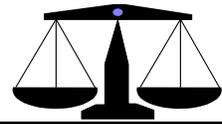




OEDCA DIGEST



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**Department of Veterans Affairs
Office of Employment Discrimination
Complaint Adjudication**

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Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

INTRODUCTION

The Office of Employment Discrimination Complaint Adjudication (OEDCA) is an independent adjudication unit created by statute, located in the Office of the Secretary. OEDCA issues the Department’s final decisions or orders on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary or Deputy Secretary.

This issue of the *OEDCA Digest* features final agency decisions and orders finding discrimination that were issued in 2011. Most of the cases highlighted involved either reprisal by management officials, harassment (both sexual and nonsexual), or management’s failure to accommodate an employee’s physical disability. Also featured are articles regarding unauthorized access of an employee’s confidential medical records and the limits on the Department’s ability to make disability-related inquiries or require medical examinations.

Maxanne R. Witkin
(Director)

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I AGENCY OFFICIALS FAIL TO PROVE ACCOMMODATION CREATED AN UNDUE HARDSHIP

The Complainant was hired as a peer counselor for veterans who suffered from mental disabilities or were recovering from alcohol or drug addictions. She was hired specifically because she suffered from Post Traumatic Stress Disorder (PTSD) and depression, was a recovering addict, and was otherwise qualified for the position. When symptoms of her disabilities prevented her from working with patients, she requested and was granted leave to go home and recuperate.

Complainant was issued a written counseling concerning her use of leave that she properly requested and that was approved. Most of her leave use was due to disabling conditions. Her remaining leave use was due to a major snow storm, to attend a teacher's conference, and for family leave.

Complainant was counseled and then terminated due to her approved, but unplanned leave use. Much of the unplanned leave was due to the symptoms resulting from Complainant's PTSD and depression. OEDCA found that agency officials violated the Rehabilitation Act when they terminated Complainant for utilizing the leave she was granted as an accommodation for her disabilities. In defense of the termination, agency officials stated that continuing to grant leave as an accommodation would cause an undue hardship for the agency. However, they

did not provide evidence to show that any undue hardship was created by Complainant's absences. Instead, they merely indicated that an accommodation would be an undue hardship.

Under the Rehabilitation Act, Federal agencies are required to provide reasonable accommodation for the known physical or mental disabilities of an otherwise qualified individual, unless the agency can demonstrate that the accommodation would impose an undue hardship. The undue hardship burden is rigorous, and the Agency must prove convincingly that a hardship actually exists. Undue hardship refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the employer's business. The Agency failed to meet this burden and therefore discriminated against the Complainant when it terminated her.

II PARKING POLICY CONFLICTS WITH OBLIGATION TO PROVIDE REASONABLE ACCOMMODATION

Although management officials are not required to provide an accommodation of an employee's choice, they are required to provide effective accommodations. The Complainant, who had a knee injury, was initially told by facility police officers that he could park in any handicapped parking space, as long as he had a handicapped placard. Management was aware of the permanent nature of Complainant's knee injuries and allowed him to park in the patient parking lot for 2 ½ years.



In July of 2009, the Complainant was told that he could no longer park in the handicapped spaces in the patient parking lot because these spaces were only for patients. As an alternative, the Complainant was told to park in the employee parking lot which was significantly further away from his office. His fellow employees were instructed to pick him up from his new parking space and drive him to his office.

Although management provided an alternative accommodation for the Complainant it was not effective. It exacerbated his disability and caused friction with his coworkers. Citing these as reasons for why he needed a different reasonable accommodation, the Complainant's request was denied. The facility cited its parking policy that mandated that handicap parking spaces not be reserved for specific individuals or employees.

Absent any evidence that allowing the Complainant to park closer to his office would pose an undue hardship, management erred by denying Complainant's request. Management had demonstrated two years prior to denying the Complainant's request that they could accommodate him.

Irrespective of what an Agency's policy mandates, the Agency is obligated to comply with Federal regulations as required by the Rehabilitation Act. Managers must develop policies that align with the mandates of Federal regulations and civil rights law. In the event that a facility's policy is at odds with the Agency's obligation to provide an effective accommodation for a

disabled employee, Federal law will be followed.

III

PROBATIONARY EMPLOYEE'S REQUEST FOR EXTENDED LEAVE UNDER FMLA WAS A REQUEST FOR REASONABLE ACCOMMODATION

Complainant, who worked as a Nursing Assistant, suffered multiple injuries as a result of an automobile accident. Her injuries included fractures to her skull, ribs, forearm, ankle, heel and other internal injuries. Considering the severity and extent of these injuries, Complainant requested that the Agency grant her four months of leave without pay (LWOP) so that she could recuperate.

At the time that the Complainant made this request, she also indicated that she could return to work sooner if given a sedentary position with less physical demands. When management became aware that its FMLA policy did not grant extended leave to probationary employees, the Complainant's request was denied and she was terminated.

OEDCA found that the Agency violated the Rehabilitation Act because there was no interactive process between the Complainant and the Agency. Instead of engaging the Complainant to see whether or not there were other duties that she could perform, management erroneously concluded that the Complainant was not entitled to alternative accommodations which would have allowed her to successfully perform her work duties.



The Rehabilitation Act requires that Agency officials initiate an interactive process once a request for a reasonable accommodation is made. Had management engaged in this process, they could have identified the extent of the Complainant's limitations, and possible accommodations.

IV

REHABILITATION ACT OF 1973 SUPERSEDES PARKING POLICY

The Complainant, a Patient Support Assistant at a VA Medical Center (VAMC), alleged that management officials discriminated against her based on disability when her request for on-site parking, was denied. Complainant is an amputee with a club foot and missing digits on her hands and foot. At the time that management denied the Complainant a parking space, the VAMC was undergoing construction. The construction closed off access to the parking lot where disabled employees normally parked and where the Complainant had parked for the previous two years.

To accommodate the disabled employees, management designated parking spaces in lots further away from the VAMC provided a shuttle bus. During the month that the shuttle bus accommodation was instituted, the Complainant filed an application requesting on-site parking. She stated that walking to and from the shuttle stop and climbing stairs to enter the bus was difficult, causing her stump to become irritated, develop blisters, and swell.

The Chair of the Reasonable Accommodation Committee (RAC) did not engage in the interactive process with Complainant to determine if the change in parking arrangements effectively accommodated her. Instead, he characterized Complainant's request for reasonable accommodation as that of a disgruntled employee.

VAMC management cited the facility's parking policy to justify its actions. The Rehabilitation Act of 1973 supersedes the parking policy if, in its application, it denies a qualified individual with a disability reasonable access to the workplace.

The Agency did not present any evidence that the accommodation of on-site parking was either outside of Complainant's physical restrictions or posed an undue hardship. Thus, OEDCA found that the Complainant demonstrated that the Agency failed to provide her with a reasonable and effective accommodation and management did not establish any legal defense for its actions.

V

OWCP POLICY DOES NOT EXEMPT MANAGEMENT FROM PROVIDING AN EFFECTIVE ACCOMMODATION

Complainant worked as a tray passer in the facility's Food Service Unit until she injured her left shoulder on-the-job in 2006. She applied for benefits from the Office of Workers Compensation Programs (OWCP) after her injury. Her application was accepted and she was accommodated at work with the 10



pound lifting restriction dictated by her physician and OWCP.

While she was accommodated for her shoulder injury, she subsequently developed a disability in her left arm and hand. Her physician restricted her completely from using her left hand. She requested and was granted an accommodation for this disability when she was reassigned to a cashier position which required the use of only one hand. In January 2008, she was transferred to the Pathology Department where her disability was also effectively accommodated.

On March 3, 2008, she was transferred back to the Food Service Unit where she was assigned as a food scooper and only needed one hand to complete her duties. However, she was also assigned duties outside of her medical restrictions and was forced to use both hands to complete many of her new duties.

In June 2008, her physician informed OWCP that her shoulder injury no longer required an accommodation. OWCP discontinued benefits and, in November 2008, informed the agency that it was no longer required to accommodate Complainant's shoulder injury. Agency officials were aware that Complainant was still disabled in her left arm and hand, however, they discontinued her accommodated position in Food Service.

On November 24, 2008, when Complainant arrived to her food scooping position, she was informed that there were no more light duty positions available and that she must

resume full time work with both hands in violation of her medical restrictions. Complainant could not perform her new duties and took leave while she petitioned the agency to reconsider and provide her with an effective accommodation for her disability. The agency refused to provide any further reasonable accommodation. Complainant applied for and received disability retirement, effective July 2010. The administrative judge found that the Complainant was discriminated against because she had to choose between working in pain or taking leave in order to keep her employment with the agency.

VI

UNNECESSARY DELAY IN PROVIDING A REASONABLE ACCOMMODATION RESULTS IN A VIOLATION OF THE REHABILITATION ACT

Complainant, a Rehabilitation Technician, was substantially limited in her ability to reach overhead or reach forward. In February 2007, Complainant's physician wrote a prescription for an assessment of Complainant's worksite. Ergonomic assessments were completed by a contractor in March 2007, October 2007, and April 2008, but the agency did not receive a work site assessment report until November 2008. The recommended desk alterations were completed on February 4, 2009. The agency attributed the delay in providing the adjustment to Complainant's work area to the contractor, and to Complainant's failure to provide current medical information regarding her need



for a workplace assessment. Complainant denied that the agency requested additional medical information from her.

OEDCA agreed with the administrative judge's decision that the agency violated the Rehabilitation Act due to its unnecessary delay in responding to Complainant's accommodation request. Although the contractor was negligent when it did not provide the assessment in a timely manner, the AJ noted that the agency had other options available to obtain the needed assessment. The AJ found that the agency failed to provide an acceptable explanation for its 15-month delay in providing Complainant a simple accommodation.

When agency officials receive a request for accommodation they should act upon it immediately and have valid reasons for any unnecessary delay. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, the factors that OEDCA considers include: (1) the reasons for the delay; (2) the length of the delay; (3) how much the individual with a disability and the agency contributed to the delay; (4) what the agency was doing during the delay; and (5) whether the required accommodation was simple or complex to provide.

VII ENSURING THE EFFECTIVENESS OF AN ACCOMMODATION IS AN ONGOING REQUIREMENT

Changes in a Complainant's condition or the work environment can cause an

accommodation that was at one time effective, to become ineffective. This is what managers recently discovered after an administrative judge cited its facility for failing to provide an effective accommodation.

The Complainant who worked as an Accountant Clerk was diagnosed with sinusitis, a condition which limited her ability to breathe, sleep, and concentrate. The Complainant's condition was aggravated when she was exposed to cold air, including air conditioning, an open window, or air blown from a fan.

Management effectively accommodated the Complainant by providing deflectors and by reassigning the Complainant to another cubicle. When Complainant was reassigned to another cubicle, she was required to sign a document acknowledging that the new seating arrangement fit her needs, thereby making the seating arrangement permanent and final.

The accommodation was effective throughout the the winter months; however, in the summer months, Complainant began to complain about air coming through the vents in her office. Complainant submitted another request for an accommodation and it was denied.

Although management required Complainant to sign a document stating that the accommodation she was given effectively met her needs, management was still responsible for accommodating her. Attempts to forestall future requests for accommodation are improper. Managers are not exempt from



providing alternative accommodations in the event that an initial accommodation is later found to be ineffective. Managers should note that an Agency's requirement to provide an accommodation is ongoing and subject to change with respect to the condition of the disabled employee.

Around the time that the Complainant submitted her request for an accommodation, management required that she undergo a Fitness for Duty Examination (FFDE). The request for the Complainant to take the exam focused entirely on her effort to obtain an accommodation. The Complainant's supervisor failed to provide an explanation for requiring her to undergo this exam.

The judge concluded that the FFDE was not warranted and this request, coupled with the requirement of agreeing that the new assignment was permanent were attempts to retaliate against the Complainant for requesting an accommodation. Employees that are deemed disabled by the standards of the Americans with Disability Act are entitled to request accommodations free of scrutiny and roadblocks. Management cannot dissuade employees from participating in protected activity.

VIII

HOSTILITY FROM MANAGEMENT OFFICIALS RESULTS IN A PER SE REPRISAL VIOLATION

Expressing hostility to the EEO complaint process by individuals in a supervisory or managerial position is

classified as a per se reprisal violation. The Complainant was chastised by her supervisor for speaking to other employees about her EEO lawsuit; was told that it was improper for her attorney to send a fax to the supervisor which contained information concerning her request for accommodation; and was told that she should not have communicated with upper management about being penalized for having breast cancer.

An administrative judge ruled that these actions constituted per se reprisal. Collectively these actions, whether intentional or not, intimidated the Complainant and interfered with the EEO process.

Employees have the right to discuss their EEO activity free of negative comments, fear, hostility, and harassment by management officials. Actions by management, regardless of how minor they may seem, that in any way deter or prevent a complainant from engaging in the EEO process, are prohibited by law.

IX

INSINUATING THAT A COMPLAINANT WAS DISCIPLINED BECAUSE OF HIS INVOLVEMENT IN THE EEO PROCESS CONSTITUTES PER SE REPRISAL

The Complainant, was a Supervisory Medical Technologist, was disciplined for making various performance errors ranging from failing to reconcile incomplete status reports, leaving a defective medical device in the emergency department, failing to



properly calculate measurements, and for putting reagents that were required to be at room temperature in the refrigerator. All of these errors did indeed warrant the seven day suspension and PIP (Performance Improvement Plan) that the Complainant was given.

It was management's response to the employee however, that turned a simple disciplinary action into a per se reprisal violation. When the Complainant inquired about why he was being suspended and placed on a PIP, his supervisor's response was that the discipline was taken because of his "prior EEO activity".

When questioned, the supervisor testified that while she didn't recall making the statement, it didn't seem unreasonable. Although the supervisor claimed that she was under stress at the time that she gave this response, the administrative judge determined that the supervisor's statement was credible.

Statements made regarding a Complainant's EEO activity will be taken at face value and in this case, the supervisor openly admitted that the Complainant's EEO activity served as a motivating factor in the Agency's decision to discipline him.

Adverse actions must be based on an employee's conduct or performance and must be for legitimate non-discriminatory reasons.

X

MANAGEMENT'S REFERENCE RESULTS IN A PER SE REPRISAL FINDING

A Complainant's EEO activity must not be discussed with potential employers or management officials. In a case involving a Complainant who was a VISN Human Resources Specialist, an administrative judge reiterated the Equal Employment Opportunity Commission's (EEOC) commitment to sanctioning behaviors that deter employees from filing EEO complaints.

The Complainant applied for a job at a VA facility and listed the VISN Director as a reference. The Complainant received a conditional job offer pending contact with her references. After contacting the VISN Director, the hiring official was told that whenever Complainant ran into difficulties, she filed EEO complaints. The hiring facility informed the Complainant of the remarks and, after giving the Complainant a chance to respond to the comments, reaffirmed the job offer. She declined the job offer because she thought that the comments regarding her EEO activity would negatively affect her reputation at the new VA facility.

Both OEDCA and the administrative judge found that the Complainant's reason for declining the job offer demonstrate the effect that an inappropriate comment can have on an employee's rights and how such comments are likely to deter Complainants from engaging in the EEO process. The EEOC has consistently ruled that any action by an agency



manager that interferes with an employee’s rights or has a chilling or intimidating effect on the exercise of those rights will be deemed a per se violation of Title VII.

XI

SUPERVISOR’S STATEMENT RESULTS IN A FINDING OF PER SE REPRISAL

The Complainant alleged discrimination, based on sex and reprisal, regarding a work assignment, overtime, a non-selection, and sexual harassment. Although the Complainant did not prevail on any of her claims, OEDCA found evidence of per se reprisal by management.

Upon learning that Complainant had initiated an EEO complaint; her supervisor called her and told her to “keep your f’ing mouth shut.” Although the supervisor denied making the statement, he was found not to be a credible witness, and OEDCA determined that more likely than not, he made the statement. OEDCA determined that the Complainant reasonably perceived the statement as intimidating and a threat.

XII

SUPERVISOR’S CONTRADICTORY REASONS FOR CHARGING A COMPLAINANT AWOL INSTEAD OF LWOP LEADS TO FINDING OF REPRISAL

Denial of leave requests and scheduling are not usually the kinds of actions that one typically associates with an intent to discriminate against an individual.

However, in a recent case where a management official failed to provide clear, consistent, and legitimate reasons for charging a Complainant AWOL instead of LWOP, the AJ found evidence of retaliatory discrimination.

The Complainant, a Program Assistant, requested sick leave, but was charged AWOL because she did not have enough sick leave. The AWOL charge ultimately contributed to management’s decision to issue the Complainant a three day suspension.

The AJ found that management’s actions were retaliatory because the Complainant had received prior authorization for her absence and her immediate supervisor’s reasons for charging the Complainant AWOL instead of LWOP were inconsistent . The finding of retaliation was further supported by the supervisor’s expressed hostility toward the Complainant at the time that she availed herself of the EEO process.

Whenever actions made by management officials are challenged because of a reasonable belief that discriminatory bias occurred, management officials are required to articulate legitimate, nondiscriminatory reasons for their actions. Moreover, hostility toward individuals who utilize the EEO process will not be tolerated. Title VII strictly prohibits employers from reprising against their employees because of their decision to participate in the EEO process.



XIII

AGENCY OFFICIALS REQUIRED TO TAKE IMMEDIATE AND APPROPRIATE CORRECTIVE ACTION IN SEXUAL HARASSMENT CASE

Complainant, a Medical Support Assistant, claimed that she was subjected to sexual harassment by her team leader. The sexual harassment included sexually suggestive comments and pictures, and touching Complainant's leg. The Complainant contemporaneously reported the incidents of sexual harassment to her union representative and to co-workers. There was also evidence that the Complainant immediately responded to the team leader with disapproval of the sexually suggestive pictures and leg touching. A co-worker corroborated Complainant's claim that the team leader showed her sexually suggestive pictures.

In response to an inquiry by his supervisor, the team leader denied Complainant's allegations, but declined to submit an affidavit during the investigation of the EEO complaint. In light of the team leader's failure to provide an affidavit, Complainant's contemporaneous reporting of the harassment and the co-worker's corroboration, OEDCA found that the incidents alleged by Complainant had occurred. OEDCA also found that the team leader's conduct was severe and pervasive enough to alter the terms and conditions of Complainant's employment.

OEDCA concluded that the agency was liable for the sexual harassment because its response was inadequate. Management moved the Complainant to another area away from the team leader, but nothing further was done. The Agency was obligated to take further preventive measures, such as providing targeted training and monitoring the team leader's conduct. This case highlights the importance of taking immediate and appropriate corrective action and making sure that the corrective action is adequate.

XIV

SUPERVISOR'S FAILURE TO ACT PROMPTLY LEADS TO A FINDING OF SEXUAL HARASSMENT

A female Complainant was the Lead Mail Clerk at a VA Medical Center. A male employee, who was a convicted sex offender, was placed in the mailroom in 2005. The parties stipulated that the male co-worker engaged in unlawful sexual harassment of the Complainant and that management failed to take prompt and effective remedial action regarding the sexual harassment.

The administrative judge found that the Complainant was sexually harassed when her male coworker discussed explicit sexual matters in her presence and was reprimed against when she was issued a letter of counseling on June 26, 2008, for making negative comments about the co-worker. Although the Complainant had reported the sexual harassment to her supervisor on at least four occasions in March, April, and May 2008, the supervisor



failed to take prompt and effective action to address her allegations.

XV

AGENCY OFFICIALS HAVE AN OBLIGATION TO INVESTIGATE CLAIMS OF SEXUAL HARRASMENT

A female Complainant was a Security Assistant in the Police and Security Service at a VA Medical Center. Many of Complainant’s male co-workers used derogatory slurs about women, including “bitch” and made disrespectful, offensive references about the Complainant both in her presence and behind her back. Some of the male officers also ignored the Complainant’s dispatch communications and treated her with disrespect. Although the Complainant frequently reported the harassment to her supervisor, nothing was done to stop it. Complainant filed an EEO complaint but shortly thereafter, she was subjected to discipline for infractions for which male officers were not disciplined.

The administrative judge’s finding of discrimination makes three points that are worth noting. The first is that derogatory comments not made to Complainant directly are relevant to whether a hostile work environment existed. In this case, the Agency argued that such comments were not relevant.

Additionally, the administrative judge noted that Agency officials are obligated to investigate charges of sexual harassment independent of the EEO complaint process. Complainant’s supervisor responded to Complainant’s allegations by forwarding her e-mail

complaining of harassment to the EEO manager.

The Agency argued that Complainant stopped complaining after a certain date. However, this did not absolve the Agency from liability given the openness of the harassment and the retaliatory treatment Complainant received after complaining.

XVI

UNFAIR DISTRIBUTION OF WORK ASSIGNMENTS RESULTS IN FINDING OF HOSTILE WORK ENVIRONMENT

Complainant, a Certified Nurse Assistant (CNA), claimed that the Agency created a hostile work environment when she was assigned more total care patients than white CNAs.

An administrative judge found that Complainant was subjected to harassment based on race because she was assigned to work with terminal patients more frequently than white CNAs, and these patients required more physical work and were emotionally draining. The AJ drew an inference that management’s reason for the assignment was pretextual because the evidence demonstrated a pattern of favoritism toward white employees.

XVII

SUPERVISOR’S ACTIONS/CONDUCT CONSTITUTED SEXUAL HARASSMENT

After Complainant expressed her concerns about not promptly receiving a



promotion, her supervisor responded by stating “if you are struggling for money and failed to use your resources, your mother should have taught you better.” This statement caused the Complainant to erupt in extreme anger. After noticing the Complainant’s response, the supervisor continued to repeat the statement numerous times, which in turn lead to an argument and culminated in a physical altercation between the Complainant and her supervisor.

Although the supervisor testified otherwise, the administrative judge found that a reasonable person would interpret the comment to insinuate that the Complainant’s mother should have taught her how to prostitute herself. The gender-based framework of this remark was deemed improper and inappropriate, and was essentially, the catalyst that sparked the altercation. This comment alone was enough to substantiate an inference of gender-based discrimination. Regardless of what the supervisor meant, his response was inappropriate.

As defined by Federal EEO law, harassment consists of personal slurs or other denigrating or insulting verbal or physical conduct relating to an individual’s membership in a protected class. The comment and conduct of the supervisor in this case clearly violated the law as they both demonstrated denigrating references based on the Complainant’s gender.

In cases where a supervisor’s conduct or remarks are unwelcomed, severe, and create an intolerable work environment, the Agency will be held liable for harassment.

XVIII

STEREOTYPICAL REFERENCES RESULT IN A FINDING OF DISCRIMINATION

After making only one error, Complainant’s work performance was incessantly scrutinized in a manner that no other employee’s work was. The Complainant, the only black male in his office, was subjected to many fact-finding sessions for every error that he made, while other employees who made the same errors were treated differently. Although his supervisor claimed that all employees were given the same counseling for making mistakes, she failed to produce any evidence to support her testimony. The record established that the Complainant was singled out, yelled at in a harsh manner when unnecessary, and was treated worse than other employees.

Additionally, on numerous occasions the Complainant and two other African American employees were referred by the supervisor as the *Three Stooges*. While in most cases, a reference like this would not be construed as derogatory or racist, considering the context and the fact that no employees of other races were referred to in this same manner. Thus, a reasonable person would likely to find this comment to be a characterization of black employees as silly, and ignorant.

Referring to groups in a manner that is stereotypical violates Title VII. In the event that a Complainant challenges the equity of a workplace environment with specific examples, management officials



are required to produce evidence that shows otherwise. Absent any evidence to refute an employee's claims of a discriminatory work environment, management officials will be found liable for discrimination.

XIX

ACCESSING COMPLAINANT'S MEDICAL RECORDS WITHOUT PROPER AUTHORIZATION CONSTITUTES PER SE VIOLATION OF REHABILITATION ACT

Complainant, a nurse was charged with inappropriate behavior with a patient. An Administrative Investigative Board (AIB) was convened to look into the charge. The AIB Chairperson accessed Complainant's medical records to substantiate statements made by witnesses during the investigation. A psychologist at the Medical Center also accessed Complainant's medical records to verify Complainant's address.

Complainant testified that three other individuals accessed her medical records without authorization. Complainant alleged that she was subjected to reprisal when agency officials and employees accessed her medical records. OEDCA found that Complainant did not present any evidence to show that her medical records were accessed in reprisal for prior EEO activity. However, OEDCA concluded that agency officials violated the Rehabilitation Act when they accessed Complainant's medical records without her authorization.

29 CFR 1630.14(c)(1), provides that information in an employee's

confidential medical record may only be used for the following reasons: 1. supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; 2. first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and 3. government officials investigating compliance with this part shall be provided relevant information on request.

Neither of the reasons offered by the chairperson of the AIB or the psychologist was justified under 29 C.F.R. 1630.14(c)(1). Thus, OEDCA found that the agency committed a per se violation of the Rehabilitation Act by accessing Complainant's medical records without her authorization.

XX

DISCLOSURE OF COMPLAINANT'S MEDICAL CONDITION TO CO-WORKERS IS UNLAWFUL

Complainant, an Information Technology Specialist, was a qualified individual with a disability. In 2009, Complainant provided written medical documentation to her supervisor disclosing her diagnosis and formally requesting an accommodation. Shortly after Complainant made her request, some of her co-workers approached her to discuss her specific accommodation. The evidence established that Complainant's immediate supervisor had discussed Complainant's disability and need for accommodation with her co-workers.



OEDCA issued a decision finding that these disclosures violated the Rehabilitation Act. The fact that Complainant may have disclosed her disability and need for accommodation with co-workers did not give her immediate supervisor permission to do the same.

This case highlights the importance of not disclosing to co-workers an employee's disability or any accommodation that has been provided.

Additionally, managers must be trained on how to respond to subordinate questions regarding workplace modifications and different performance or conduct standards. If asked about such modifications, a manager could respond that she does not discuss one employee's situation with another in order to protect the privacy of all employees and assure staff members that the employee is meeting the agency's work requirements.

XXI

FUNCTIONAL CAPACITY EXAM VIOLATED REHABILITATION ACT

Complainant, a Licensed Practical Nurse, attempted to return to work following a knee injury. After she obtained a note from her treating orthopedist that she could return to work without restriction, she was told on December 9, 2009, to obtain a second opinion. The second opinion from a non-treating orthopedist indicated that she could return to work without restriction.

On December 16, 2009, the Employee Health Nurse cleared Complainant to

return to work. She returned to work on December 17, 2009, but after a half day's work was told that she had to leave because she had not brought her second doctor's note. On December 18, 2009, Complainant provided the second medical opinion but was informed that she would not be permitted to return to work until she completed a Functional Capacity Exam (FCE). Although the FCE results were completed by January 6, 2010, Complainant was not cleared to return to work until January 13, 2010. Complainant's request that she be compensated for her absence was denied.

OEDCA issued a final decision finding that the agency violated the Rehabilitation Act when it required Complainant to undergo a FCE. The Rehabilitation Act permits a disability-related inquiry or medical examination of an employee where such a step is "job-related and consistent with business necessity." Specifically, an examination will be permitted where an employer "has a reasonable belief, based on objective evidence that an employee's ability to perform essential job functions will be impaired by a medical condition." The burden is on the employer to demonstrate that any such examination is job-related and consistent with business necessity.

OEDCA's final decision concluded that an FCE was not "job-related and consistent with business necessity" because Complainant had already submitted documentation from two different orthopedic specialists that she could return to work without restriction.



XXII

PSYCHOLOGICAL ASSESSEMENT MUST BE JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY

The Rehabilitation Act limits an employer's ability to make disability-related inquiries or require medical examinations. An Administrative Judge concluded that the VA overstepped these limitations after requiring the Complainant to undergo a series of psychological examinations.

By law, Agencies are required to establish that examinations of employees are job-related and consistent with business necessity. In this case, the written psychological tests that the Complainant was required to undergo, after already passing his pre-employment testing, violated his rights under the Rehabilitation Act.

Because management did not show that the examination was job-related and consistent with business necessity the results from the test were discarded and the Complainant was re-instated to his position as Police Officer.

Before requiring an employee to undergo any type of medical examination, management officials must have a reasonable belief based on objective evidence that the Complainant's ability to perform the essential job functions is impaired or have reason to believe that the Complainant poses a direct threat. Management officials cannot unjustifiably require employees or

prospective employees to undergo medical or psychological examinations.

XXIII

SELECTION WAS BASED ON SELECTEE'S SEX

The Complainant filed a complaint of discrimination based on sex when she was non-selected to the position of Decision Review Officer. The Director and Assistant Director of the VA Regional Office, as well as the Manager and Assistant Manager of the Veterans Service Center (VSC), were the management officials involved in the non-selection.

The VSC Manager testified that it was "strongly suggested" to him by the Director that, based on "diversity," one of the two DRO promotions should go to the male selectee, based on alleged underrepresentation of males in that job category. The Complainant was then non-selected by the VSC Acting Manager despite the fact that the Complainant and the female selectee were clearly ranked higher than the other applicants, including the male selectee.

The Assistant Director testified that diversity played no part in the non-selection. However, subsequent to the non-selection, the Assistant Director met with the Complainant. According to a witness who attended the meeting, the Assistant Director told the Complainant that diversity was a factor, along with a low leave balance, in her non-selection.

While the applicable Veterans Benefits Administration Equal Employment



Opportunity Policy Statement does reference promoting diversity, it does so only in regard to increasing the representation of women, minorities and individuals with disabilities and cannot be used as a basis for discriminating against employees when making selection decisions.

XXIV

AGENCY OFFICIAL’S REASON FOR COMPLAINANT’S NONSELECTION NOT CREDIBLE

Complainant was employed as a Vocational Rehabilitation Specialist from October 2003 to February 2008. In January 2009, she applied for the position of Vocational Rehabilitation Specialist and was informed of her non-selection in March 2009.

Agency officials articulated a legitimate, nondiscriminatory reason for the non-selection, but there was un rebutted evidence that this reason was pretextual. There was evidence that the selecting official made comments to other employees that Complainant would not be considered for the vacancy because of her prior EEO activity and troubled past at the agency.

The Administrative Judge found that Complainant should have been selected because she had five years experience as a Vocational Rehabilitation Specialist, she had exceptional performance appraisals, and the testimony regarding Complainant’s past misconduct was not credible. There was witness testimony that corroborated the selecting official’s retaliatory bias and the hearing record lacked

documentation of Complainant’s past misconduct.

XXV

COMPLAINANT PROVED THAT SELECTEE’S PRESELECTION WAS DISCRIMINATORY

Complainant applied for the position of Chief of Social Work. She had been recommended by the previous Chief of Social Work and was well qualified for the position. Prior to announcing the position, management officials appointed another employee to be the Acting Chief for two months. The paperwork regarding the employee’s appointment to be the Acting Chief made it appear as though the employee had already been selected for the position in the absence of a vacancy announcement.

An Administrative Judge found that Complainant’s non-selection was due to a combination of factors. The selecting panel consisted of four employees who were involved in Complainant’s prior EEO complaints. One of the panel members stated that Complainant was not selected because she filed an unfair labor practice and was a key player. Complainant had been recommended by the previous Chief of Social Work and was well qualified for the position.

XXVI

COMPLAINANT WAS RETALIATED AGAINST WHEN SHE WAS TERMINATED FOR SICK LEAVE ABUSE

Complainant was a Probationary Licensed Practical Nurse. She advised



her supervisors that she would occasionally need to take an extra day off because she experiences extreme fatigue after working overtime. As a reasonable accommodation, Complainant requested sick leave on April 1 and 8, 2008 because of fatigue after working double shifts.

On April 8, 2008, Complainant received a letter of counseling for taking sick leave on three occasions following a day off. She was warned that if she abused sick leave she could be placed on sick leave certification. After Complainant received the letter of counseling, she took sick leave to attend a funeral, because she became ill at work, and to recover from a double shift. Shortly thereafter, Complainant was terminated because management believed her unscheduled sick leave use demonstrated lack of dependability.

The Agency argued that it counseled and then terminated Complainant because it believed she was abusing sick leave. OEDCA found in its final order, that the Agency's reason was pretextual. The evidence did not demonstrate sick leave abuse or lack of dependability. Rather it supported a finding that Complainant used her sick leave because of a medical condition and for other circumstances over which she had no control.

Because the Agency has a legitimate business interest in preventing sick leave abuse, it is understandable that it would scrutinize patterns of sick leave usage. However, sick leave usage which appears abusive many not be indicative of lack of dependability. Moreover, contrary to the warning to

place Complainant on medical leave certification if her pattern of sick leave usage continued, the agency terminated her instead. This failure to follow its own policies contributed to a finding of discrimination.

