

VA discriminates against male veterans due to a biased belief that male survivors are less credible and deserving of benefits than female survivors.

More than six months later, the VA has failed to disclose records about disparities in the grant and denial rates of male military sexual trauma survivors' disability claims—data that goes to the heart of plaintiffs' requests. The VA has also made no apparent effort to investigate the full scope of the VA's homophobic and sexist culture, to address the root causes of bias in its adjudicatory processes, and to provide restitution to veterans victimized by its biased decision making. The VA's failure to uncover the full scale of the bigotry within its system undermines veterans' ability to trust that their assigned Veterans Law Judge will adjudicate their claim on the basis of the facts, not their gender. The public—and the many veterans who seek benefits for the sexual trauma they experienced during service—deserve answers as quickly as possible.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331 and 1361.

2. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(3) as Plaintiff Connecticut Veterans Legal Center resides and has its primary place of business in the District of Connecticut, and no real property is involved in this action.

PARTIES

3. Plaintiff Protect Our Defenders (POD) is the only national nonprofit organization solely dedicated to ending the epidemic of sexual harassment, assault, and rape in the military, and to combating a culture of pervasive misogyny and retribution against victims. POD honors, supports, and gives voice to survivors of military sexual assault and sexual harassment, and seeks reforms to ensure that all survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice. POD's

commitment to servicemembers extends beyond their time on active duty. Ensuring that survivors have access to justice, benefits, and compensation as they transition into civilian life requires inquiry into the VA's practices. POD analyzes sexual assault and harassment data, publicizes its research, presses for collection and disclosure of military and VA data on demographics of and disparities affecting both the victim and the accused, educates the public and press on key findings, and collaborates on major research projects. Because members of Congress, stakeholders, survivors, veterans' advocates, and the press rely on POD for fact-based analysis, it is crucial that POD receive the requested information promptly, as required by statute.

4. Plaintiff Connecticut Veterans Legal Center (CVLC) is a Connecticut-based nonprofit organization whose mission is to help veterans who have experienced homelessness and mental illness overcome legal barriers to housing, healthcare, and income. CVLC advocates on behalf of marginalized veterans, including providing legal assistance to individuals who have been denied critical disability benefits by the VA. CVLC also spearheads advocacy and education efforts on behalf of veterans within the state and nationally and produces manuals for veterans' legal services nationwide. Because experiencing military sexual trauma (MST), particularly for male veterans, is a significant risk factor for homelessness and serious mental health conditions, information on bias against male MST survivors is central to CVLC's ability to serve veterans.

5. Defendant Department of Veterans Affairs is the federal agency responsible for coordinating and supervising government activity related to the administration of benefits to veterans of the U.S. military. The VA is an agency within the meaning of 5 U.S.C. § 552(f).

STATEMENT OF FACTS

The VA Adjudicatory System Harbors Gender-Based Biases

6. All veterans are owed a fair and impartial hearing when seeking disability

compensation benefits. The VA is obligated by statute, by its own regulations, and under the due process and equal protection clauses of the U.S. Constitution to provide such a hearing. *See, e.g.*, 38 CFR 3.103.

7. Veterans who have experienced military sexual trauma (MST) often desperately need the benefits that they earned in service in order to heal. Yet, preliminary evidence suggests that these are the very veterans against whom Veterans Law Judges (VLJs) discriminate.

8. The limited records that the VA has returned in response to Plaintiffs' requests thus far fail to include data on MST-related claims. However, they show that male veterans are still less likely to be granted disability benefits for post-traumatic stress disorder on appeal to the BVA than female veterans, and are likelier to have their claim remanded or denied outright. As long as the VA refuses to share disaggregated MST-specific data, plaintiffs are unable to confirm whether this disparity is related to VLJs' bias against male survivors of MST.

9. Generally, however, survivors of sexual assault who contravene gender stereotypes are less likely to be believed. In the context of military culture, this mechanism can operate against male servicemembers. *See O'Brien et al., Don't Tell: Military Culture and Male Rape*, 12 PSYCH. SERVICES 357 (2015) (categorizing the myths that persist in military culture as "men don't get raped" or at least "real men/strong men don't get raped;" "male on male rape is about homosexuality;" and "male rape is not serious," among others).

10. As the Department of Defense has acknowledged, male survivors are often "afraid of their friends or teammates finding out what happened to them. They believe they will be looked at as less than a man, that they will be ostracized and shunned. And, many victims see the assault as the death-knell to their careers." Jim Garamone, *Experts: Males Are Also Victims of Sexual Assault*, DoD News (Feb. 20, 2015).

11. Servicemembers' fears of social and professional retaliation for reporting and seeking treatment for sexual assault are well-founded. Prior to the repeal of Don't Ask, Don't Tell in 2011, for example, male service members who were assaulted by men were often discharged for engaging in homosexual conduct. Nathaniel Penn, "Son, Men Don't Get Raped," GQ (Sept. 2, 2014). Even after the repeal, servicemembers who report sexual assault face high rates of retaliatory discharge. See Human Rights Watch, *Booted: Lack of Resource for Wrongfully Discharged US Military Rape Survivors* (2013).

12. To the extent that male survivors of MST deviate from the stereotypical masculine ideal or are assumed to be gay, VLJs have expressed attitudes that would suggest bias against them. The Merit Systems Protection Board (MSPB) found in 2017 that multiple VLJs had engaged in sexist, racist, and homophobic stereotyping while on the job, including in an online platform that participants nicknamed the "Forum of Hate." See *VA v. Markey*, 2017 MSPB LEXIS 4774, *4-8 (M.S.P.B. Nov. 9, 2017).

13. For more than seven years, several VLJs and board attorneys at the BVA sent racist, sexist, and homophobic communications using government email servers. These employees used derogatory terms to describe sexual intercourse with female employees; referred to male BVA employees as "butt buddies" and speculated about whether they engaged in oral sex with one another; and favorably cited the Ku Klux Klan. After making a "joke" about same sex relationships, one participant wrote, "I am clearly filled with hate. Need to stop." The VLJ responded, "[N]o!! actually keeps it sane here." *Id.* at *37.

14. As part of a decision to uphold the termination of one of the VLJs involved, the MSPB found that "It is logical for the public to conclude Respondent and other [Forum of Hate] members are prejudiced against homosexuals." *Id.* at *8. These individuals were tasked with the

adjudication of sensitive claims involving disability and military sexual trauma; it is logical, also, for male veteran survivors of MST to conclude that the VLJ adjudicatory system is prejudiced against them.

FOIA Requires Transparency regarding the BVA's Treatment of Survivors of MST

15. Plaintiffs' FOIA requests seek to identify similar disparities in grant and denial rates of claims related to MST by individual VLJs.

16. The VA disability compensation program is a lifeline. The VA has a legal duty to assist veterans and must afford them the benefit of the doubt, not a deck stacked against them by prejudice. *See* 38 USCS § 5107 (stating that the Secretary "shall give the benefit of the doubt to the claimant" where there is an "approximate balance of positive and negative evidence"). Consequently, the VA has a responsibility to ensure that veterans' claims are decided not on the basis of gender or stereotypes, but on the facts and the law.

17. When the VA skirts its legal obligations to veterans, transparency and public oversight become necessary.

18. The public has a strong interest in information that reveals the effectiveness of efforts to support veterans who have experienced MST in an equitable manner, given the enormity of the sexual assault epidemic in the U.S. military, and its emotional and financial ramifications on veterans, particularly those veterans whose MST-related claim are denied. This information includes records regarding gender disparities in the handling of MST-related disability benefits claims by VLJs.

19. Perhaps most critically, veterans deserve full transparency when their due process and equal protection rights are at stake, whether they put the data collected to use in broader political advocacy, or in their own disability benefits appeals.

The Plaintiffs' FOIA Requests

20. On August 23, 2017, Plaintiffs submitted a Freedom of Information Act (FOIA) request to the Department of Veterans Affairs seeking information about the VA's treatment of survivors of sexual harassment, assault, and rape. This request is enclosed as Exhibit A, and has been assigned FOIA tracking number 17-12817-F.

21. Plaintiff's FOIA request seeks records on the gender breakdown of the dispositions of claims with military sexual trauma elements at the Board of Veterans Appeals. Specifically, Plaintiffs have requested statistics on the disability benefit requests allowed, remanded, or denied by type of disability claimed.

22. Plaintiffs received a letter from the VA on September 21, the day on which the twenty working day period for response provided by FOIA expired, stating that the VA was processing the request. VA FOIA officer Margaret Peak told Plaintiffs' counsel over the phone the same day that the VA's response would arrive within two weeks.

23. On October 31, twenty-seven working days after the initial period for response provided by FOIA expired, the VA provided its final disposition on Plaintiffs' requests. It is attached as Exhibit B.

24. The VA provided some responsive records in its final disposition. Specifically, it adequately addressed Plaintiffs' first and second requests, and subpart (a) of Plaintiffs' third, fourth, fifth, and sixth requests.

25. However, the VA failed to respond adequately to subparts b, c, and d of Plaintiffs' third, fourth, fifth, and sixth requests. Critically, these are the subparts that ask the VA to provide, for each individual VLJ, the total number of Board decisions that were allowed, remanded, and denied, by disability claimed and by gender. The records provided do not include data on claims

related to MST.

26. The VA failed to conduct an adequate search for records. The VA failed to specify its search methods and provided no explanation for withholding records, and so Plaintiffs timely appealed the VA's final disposition, attached as Exhibit C. on November 17.

27. The twenty working day period for response provided by the FOIA expired on December 18. Over two months later, the VA has still not responded substantively to Plaintiffs' appeal.

28. On December 11, Plaintiffs received a letter informing them that the VA was "unable to offer an estimate as to when [their] appeal will be completed."

29. After another month and a half of silence, on January 29, 2018, the VA sent Plaintiffs a letter stating that their appeal had been remanded to a FOIA officer at the Board of Veterans Appeals. The letter is attached as Exhibit D. The FOIA officer has been instructed to provide Plaintiffs with another "Initial Agency Decision containing a detailed index, if applicable, covering the responsive information, the exemptions applicable to that information, the rationale for the use of each exemption and the number of pages associated with that information," and "a description of the search conducted in this case." The letter provides no indication of when the FOIA officer will complete review.

CLAIMS FOR RELIEF

30. Plaintiffs repeat and incorporate every allegation contained in paragraphs 1-29 as if set forth here in full.

31. Defendant's failure to notify Plaintiffs within 20 days (excepting Saturdays, Sundays, and legal public holidays) whether it will comply with their requests violated their rights to records under 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(3)(A).

32. Defendant's failure to release responsive, non-exempt records violated Plaintiffs' right to those records under 5 U.S.C. § 552(a)(3)(A).

33. Defendant's failure to make a reasonable search for responsive records violated Plaintiffs' rights under 5 U.S.C. § 552(a)(3)(C).

34. Defendant's withholding of responsive records under 5 U.S.C. § 552(b)(6) violated Plaintiffs' rights under 5 U.S.C. § 552(a)(3)(C).

REQUESTED RELIEF

WHEREFORE, Plaintiffs Protect Our Defenders and Connecticut Veterans Legal Center respectfully request that this Court:

1. Order Defendant to conduct a reasonable search for records responsive to their requests;
2. Order Defendant to disclose and release the requested records in their entireties;
3. Order Defendant to grant a full fee waiver to Plaintiffs;
4. Provide for expeditious proceedings in this action;
5. Award Plaintiffs costs and reasonable attorney's fees in this action as provided by 5 U.S.C. § 552(a)(1)-(2); and
6. Grant any other and further relief the Court deems appropriate.

Dated: March 7, 2018
New Haven, CT

Respectfully submitted,

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**Motion for law student appearance forthcoming*

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