



# FIGHTING FOR MILITARY WOMEN



The Service Women's Action Network (SWAN) is a nonprofit organization in New York City that advocates for military women and works to eliminate rape, sexual harassment, and sexual assault in the military, as well as other barriers faced by servicewomen.

When military personnel are discriminated against, assaulted, or harassed, they may not have the same remedies that are available to civilians. They cannot simply report the problem and file suit, as civilians might do with their employers, and they cannot quit their jobs. The structure of the military complicates both the reporting process and the administration of justice. SWAN is working to change that.

The organization's executive director is **Anu Bhagwati**, a former captain in the Marine Corps and the second woman to complete the Marine Corps Martial Arts Program instructor training school. She talked with *Trial* Managing Editor **Allison Torres Burtka** about SWAN's work.

**Q** Why did you and your cofounders create SWAN?

**A:** At the time, in 2007, we were primarily concerned with how few resources there were for women coming out of the service who had experienced various forms of trauma and discrimination. There were high rates of sexual assault and harassment, domestic violence, and rampant discrimination against women.

**Q** Last year, nearly 3,200 instances of sexual assault in the military were reported, but the Department of Defense (DOD) estimates that the number is more than 19,000. You've referred to the problem as epidemic. Why do you think the numbers are so high?

**A:** Nineteen thousand sexual assaults per year amount to 52 sexual assaults every single day. People often ask why underreporting is so high—it's even

higher than it is in the civilian world.

In the military, you don't want to stick out. Successful careers are usually based on fitting in. Reporting a sexual assault is often perceived as distracting a unit from its primary mission. All eyes are on you, and people may think you've potentially ruined a good man's career, you're drawing precious resources away from war-fighting, you've lied, or you're a whore—that type of culture is very pervasive. The pressures on an individual survivor to stay quiet are overwhelming.

I think the numbers are high in part because there's practically no deterrent. The DOD has had sexual assault policies for years, but very few sexual predators are actually prosecuted or punished. There are multiple loopholes through which they can escape. One problem is that nonjudicial and administrative punishments are often meted out instead of judicial punishments. You'd expect someone accused of a rape or sexual assault to see the inside of a courtroom and face a judge and jury, but that rarely happens.

Of the 3,158 sexual assaults that were reported last year, only 529 were preferred for court-martial, and out of those 529, only 53 percent resulted in convictions. Women and men who are sexually assaulted see these low numbers—they see how difficult it is for predators to be punished in an appropriate manner, and it reinforces the perception that it's safer for survivors to just stay silent.

More often than not, the perpetrator gets an inappropriate punishment, if there's any punishment at all. For example, a sexual offender pleads guilty to sexual assault under nonjudicial punishment and his punishment is restriction to his barracks or denial of commissary privileges, which are absurd punishments, considering the crime. Under military law, junior officers are often assigning these punishments. These officers have very little understanding of military law, let alone the complexities of sexual

assault cases. It's something that we're working to fix, so that all sexual assault cases go through a general court-martial convening authority for case disposition, rather than through junior officers who have a lot less experience.

**Q Why is it problematic to have junior officers deciding punishments?**

**A:** If the perpetrator is in your unit, there's an automatic conflict of interest for your commander. There's no way for a commander to look at the case impartially when he or she knows both people.

Even though this officer is not a lawyer or a judge by training, he or she is basically endowed with judicial authority to determine what happens in the case—whether it should be thrown out or whether there's enough evidence for a court-martial. These are young officers with no legal training whatsoever and very few legal resources.

Also, junior officers are focused on their unit's operational performance and don't have the time or desire to properly deal with these cases. They are focused on training for war and war-fighting.

**Q In *Cioca v. Rumsfeld*, a group of plaintiffs who were raped, sexually assaulted, or sexually harassed filed suit against the current and former DOD secretaries, arguing that they failed to prevent and prosecute these crimes, discouraged reporting, and allowed retaliation. Could you talk about your involvement in the case?**

**A:** We assisted the law firm Burke PLLC [based in Washington, D.C.] in navigating the veterans' community. We also provided research and information to the firm up front and helped with their strategy regarding the effects of the lawsuit on potential legislative action. Once the lawsuit was filed, SWAN helped educate the public, the media, and policymakers about military culture regarding sexual



assault and sexual harassment. Numerous Congress members came forward to ask us how they could fix the problem. We helped draft legislation for more than a dozen offices on various issues related to discrimination, harassment, assault, rape, and domestic violence.

Something has shifted in Congress. We're seeing that regardless of political party, no one can afford to pretend the problem doesn't exist. At the very least, both parties are actively interested in learning as much as they can about the issues.

For sexual assault survivors who served in the Vietnam era or who were raped even before then, there's a sense that nothing like this has ever happened—that no one has ever paid this much attention to these issues. Even though these problems are not going to go away overnight, there's a palpable feeling that we can change things for the better. There's no doubt that the lawsuit has been pivotal in changing military and congressional culture around this issue.

**Q The *Cioca* plaintiffs were all retaliated against after being attacked. How does retaliation compound the problem?**

**A:** There is a lack of deterrent, lack of punishment for predators, and lack of safety for victims who do come forward. They are often retaliated against by their own chains of command. Enlisted leadership and commanding officers may say they're lying, and they may receive death threats from the perpetrators. We've had cases of women who have reported their assaults and eventually been murdered.

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It's not easy to transfer to another unit, and you can't just quit your job like you can in the civilian world. If you did, you'd be sent to jail. It's a very difficult system to navigate, especially for junior enlisted troops, who make up the majority of sexual assault victims.

When you're retaliated against, you're effectively silenced. You're living in terror as you go about your daily duties, and you often feel like you're alone. It's very hard to know what resources are available to you when the entire unit is against you and the perpetrator is watching your every move.

People who are raped and assaulted often develop serious health conditions like post-traumatic stress disorder (PTSD), and many people's job performance declines. Victims are often punished for reporting a rape or assault and then punished again for bad performance; some are even demoted or discharged.

If you dig even deeper, you'll find that servicemembers are also improperly diagnosed with personality disorders, which will lead to a discharge from the military. We're working with several help line clients who, after reporting their rapes, were told they have a personality disorder and have been kicked out of the military.

Troops have been improperly diagnosed with personality disorders for decades. We've seen this happen prominently to combat veterans, most of whom should have been diagnosed with PTSD. A personality disorder discharge prevents a veteran from getting access to veterans benefits.

Just imagine getting raped, and then

not only being kicked out as retaliation for reporting your attack but then being denied veterans' benefits as well. It's a very insidious problem, and we're working with Congress members to determine how deep it goes.

## **Q How does the difficulty of getting records from the military complicate the issue?**

**A:** Multiple policies are preventing servicemembers and veterans from accessing justice and veterans benefits. Rape kits and their accompanying documentation are only kept for a year. The hard copies of sexual harassment investigations are destroyed after two years, and the database containing those investigations is expunged after five years.

We want to maintain these documents indefinitely so that veterans can get compensation for service-connected conditions like PTSD. Because PTSD symptoms can take quite some time to surface, and because it's not always safe or possible for a servicemember to press charges immediately after an attack, we need to keep these records indefinitely. A lot of victims do not feel safe pressing charges when they're still stationed with or close by the perpetrator.

Also, the military cannot effectively prosecute the same offender for multiple assaults committed over time due to the lack of records and evidence retention.

## **Q In *Cioca*, the plaintiffs alleged that their First and Fourteenth Amendment rights were violated under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*. Are**

**there other remedies in the civil justice system that military victims can pursue?**

**A:** Under the *Feres* doctrine, servicemembers are prohibited from bringing suit against the federal government for negligence. The *Feres* doctrine certainly needs to go, but even if it's not overturned, we've worked on legislation that would remedy some of the problems. Rep. Bruce Braley's [D-Iowa] legislation, the Holley Lynn James Act, would directly resolve some of the flaws in the military justice system. It would create an exception to the *Feres* doctrine that would allow a victim to sue under the Federal Tort Claims Act. That bill also covers domestic violence; Holley Lynn James was an Army lieutenant who was killed by her husband. This bill alone would provide a deterrent that would radically improve both cultural norms about sexual violence and military prosecution of sexual assaults.

We have also drafted legislation that would allow victims to be awarded restitution, similar to what civilians enjoy under the Mandatory Victims Restitution Act.

## **Q What impact has the *Cioca* case had?**

**A:** It has forced the DOD to state for the record that the system requires enormous reform, and in that sense, the DOD has been forced to publicly side with the victims. Burke PLLC chose 16 plaintiffs who were all retaliated against. But those cases are not simply egregious—they're not some extreme end of the spectrum—they're actually quite indicative of the average case. These women and men were ganged up on, bullied, forced to stay quiet, psychologically and physically tortured, and nothing happened to the perpetrators.

The DOD definitely needs a third-party oversight system. Cases should be adjudicated well beyond the immediate chain of command, and perpetrators

need to be punished with sentences that reflect the brutal nature of their crimes. *Cioca* has paved the way for enormous systemic reform—we just need to keep the pressure on.

**Q SWAN has celebrated the repeal of Don't Ask, Don't Tell (DADT) but has warned that the repeal won't stop women and lesbian, gay, bisexual, and transgender servicemembers from being harassed. Why is that?**

**A:** Unless policies are enforced, they just sit there in writing. Until you change the military's systemic tolerance of homophobia and misogyny, harassment will continue. Lesbians often face the double whammy of sexism and homophobia in the military, which is particularly brutal.

Repealing DADT prevents lesbian, gay, and bisexual servicemembers from being discharged for their sexual orientation (transgendered troops were notably left out of the repeal), but it does not prevent discrimination against these troops from here on out.

Military equal opportunity policy does not include gays and lesbians as a protected class. That is something we are very concerned about. Even if the military equal opportunity system is not perfect, it's designed to protect classes of people who have been singled out because they belong to that class. Gays and lesbians certainly need that protection. Without it, workplace discrimination—for example, being denied promotions or prestigious assignments, or being given undesirable assignments based on your sexual orientation—can continue unchecked.

**Q How has "lesbian-baiting" been used under DADT?**

**A:** Under DADT, women faced the possibility of being discharged for refusing to sleep with men who were harassing them. DADT was used as a threat and tool of punishment to put down anyone who

didn't conform. It was randomly enforced; anyone who was the target of someone else's personal grudge could become the victim of an investigation and could be discharged for allegedly being gay.

In the *Cioca* case, one of the plaintiffs was a straight man who was gang-raped. When he reported it, he was punished with additional harassment and eventually discharged under DADT.

**Q Women veterans often complain of inadequate health care from the U.S. Department of Veterans Affairs (VA) and difficulty getting disability compensation for mental health claims. What are some of the gender-specific problems they encounter?**

**A:** The VA health care system has long been used to treating men. Now, in Iraq and Afghanistan, women are exposed to hostile fire as much as their male counterparts. We're seeing a need for education in the VA to make sure that women coming back from war are treated for conditions associated with combat, like PTSD. There's been a massive learning curve at the VA, and they're doing much better on the health care side when it comes to women veterans. It has been a culture shock for them to have to consider how to make facilities friendly to women—even simple things like a doctor making sure to close a door or curtain for privacy.

But on the benefits side of the VA, things are still extremely broken, especially when it comes to sexual trauma claims. SWAN and the American Civil Liberties Union sued the DOD and VA for documentation related to sexual trauma, and we found that veterans who file PTSD claims based on sexual assault or harassment, regardless of their gender, are much less likely to get their VA claims accepted than veterans whose PTSD claims are based on combat.

Right now, the standard of proof has been liberalized for combat trauma claims—a combat veteran doesn't have

to prove the specific stressor, such as the roadside bomb explosion that led to his or her PTSD. But the VA didn't liberalize the standard for sexual trauma cases. As a result, the VA has set up an unfair system in which there are now two standards of proof required for the same mental health diagnosis.

Even when there is plenty of evidence to corroborate sexual assault or sexual harassment, the VA employee processing the claim may flat-out ignore the evidence. The people handling claims are allowed the discretion to reject claims for any number of reasons, including personal opinions about sexual trauma and rape mythology.

Rep. Chellie Pingree [D-Me.] has introduced legislation that would fix this disparity. And we are working closely with the undersecretary of the Veterans Benefits Administration to see if the VA can liberalize its own policy to help veterans who file sexual trauma claims, without the need for a congressional fix.

**Q What other types of discrimination do military women face?**

**A:** There's a very strict glass ceiling in the military in terms of career progression. At SWAN we call it the "brass ceiling." Because women have been banned from a whole variety of assignments, including combat units, they don't attain the same ranks at the same rate as their male counterparts. You wouldn't see a woman on the Joint Chiefs of Staff, for example, precisely because she's not allowed to serve in certain combat assignments that would make her eligible for that job. You're seeing a lot of positive changes for women on the battlefield right now, including the use of female engagement teams, but there's still a lot of inequity and a long way to go to eliminate employment discrimination.

The Military Leadership Diversity Commission recently acknowledged that the military is not as good as it could

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be because women are restricted from combat assignments. The military is shifting toward a more integrated force, one that is based on merit rather than gender bias. For instance, the military has recently integrated submarines to include women officers, and the Marine Corps just allowed women into its human intelligence field. When I was

in the Marines, I wasn’t allowed to be a human intelligence officer—simply because I was a woman—even though that was my top choice and I was more than qualified to do so.

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the system because men expected them to fail.

**Q** What would you say to AAJ members who are interested in representing servicemembers?

**A:** Servicemembers themselves don’t realize they have fewer legal rights than civilians until a shocking injustice happens to them. Opening up the federal courts as much as possible to address negligence against servicemembers is going to fix the problem. I think the trial lawyer community has a great opportunity to get involved in cases regarding employment discrimination; violent crimes like sexual and domestic violence against servicemembers, family members, and civilians; and medical malpractice. There’s a huge opportunity to remedy injustice from the outside. ■