severe. (R. at 49–50). Appellant contends that the evidence of how the photo was "shocking" was speculative and thus an unconstitutional presumption. (Appellant Br. 8). However, this is not a conclusive presumption like the court was concerned about in *Phillips*. *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011). Here, the military judge's colloquy was based on facts appellant articulated that addressed what the public *would* think about his conduct. As the court found in *Phillips*, the government is not required to specifically articulate how the conduct is discrediting. *Id*. Therefore, in the light most favorable to the government, appellant's responses provide legally sufficient evidence.

Together, this evidence demonstrates that a reasonable person in the victim's position would perceive, and that she in fact did perceive, an intimidating, hostile, or offensive work environment.

3. Prejudice to good order and discipline

"Proof of the conduct itself may be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that under all the circumstances, it was of a nature to bring discredit upon the armed forces." *Phillips*, 70 M.J. 161, 163. "The responsibility of the evaluation of the nature of the conduct rests with the trier of fact." *Id*. at 165.

> In general, the government is not required to present evidence that anyone witnesses or became aware of the conduct. Nor is the government required to specifically articulate how the conduct is service discrediting. Rather, the government's obligation is to introduce sufficient evidence of the accused's allegedly service discrediting conduct to support a conviction.

Id. at 166.

4. Good order and discipline element was met.

The evidence shows that appellant's conduct undermined good order and discipline. Per appellant himself, by sending the unsolicited sexual image, he harmed morale and disrupted unit cohesion. (R. at 57). Because the victim was the battalion medic, her ability to provide medical support to appellant's company was directly affected. (R. at 57). The disruption of a medic's ability to perform her

duties strikes at the core of unit readiness and discipline. Appellant's statements confirm the prejudicial effect of his conduct. He admitted that his actions went against the policies and regulations that maintain unit cohesion and the ability to fight. (R. at 56). Therefore, this element is met beyond a reasonable doubt.

5. Service discrediting element was met.

Here, the military judge addressed the service discrediting element last, after considering all the circumstances told to him prior. (R. at 56). The military judge specifically asked appellant if his conduct was of a nature to bring discredit on the armed forces. (R. at 56). Once the appellant answered, the military judge reread the definition of discrediting. (R. at 56). Appellant again answered the question with, "the public would look down, your honor, knowing that military members are doing this." (R. at 56). The military judge's finding that appellant's conduct was service discrediting was not speculative. Appellant acknowledged his actions as behavior unbecoming of a military member. (R. at 56). The military judge was allowed to consider all the circumstances of the conduct, alongside the appellant's reasoning to find that the element was met beyond a reasonable doubt.

Appellant contends that his testimony during his colloquy was speculative because he stated the "public would look down on this." (Appellant's Br. 12). But appellant only needs actual knowledge that he was engaging in conduct of a sexual nature. Actual knowledge is not required for the other elements of the offense.

MCM pt. IV, ¶ 60 (2019).

Taken together, the stipulation of fact, the victim's reaction, and appellant's sworn admissions during providence, all provide legally sufficient evidence that appellant's conduct was prejudicial to good order and discipline and service discrediting.

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S PLEA TO SPECIFICATION 1 OF CHARGE II WHEN THERE WAS A SUBSTANTIAL BASIS IN LAW TO QUESTION THE PLEA.

Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea -- an area in which we afford significant deference." *Inabinette*, 66 M.J. at 322, (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Courts have recognized that "[t]here exist strong arguments in favor of giving broad discretion to military judges in accepting pleas, not least because facts are by definition undeveloped in such cases." *Id*. (citing *Jordan*, 57 M.J. at 238). This has

given rise to a substantial basis test: "[d]oes the record as a whole show 'a substantial basis' in law and fact for questioning the guilty plea." *Id*. (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Law and Argument

The military judge did not abuse his discretion by accepting appellant's plea of guilty in this case. He conducted a probing providency inquiry in which the appellant supplied a strong factual basis for each element. Consideration of the record's entirety demonstrates no substantial basis in law to question the guilty plea to Specification 1 of Charge II.

A. The Record Demonstrates a Fact-Focused Providency Inquiry

The providence inquiry in this case was thorough and comprehensive. The military judge walked appellant through each element of Article 134 sexual harassment, ensuring he understood—and could articulate—why his conduct met each requirement. (R. at 37–84). The military judge did not rely on conclusory answers. Instead, he: explained the elements clearly, asked appellant to describe the conduct in his own words, required appellant to explain why the conduct was unwelcome, severe, and created an intimidating or hostile work environment, clarified definitions such as "severe," "intimidating," "hostile," "offensive," "good order and discipline," and "service discrediting," and repeatedly summarized appellant's admissions to ensure accuracy. This approach is precisely what

Inabinette and *Jordan* require: an inquiry that confirms the accused both understands the law and admits facts that objectively satisfy the offense. *Inabinette*, 66 M.J. at 322; *Jordan*, 57 M.J. at 238.

Appellant contends that because he utilized words such as "*if* anyone outside of the armed services knew" to explain how his behavior was service discrediting, the factual basis is not sufficient. (Appellant's Br. 15). In *Phillips*, the Court made it very clear that the focus is on "whether the accused's conduct *would tend* to bring discredit on the armed forces *if known* by the public." 70 M.J. 165 (emphasis added). The Court further explained that the government need not prove anyone was aware of an accused's conduct or "to specifically articulate how the conduct is service discrediting." *Id.* at 166. Therefore, appellant's argument fails.

B. Appellant's Detailed Admissions Fully Support Each Element of the Offense.

A provident plea requires that the accused's own statements "objectively support the plea." *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994).

1. Creation of an intimidating, hostile, or offensive work environment

Appellant explained: the image was "shocking," it was sent "out of the blue," it would cause her "issues with [him] coming around," and it would negatively affect their professional interactions because she was the battalion medic. (R. at 49–53). These facts establish both subjective and objective perception of a hostile or offensive environment.

2. Prejudice to good order and discipline

Appellant stated that his actions harmed morale and undermined unit cohesion. (R. at 57). He acknowledged that his conduct interfered with the victim's ability to perform medical duties for his company—an impact directly tied to unit readiness. (R. at 57). These factual admissions provide a strong basis for the good order and discipline element.

3. Service discrediting

Appellant stated that the public would "look down on" this conduct and perceive it negatively if known to involve a service member. (R. at 56). Under *Phillips*, this admission, combined with the nature of the conduct, is more than sufficient. 70 M.J. 161, 163–66 (C.A.A.F. 2011).

C. The Record Contains No Material Conflict Requiring Rejection of the Plea

The "substantial basis" test determines if there is a direct and meaningful conflict between the plea and the accused's statements. *Inabinette*, 66 M.J. at 322. Here, no such conflict exists because appellant consistently affirmed each element, his statements aligned with the stipulation of fact, the military judge addressed and resolved any potential ambiguities by seeking clarification and summarizing appellant's explanations and appellant never retreated from his admissions or expressed uncertainty.

Even more, while not evidence, the victim's unsworn statements confirm rather than contradict appellant's statements with regard to a hostile work environment. The victim stated that after the assault, she no longer connected with co-workers. (App. Ex. VI). The victim was afraid that while at work, appellant would come around the corner. (App. Ex. VI). The victim's love for her work diminished, due to appellant's actions. (App. Ex. VI). The victim stated, "I know it wasn't always like this; I remember that it wasn't. Now I feel like it always will be. This is because of Frank Barbosa and what he did to me." (App. Ex. VI).

Taken together — appellant's statements, the stipulation of fact, and the victim's description — create a cohesive and reliable factual basis for each element. The record contains no legal or factual inconsistencies. The military judge did not abuse his discretion in accepting appellant's guilty plea to Specification 1 of Charge II.

Conclusion

WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence.



TERI'EL M. DIXON
CPT, JA
Appellate Attorney, Government
Appellate Division



VY T. NGUYEN
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]

RICHARD E. GORINI
COL, JA
Chief, Government Appellate
Division

CERTIFICATE OF SERVICE

UNITED STATES v. FRANK BARBOSA 20240538

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 8th day of January, 2026.

[redacted]

Paralegal
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[redacted]

PANEL NO. 3