

# **Discrimination in Military Discipline and Discharges**



## Racial Discrimination Within the Armed Forces

- There is a long history of discrimination within the military justice system dating back to the Revolutionary War.
- For example, during the Korean War, in the 25th Army Division there were 4 times as many white soldiers as Black Soldiers, but twice as many Black Soldiers were subjected to courts-martial.
- A 1972 study by the Secretary of Defense showed that racial minorities received a disparate portion of General/OTH Discharges.



# Racial Discrimination Within the Armed Forces

- In 2002, Congress ordered the military to conduct periodic surveys to assess discrimination.
- The Protect Our Defenders 2017 Report found that racial disparities occur in all branches:
  - Air Force: Black Servicemembers more likely to face court martial or NJP.
  - Marines: Black Servicemembers 32% more likely to be found guilty at court-martial or NJP and 61% more likely to face court-martial/NJP in general.
  - Navy (2014-2015): Black Sailors were 40% more likely to be referred to a special or general court-martial.





## Racial Discrimination Within the Armed Forces

- 2019 Government Accountability Office Report found: "Even when controlling for factors like rank and education, Black and Hispanic Servicemembers across the armed forces are more likely than white Servicemembers to be investigated, receive nonjudicial punishments such as an Article 15 or be court-martialed for alleged violations of the UCMJ."



## Racial Discrimination Within the Armed Forces

- November 2022 CLVC Report found that Black Servicemembers receive over 25% of OTH discharges and over 30% of General Discharges, despite making up only 18% of separations in the military.
- Black Servicemembers across all service branches were approximately 1.5 times as likely as white Servicemembers to receive a OTH discharge and twice as likely to receive a general discharge.
- Between 2014-2020, there was "no discernable improvement over time, in the racial disparities in discharge status."





## Sexual Orientation Discrimination

- According to VA, over 100,000 Servicemembers have been discharged from the U.S. Military because of their sexual orientation.
- From the 1940s to the beginning of the 1990s, LGBTQ+ people were banned from service in the military.
- Around 17,000 people were discharged for their sexual orientation in the 1980s, according to a report by the U.S. General Accounting Office.
- During this time, white LGBTQ+ women represented 6.4% of Servicemembers, but 20.2% of those discharged.



# Sexual Orientation Discrimination

- In 1993, Don't Ask, Don't Tell was enacted.
- Military investigators used a variety of invasive tactics to "investigate" LGBTQ+ Servicemembers and oust them from the service.
- A large percentage of discharges based on sexual orientation were OTH, even though under DADT, any discharge not involving misconduct was to be Honorable.
- Approximately 14,000 Servicemembers were discharged under DADT.
- DADT was repealed in 2010.





# Gender Discrimination/Sexual Assault

- A 2021 Rand Arroyo Center study, commissioned by the Army found:
  - "Female Soldiers experience significantly more types of sexual harassment/gender discrimination behaviors than male Soldiers."
  - "Nearly half of female Soldiers indicate that at least one of their alleged perpetrators was either their supervisor or someone in their chain of command."
- The 2021 Department of Defense Annual Report on Sexual Assault in the Military found over 35,000 active duty Servicemembers experienced sexual assault in FY21.
  - 8.4% of women – over 19,000 women
  - 1.5% of men – over 16,000 men





## Gender Discrimination/Sexual Assault

- In 2016, DOD Inspector General found 1/3 of victims are discharged after reporting their assault, usually within 7 months of reporting.
  - The IG Report states, "Many Servicemembers reported being singled out for discipline for minor infractions following a sexual assault report in an effort, they believe, to create a record justifying a misconduct discharge."
- The Human Rights Watch 2016 Report noted that many sexual-assault victims were discharged for "personality disorder."



Brent G. Filbert

# **Effectively Presenting Discrimination Issues in Discharge Upgrades**

*How to represent victims of racial, gender, and sexual orientation  
discrimination before military discharge upgrade boards.*





# **Guidance on Handling Discrimination Upgrade Cases**

- **Important and interesting cases**
  - **To the individual veteran**
  - **To the military generally**



## **Guidance on Handling Discrimination Upgrade Cases**

- **Can you prove discharge was due to discrimination?**
  - **Almost impossible!**
- **Why?**
  - **Evidence of discriminatory motive rarely available**
  - **Liberal consideration does not apply**
  - **Presumption of Regularity**
    - **Presumption is that discharge was proper**
    - **Burden to prove error or injustice is on the veteran**





## **Guidance on Handling Discrimination Upgrade Cases**

- **Must tie conduct leading to discharge to discrimination**
- **2 primary ways**
  - **Kurta Memorandum**
    - **Mental health condition**
    - **Victim of sexual assault/harassment**



# **Guidance on Handling Discrimination Upgrade Cases**

- **2 primary ways**
  - **Misconduct by veteran in response to discrimination**
    - **Based on equity (DRBs) and injustice (BCM/NR)**
      - **10 U.S. Code §§1552 and 1553**
      - **32 CFR 70.9(c)(3)(ii)(D)**
    - **Wilkie Memorandum**
      - **Fundamental fairness**





# Success Rates – 2<sup>nd</sup> and 3<sup>rd</sup> Quarter CY2022

<b>Review Boards</b>	<b>Mental Health Claims Adjudicated</b>	<b>Relief Granted</b>	<b>Percent</b>
Air Force Discharge Review Board	116	10	8%
Air Force Board for Correction of Military Records	57	10	17%
Army Discharge Review Board	538	198	36%
Army Board for Correction of Military Records	264	122	46%
Naval Discharge Review Board	470	210	44%
Board for Correction of Naval Records	672	117	17%
<b>Review Boards</b>	<b>Sexual Assault Claims Adjudicated</b>	<b>Relief Granted</b>	<b>Percent</b>
Air Force Discharge Review Board	25	3	12%
Air Force Board for Correction of Military Records	24	8	33%
Army Discharge Review Board	69	42	60%
Army Board for Correction of Military Records	29	24	87%
Naval Discharge Review Board	64	24	37%
Board for Correction of Naval Records	131	37	28%



## **Evidence Necessary in Discrimination Upgrade Cases**

- **Evidence discrimination occurred**
  - **Affidavit from veteran**
  - **Complaints by veteran on active duty or at VA**
  - **Buddy statements**
  - **Supporting circumstantial evidence**
    - **Chronology of events**
    - **Performance decline**
    - **Mental health treatment**



## **Evidence Necessary for Discrimination Upgrade Cases**

- **Resulting mental health condition led to misconduct**
- **How?**
  - **Expert nexus opinion**
  - **VA service connection**
  - **Service treatment records**
  - **VA medical records**
  - **Private medical records**





## **Evidence Necessary for Discrimination Upgrade Cases**

- **Misconduct by veteran in response to discrimination**
  - **Altercations**
  - **AWOLs**
  - **Drug use**
  - **Veteran's affidavit**
  - **Buddy statements**



# **Change in Policy Argument**

- **32 CFR 70.9(c)(1) - policies and procedures differ in material respects from current policies and procedures, provided:**
  - **Substantial enhancement of rights; and**
  - **Substantial doubt that the applicant would have received the same discharge.**



# **Change in Policy Argument**

- **Wilkie Memorandum – Paragraph 6f:**
  - **Changes in policy, whereby a Service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received.**





# **Change in or Failure to Follow Law/Policy Argument**

- **DoD and Service Instructions**
  - **Prohibiting discrimination**
  - **Handling discrimination complaints**
  - **Treatment of the victim**
  - **Whistleblower protections**
    - **10 U.S.C 1034**



# **Trauma-Informed Representation**

- **Discrimination is traumatic experience**
  - **Understand why veteran acts in certain ways**
  - **It's not you!**
- **Tips on effectively working with veteran**
  - **Let them vent**
  - **Prepare client by explaining and forewarning**
  - **Keep client informed**
  - **Be willing to take breaks/reconvene**
  - **Explain boundaries, if necessary**

