



# OEDCA DIGEST



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***SUMMARIES OF SELECTED DECISIONS ISSUED BY THE OFFICE OF  
EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION***

### FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent adjudication unit created by statute. Located in the Office of the Secretary, OEDCA’s function is to issue the Department’s final agency decision 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 of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include retaliation, impact of medication on disability status, reasonable accommodation of a disability, definition of disability, evidence *vs.* “gut feelings”, the “awareness” factor in race claims, definition of “hostile environment”, and claims resulting from the denial of FOIA requests. Also included in this issue is EEOC’s guidance on the “association” provision of the *Americans with Disabilities Act*.

In response to user requests, the *OEDCA Digest* now contains a comprehensive cumulative index.

The *OEDCA DIGEST* may be accessed both on the internet at: <http://www.va.gov/orm/oedca.asp> and on the Department of Veterans Affairs Intranet at <http://vaww.va.gov/orm/oedca.htm>.

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## I

### ***EMPLOYEE'S EVIDENCE NOT SUFFICIENT TO ESTABLISH "PRIMA FACIE" CASE OF RETALIATION***

The following case illustrates why so many retaliation (*aka* reprisal), complaints fail, despite the fact that something adverse to an employee's interest occurs after the employee engages in protected EEO activity.

The employee in this case (hereinafter referred to as the "complainant") applied but was not selected for an IT position in 2005. When she questioned the selecting official about the reasons for his decision, he mentioned the need for her to improve her job performance, learn how to complete tasks without supervision, and promote a team effort with her coworkers.

The complainant disbelieved those reasons and filed an EEO complaint alleging retaliation as the real motive for his decision. Specifically, she attributed her nonselection to a prior EEO complaint she filed in 1999.<sup>1</sup>

As in cases of disparate treatment, a complainant who alleges retaliation must first establish a *prima facie* case; *i.e.*, enough evidence that, if not rebutted by the employer, a trier of fact could reasonably conclude that unlawful retaliation because of prior EEO

activity did occur.

Establishing a *prima facie* case of retaliation is generally not difficult, but neither is it automatic. Usually, a complainant must present evidence of (1) prior EEO activity, such as participation in the EEO complaint process, or some other form of opposition to prohibited discrimination, (2) adverse treatment, (3) awareness of the prior EEO activity by the official responsible for the adverse treatment, and (4) a causal connection between the prior EEO activity and the adverse treatment. Proof of the fourth element may come from comparative evidence concerning other employees, but in most cases proof will consist of showing a short time frame between the prior EEO activity and the adverse treatment.

The complainant, like most complainants, had no troubling proving the first two elements. She was able to show that she had previously engaged in EEO protected activity, and that she subsequently experienced adverse treatment. As for the third element, she was unable to prove that the selecting official knew of her prior EEO activity. The official denied such knowledge, and there was no evidence in the record to show that, more likely than not, he was aware of her prior EEO complaint.

Moreover, the complainant was unable to satisfy the fourth element of proof *i.e.*, evidence of a causal connection between her prior complaint activity and her nonselection. The time span

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<sup>1</sup> A final agency decision on that complaint was issued in 2001. There is no record that an appeal or civil action filed thereafter.



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between the two – about four years – was clearly too great to permit a fact-finder to infer a retaliatory motive.

The Equal Employment Opportunity Commission (EEOC) has generally ruled that the passage of more than 12 months between protected activity and adverse treatment will defeat a *prima facie* case, although some courts have favored an even shorter period. The rationale for requiring a short time frame is that the more time that passes; the less likely it is that an individual will continue to harbor a desire to retaliate.

Bear in mind that if the prior EEO activity involves filing an EEO complaint, the time frame is often measured not from when the prior complaint was filed, but from when the last significant action in the complaint process took place or when the matter was finally resolved. In this case, the prior complaint was filed in 1999 but its processing was not completed until 2001.

Also bear in mind that establishing a *prima facie* case does not mean that the complainant wins his or her case. If management is able to articulate a legitimate, nonretaliatory reason for the adverse treatment, which it usually does, the complainant must still prove by a preponderance of the evidence that the articulated reason is a pretext; *i.e.*, that it is false. On the other hand, if management is unable to articulate a legitimate reason, then the evidence used to establish the *prima facie* case, by itself, will suffice

and the complainant will prevail.

## II

### ***EMPLOYEE WITH PTSD NOT DISABLED WHERE MEDICATION SUCCESSFULLY CONTROLLED SYMPTOMS***

As the following case indicates, medication and other measures that correct or control a medical condition must be taken into consideration when determining if the individual has a disability for purposes of employment discrimination law.

The VA employee in this case claimed to have Post Traumatic Stress Disorder (PTSD). He did not provide medical evidence to prove that he had the condition. However, during the agency's investigation into his EEO complaint, which he filed after learning that he had been charged Absent without Leave (AWOL) for 24 hours, he acknowledged that he was taking Lithium for the condition. He further acknowledged that this medication successfully controlled his condition, such that neither the condition nor the medication substantially limited any of his major life activities.

After reviewing the investigative record, an EEOC judge issued a summary judgment (*i.e.*, a decision without a hearing), finding that the employee was not an "individual with a disability", as such term is defined in the *Americans with Disabilities Act* and the EEOC's implementing regula-



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tions. The judge reasoned, correctly, that even assuming the employee's PTSD was severe enough to substantially limit a major life activity without the Lithium; his use of the medication must nevertheless be considered in determining if he is disabled. Because the medication successfully controls his condition, he is not disabled, as neither his condition nor his medication substantially limits any of his major life activities, including his ability to work.

### III

#### ***MANAGEMENT SATISFIES ITS OBLIGATION TO ACCOMMODATE DESPITE DISABLED EMPLOYEE'S DISSATISFACTION WITH THE PROPOSED ACCOMMODATIONS***

As the following case shows, a disabled employee who is eligible for reasonable accommodation of a disability is not necessarily entitled to the accommodation of his or her choice.

The complainant was employed as a Nursing Assistant in a Geriatrics and Long Term Care facility. Her duties included working with seriously ill and terminally ill patients.

Prior to and during her employment at this facility, she had experienced periods of depression. Upon returning to work following a period of medical leave taken due to a depressive episode, she requested a job reassignment. Her supervisor detailed her to

the Environmental Service until such time as she provided more specific medical documentation regarding her reassignment request. She returned within a few hours of arriving in the Environmental Service, stating that she did not wish to work there. Management offered to reassign her to another medical center in the area where she could perform different duties, but she refused, stating that it was too far from home.

A few days later, her psychiatrist provided a written note stating that she suffered from a "mental impairment" that was exacerbated by multiple deaths in her family. He stated that working with terminally ill patients would likely lead to a recurrence of her symptoms. As the note lacked specificity regarding the nature of the complainant's mental impairment, management officials requested clarification to determine if she was a "qualified individual with a disability", and thus entitled to reasonable accommodation of her condition.

The psychiatrist provided the requested clarification, describing her condition in more detail and recommending that the "majority of her work" should be with patients who are not seriously or terminally ill. A staff physician at the facility concurred with that recommendation. As there were no such positions available at the facility, management decided to reassign her to the Float Pool, an assignment that did not entail constant work with terminally ill patients.



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The complainant's psychiatrist objected to this assignment, stating that it was causing the complainant great distress and might result in a relapse. Management accordingly detailed her to work as an Information Receptionist, and eventually found and assigned her to a position as a Nursing Assistant in a non-hospice or acute care setting. Again her psychiatrist objected to the assignment, this time stating that she should not be working at all in an inpatient setting.

Management thereafter notified the complainant that there were no Nursing Assistant positions available that did not involve inpatient care, and that the only other position available for which she was qualified and which satisfied her restrictions was the Information Receptionist position to which she had previously been detailed. Accepting this position would have required a downgrade from GS-5/9 ((\$36,257 per annum) to GS-4/10 (\$33,253). The complainant declined the offer and filed a discrimination complaint alleging failure to accommodate her disability.

Based on the above facts, OEDCA concluded that management had satisfied its burden to accommodate the complainant's disability. First OEDCA found that the complainant was an "individual with a disability" based on the statements provided by her psychiatrist which described in detail her condition and the substantial limitations it placed on her ability to function in her daily life. Second, OEDCA found that management officials made

several good-faith attempts to accommodate her, all of which the complainant rejected. Each time management found a position which seemed to meet her medical restrictions, her psychiatrist rejected it and imposed additional restrictions. The record showed that management acted timely and reasonably in trying to incorporate in its offers the evolving list of medical restrictions imposed by the psychiatrist.

The fact that the complainant was not happy with the final offer, which she rejected, does not mean that there was a failure to accommodate. A complainant is not entitled to the accommodation of his or her choice, and may sometimes be required to accept a position in a different job series and at a lower grade.

## IV

### ***EMPLOYEE WITH A "HISTORY OF" A DISABILITY NOT ENTITLED TO REASONABLE ACCOMMODATION***

As the following case illustrates, not everyone who meets the definition of "an individual with a disability" is eligible for reasonable accommodation.

The complainant in this case was diagnosed with lupus in 1995. In 2005, he filed a complaint alleging, among other things, that he was discriminated against when management failed to accommodate his medical restrictions by requiring him to lift over



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20 pounds and work in areas where he might be exposed to certain patients who could compromise his immune system.

Management responded to the complaint by stating that they satisfied the restrictions imposed by the physician. Although the complainant alleged that he was ordered to clean the canteen area, which included lifting and carrying heavy trash, management had arranged for someone else to handle that particular task, and timely notified the complainant of that fact. Nevertheless, the complainant lifted and carried out the trash, despite his restriction.

The complainant also alleged that he was assigned to clean an area on the second floor of the hospital, despite the restriction about working in areas that could compromise his immune system. His supervisor testified, however, that she was unaware of that restriction, and that as soon as she learned of it, she did not move him to that area.

After reviewing the evidence in the record, OEDCA concluded that management did not discriminate against the complainant because he was not eligible for reasonable accommodation. Moreover, even if he were eligible, management complied with the restrictions imposed by his physician.

In examining the complainant's medical condition, OEDCA concluded that while the complainant was diagnosed with lupus, and while that condition did, in the past, substantially limit

some of his major life activities, his physician stated that his lupus condition had in recent years become inactive to some degree. When asked what major life activities were substantially limited at the time relevant to his complaint, the complainant mentioned only his 20-pound lifting restriction. OEDCA noted that the EEOC's case law holds that such a limitation is not substantial enough to qualify as a disability under the *Rehabilitation Act* and the *Americans with Disabilities Act*. Hence, the complainant was unable to show that he had a disability during the relevant time period.

However, the above statutes also include within the definition of "individual with a disability" those individuals who are "perceived as" having a disability as well as individuals with a "history of" (or record of) a disability. In this case, OEDCA concluded that while the complainant did not have a disability – *i.e.*, a substantially limiting impairment – he did have a history or record of a disability. The question, therefore, was whether his history of a disability entitled him to reasonable accommodation. OEDCA concluded that it did not. Generally, to be eligible for a reasonable accommodation, an individual must have a current disability, as opposed to simply being perceived as disabled or having a record of a disability. The reason, of course, is that in "perceived as" and "history of" situations, there is no actual (*i.e.*, current) disability to accommodate.

As noted above, however, even assum-



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ing there was a duty to accommodate, management satisfied its obligation.

## V

### ***BEING “FROM DETROIT” NOT SUFFICIENT TO DEMONSTRATE AWARENESS OF COMPLAINANT’S RACE***

While most individuals who file discrimination complaints do not prevail due to a lack of proof, most are nevertheless able to meet their threshold burden of establishing a *prima facie* case. This is because the elements of *prima facie* proof are generally easy to satisfy. The following illustrates a situation where even *prima facie* proof was not available.

The complainant unsuccessfully applied for a Police Officer position at a VA medical center. All applications were initially processed at the Delegated Examining Unit to determine if the applicants met minimum qualification requirements. The DEU is a regional center that processes applications from “outside” candidates – *i.e.*, applicants who are not VA employees – for all VA facilities within its geographic jurisdiction. The applications of those found qualified are then referred to the selecting official at the facility for consideration. The complainant’s application was not referred for consideration, as he did not possess the minimum requirement of at least one year of police experience.

Upon receiving notice from the DEU of his disqualification, the complainant

filed a claim alleging discrimination because of his race (African-American). Following an investigation, the complainant requested a hearing before an EEOC administrative judge, but the judge declined to hold a hearing, finding that there were no material facts in dispute.

Instead, the judge issued a decision without a hearing (“summary judgment”) in which he concluded that the complainant had failed to establish even a *prima facie* case of race discrimination. Specifically, the judge found no evidence that the HR specialist at the DEU was aware of the complainant’s race. Without such awareness, discrimination was not even possible. The complainant had argued, unsuccessfully, that the HR specialist was indeed aware of his race, as his application noted that he is from Detroit, which is “well known in this country to be a majority African-American city.” The judge, not surprisingly, rejected this reasoning as unpersuasive. The judge further found, as did the DEU, that the complainant failed to meet the minimum qualification requirements. Hence, complainant was unable to establish even a *prima facie* case of race discrimination.

In cases such as this where the official reviewing applications does not know the applicants, it is difficult to prove awareness by that official of an applicant’s race unless the applicant notes something in his or her application that would clearly indicate the individual’s race (*e.g.*, membership in the



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African-American Student Association at XXXX University). In this case, the judge found that residence in Detroit was not sufficient to support an inference that another person would conclude from that fact that the individual is African-American.

## VI

### ***“GUT FEELING” NOT EVIDENCE OF REPRISAL***

The bar to having an EEO complaint heard is very low. One need not establish a *prima facie* case in order for a complaint to be accepted and investigated. Subject to a few procedural requirements, one need only claim that something happened (or didn't happen), and that the reason is due in whole or in part to discrimination prohibited by Title VII of the Civil Rights Act, the Rehabilitation Act, or the Age Discrimination in Employment Act. On the other hand, proving such a claim is far more difficult, as the following case illustrates.

An employee alleged that the reason she was not selected for a position as a Health System Management Trainee was due to her prior EEO complaint activity. Because she timely filed her complaint and satisfied other procedural requirements, her complaint was accepted and investigated.

According to the record, she had previously filed an EEO complaint several months earlier alleging a failure to accommodate a disability. When

she later applied for the Trainee position, her name was one of ten referred to the selecting official for consideration. A rating panel initially screened the applications and ranked the candidates based on their responses to the “KSAs” (a supplemental application form on which candidates must address their qualifications as they relate to the specific knowledge, skills, and abilities needed for the job in question). The panel ranked her eighth among the ten referred. The panel then provided the selecting official, with the names of the top four candidates. Upon learning that she was not referred to the selecting official, she filed a complaint alleging reprisal (*i.e.*, retaliation).

An EEOC judge concluded that the complainant was unable to satisfy her threshold burden of establishing a *prima facie* case of reprisal, as she failed to present evidence that any of the screening panel members were even aware of her recent EEO complaint. Absent such awareness, they could not possibly have retaliated against her.

Even assuming they did know of her recent EEO activity, the judge concluded that she presented no evidence that the rating and ranking process was conducted in a biased manner. When asked the reason for her belief that retaliation was a motive, she responded by stating simply that it was a “gut feeling”.

The EEOC judge rejected that response as intangible. Mere feelings or



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beliefs, no matter how sincere, do not equate with evidence. In essence, the complainant was presenting her claim as evidence of her claim.

Many complaints fail because employees and applicants often have nothing more to go on than a “gut feeling” about the reason(s) why something happened. While gut feelings may, in many cases, be sufficient to state a claim that can be heard, far more will be needed if the claim is to succeed.

## VII

### ***COURT OF APPEALS FINDS ALLEGED HARASSMENT NOT SO SEVERE OR PERVASIVE AS TO CONSTITUTE A HOSTILE WORK ENVIRONMENT***

The Federal Court of Appeals for the 11<sup>th</sup> Circuit recently found in favor of the VA in a harassment/hostile environment claim.

The plaintiff, a loan specialist with a leg impairment, alleged, among other things, that his supervisor subjected him to a hostile work environment. Specifically, he claimed that she made demeaning comments about his leg condition, forced him to spend more time than other employees assembling and moving furniture during an office relocation, pulled him “to the floor” by his wrist when he complained about assembling and moving furniture, and indicated that she was going to “get rid of him”. He claimed that the harassment was due to his disability and

race (Caucasian).

The district court that initially reviewed the case found that the supervisor made demeaning comments about his leg condition, grabbed his arm at one point, and wanted to get rid of him. The court also found that the he spent more time assembling furniture than other employees. The court further found, however, that the supervisor accommodated his leg impairment by making adjustments to his workspace.

In reviewing the evidence as a whole, including the accommodation of the plaintiff’s leg impairment, the appellate court concluded that the plaintiff had failed to prove the existence of a hostile environment that was sufficiently severe or pervasive to alter the terms and conditions of his employment. In the end, he failed to show how these occurrences interfered with his job performance, if at all.

The vast majority of “harassment” claims filed by Federal employees fail for the same reason; *i.e.*, failure to show that the incidents alleged in their complaints were so severe or pervasive as to alter the terms and conditions of their employment. *James Dockery v. R. James Nicholson, Secretary, Dept. of Veterans Affairs*, No. 05-135659 (11<sup>th</sup> Cir., February 7, 2006), 106 FEOR 309, 106 LRP 16294.

## VIII

### ***DENIAL OF “FOIA” REQUEST***



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## ***NOT GROUNDS FOR EEO COMPLAINT***

An employee recently learned that not every act or omission perceived as discriminatory can be grounds for an EEO complaint. The employee, who had previously filed numerous EEO complaints, filed two *Freedom of Information Act* (FOIA) requests seeking documents and information regarding her employee health records, requests by other employees for training, employees receiving workers' compensation, names and grades of certain employees, and names of individuals who were granted promotions and annual leave by certain supervisors.

The facility director granted in part and denied in part some of her requests, citing the reason and legal basis for those requests that he denied.

In response to the denials, the employee sought EEO counseling, and later filed a formal EEO complaint alleging, in essence, that the denial of some of the information requested was in retaliation for her prior EEO complaint activity.

An EEOC judge, after reviewing the complaint, dismissed it on procedural grounds – in other words, without considering her retaliation claim on its merits. The reason cited for the dismissal was that the complaint, as framed, failed to state a claim under EEOC's regulations. Specifically, the judge found that while retaliation claims are generally permitted under the regulations, claims based on the

denial of a FOIA request are not permitted, as EEOC has no jurisdiction (*i.e.*, legal authority) to rule on whether an agency has correctly or incorrectly acted or ruled on a FOIA request. Any such claims must be raised under the appropriate appeals process specified by law and regulations under the *Freedom of Information Act*.

## **IX**

*(The Equal Employment Opportunity Commission recently published the following guidance on the "association" provision of the Americans with Disabilities Act. The guidance is also available at: [http://www.eeoc.gov/facts/association\\_ada.html](http://www.eeoc.gov/facts/association_ada.html))*

### ***Questions and Answers About the "Association" Provision of the Americans with Disabilities Act***

The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination on the basis of disability. Title I of the ADA makes it unlawful for any employer with 15 or more employees (including a state or local government employer) to discriminate against a qualified applicant or employee because of a disability in any aspect of employment. In addition to protecting qualified applicants and employees with disabilities from employment discrimination, one ADA provision – the "association" provision -- protects applicants and employees from discrimination based on their relationship or association with an individual with a disability, whether or



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not the applicant or employee has a disability.<sup>[1]</sup>

The purpose of the association provision is to prevent employers from taking adverse actions based on unfounded stereotypes and assumptions about individuals who associate with people who have disabilities. Thus, it makes unlawful actions such as refusing to hire an individual who has a child with a disability based on an assumption that the applicant will be away from work excessively or be otherwise unreliable, firing an employee who works with people who are HIV-positive or have AIDS based on the assumption that the employee will contract the disease, or denying an employee health care coverage available to others because of the disability of an employee's dependent. This document explains the requirements of the ADA's association provision and provides examples of how it applies to these and other employment situations.

## **1. What is the association provision of the ADA and to whom does it provide protection?**

The association provision of the ADA prohibits employment discrimination against a person, whether or not he or she has a disability, because of his or her known relationship or association with a person with a known disability. This means that an employer is prohibited from making adverse employment decisions based on unfounded concerns about the known disability of a family member or anyone else with

whom the applicant or employee has a relationship or association.

## **2. How close does the association or relationship with a person with a disability have to be for an individual to be protected by the association provision?**

The ADA does not require a family relationship for an individual to be protected by the association provision. The key is whether the employer is motivated by the individual's relationship or association with a person who has a disability.

*Example A:* An employer overhears an employee mention to a co-worker that he tutors children at a local homeless shelter. The employer, recalling that the shelter in question is well-known for providing job placement assistance for people living with HIV/AIDS, terminates the employee because it believes that its image will be tarnished if its employees associate with the "kind of person" who contracts HIV/AIDS. The employer has violated the ADA's association provision even if the employee is only minimally acquainted with beneficiaries of the shelter who have HIV/AIDS, because it made an adverse employment decision based on concerns about the disabilities of people with whom the employee has an association.

## **3. What types of employer conduct does the association provision prohibit?**



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An employer may not terminate or refuse to hire someone due to that person's known association with an individual with a disability.

*Example B:* An employer is interviewing applicants for a computer programmer position. The employer determines that one of the applicants, Arnold, is the best qualified, but is reluctant to offer him the position because Arnold disclosed during the interview that he has a child with a disability. The employer violates the ADA if it refuses to hire Arnold based on its belief that his need to care for his child will have a negative impact on his work attendance or performance.

*Example C:* A restaurant owner discovers that the chef's boyfriend is HIV-positive. The owner, fearing that the employee will contract the disease and transmit it to the customers through food, terminates the employee. This is a violation of the ADA's association provision.<sup>[2]</sup>

An employer may not deny an employee who has an association with a person with a disability a promotion or other opportunities for advancement due to that association.

*Example D:* Tiffany, a part-time salesperson at a large appliance store, applies for a full-time position. The manager hiring for the position rejects Tiffany's application because, having heard that Tiffany's mother and sister had breast cancer, he concludes that Tiffany is likely to acquire the same condition and be unable to reliably

work the hours required of a full-time salesperson. This is a violation of the association provision of the ADA.

An employer may not make any other adverse employment decision about an applicant or employee due to that person's association with a person with a disability.

*Example E:* The president of a small company learns that his administrative assistant, Sandra, has a son with an intellectual disability. The president is uncomfortable around people with this type of disability and decides to transfer Sandra to a position in which he will have less contact with her to avoid any discussions about, or interactions with, Sandra's son. He transfers her to a vacant entry-level position in the mailroom which pays less than Sandra's present position, but will allow him to avoid interacting with her. This is a violation of the ADA's association provision.

An employer may not deny an employee health care coverage available to others because of the disability of someone with whom the employee has a relationship or association.

*Example F:* An employer who provides health insurance to the dependents of its employees learns that Jaime, an applicant for a management position, has a spouse with a disability. The employer determines that providing insurance to Jaime's spouse will lead to increased health insurance costs. The employer violates the ADA



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if it decides not to hire Jaime based on the increased health insurance costs that will be caused by his wife's disability.

*Example G:* In the previous example, it would also violate the ADA for the employer to offer Jaime the position without the benefit of health insurance for his dependents. The employer may not reduce the level of health insurance benefits it offers Jaime because his wife has a disability; nor may it subject Jaime to different terms or conditions of insurance.

An employer may not deny an employee any other benefits or privileges of employment that are available to others because of the disability of someone with whom the employee has a relationship or association.

*Example H:* A company has an annual holiday party for the children of its employees. The company president learns that one of its newly hired employees, Ruth, has a daughter with Down Syndrome. Worried that Ruth's daughter will frighten the other children or make people uncomfortable, he tells Ruth that she may not bring her daughter to the party. Ruth has been denied the benefits and privileges of employment available to other employees due to her association with a person with a disability.

An employer may not subject someone to harassment based on that person's association with a person with a disability. An employer must also ensure that other employees do not harass

the individual based on this association.

*Example I:* Martin and his supervisor, Adam, have had an excellent working relationship, but Adam's behavior toward Martin has changed since Adam learned that Martin's wife has a severe disability. Although Martin has always been a good performer, Adam repeatedly expresses his concern that Martin will not be able to satisfy the demands of his job due to his need to care for his wife. Adam has begun to set unrealistic time frames for projects assigned to Martin and yells at Martin in front of co-workers about the need to meet approaching deadlines. Adam also recently began requiring Martin to follow company policies that other employees are not required to follow, such as requesting leave at least a week in advance. Adam has removed Martin from team projects, stating that Martin's co-workers do not think that Martin can be counted on to complete his share of the work "considering all of his wife's medical problems." Though Martin has complained several times to upper management about Adam's behavior, the employer does nothing. The employer is liable for harassment on the basis of Martin's association with an individual with a disability.

**4. Does the ADA require an employer to provide a reasonable accommodation to a person without a disability due to that person's association with someone with a disability?**



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No. Only qualified applicants and employees with disabilities are entitled to reasonable accommodation.<sup>[3]</sup> For example, the ADA would not require an employer to modify its leave policy for an employee who needs time off to care for a child with a disability.<sup>[4]</sup> However, an employer must avoid treating an employee differently than other employees because of his or her association with a person with a disability.

*Example J:* Kyung, an employee at an accounting firm, requests a week of unpaid leave and is told by her supervisor that there will be no difficulty in granting the leave. Kyung then mentions that she will be using the leave to care for her mother with a disability, who is coming into town for medical treatments. The supervisor denies the leave request, telling Kyung that the firm's leave policy is not intended to cover this type of situation and that she should hire someone to look after her mother. A few days later, the supervisor approves Diego's request for a week of unpaid leave to attend a father-son camp with his son. If the firm grants requests for unpaid leave for certain personal or family reasons, it is a violation of the ADA's association provision to deny Kyung's request because she wishes to use the time to assist her mother with a disability.

*Example K:* A law firm permits its attorneys to use 100 hours of administrative leave a year to provide pro bono legal services. One attorney, Sylvia, wants to use these hours to work with a non-profit organization that

provides legal and other services to individuals with psychiatric disabilities. The law firm denies her request because it does not believe that this type of work will reflect well on its image. If the firm allows attorneys to use administrative leave to provide pro bono legal services, it is a violation of the association provision of the ADA to deny Sylvia's request because she wishes to use the time to assist individuals with disabilities.

## **5. Does an employer have to provide health insurance coverage to employees who have dependents with disabilities beyond that provided to other employees?**

No. As noted above, the ADA requires employers to provide employees with dependents who have disabilities equal access to whatever health insurance coverage is offered to other employees. An employer is not required to provide additional health insurance coverage under the ADA.

*Example L:* A state employer's health insurance plan will only pay for a certain number of days of inpatient care for employees' dependents each year. An employee informs the employer that his wife's disability will require more time in the hospital than the plan covers. The ADA does not require the employer to provide additional health insurance coverage to meet the wife's needs. A health insurance plan provision that limits the number of days of inpatient care for employee dependents affects individuals with many kinds of conditions,



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only some of which are disabilities. Consequently, the limitation is not a disability-based distinction and would not violate the ADA.<sup>[5]</sup>

If, however, the employer's health insurance plan has terms or provisions which make disability-based distinctions (e.g., provisions that single out specific disabilities, groups of disabilities or disability generally), the plan itself may violate the ADA unless an employer can demonstrate that the plan provision is not a subterfuge to evade the purposes of the ADA.<sup>[6]</sup>

## LEGAL ENFORCEMENT

Any person who believes that his or her federal employment rights have been violated on the basis of an association with a person with a disability and wants to file a complaint against a federal agency or department must first contact an EEO counselor within 45 days of the date of the incident or event alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action. If informal counseling does not result in resolution of the matter, the person may then file a formal complaint against the agency or department. For more information on the Federal Sector EEO complaint process, see: <http://www.eeoc.gov/facts/fsfed.html>.

### Retaliation

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment

practices, files a complaint of employment discrimination, or testifies or participates in any way in an investigation, proceeding, or litigation. Persons who believe that they have been retaliated against may file a complaint of retaliation as described above.

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<sup>[1]</sup> See 42 U.S.C. § 12112(b)(4). Section 501 of the Rehabilitation Act provides the same protections for federal government employees and applicants. In addition, most states have their own laws prohibiting employment discrimination on the basis of disability. Some of these state laws may apply to smaller employers and provide protections in addition to those available under the ADA.

<sup>[2]</sup> According to the Department of Health and Human Services, HIV/AIDS is not a disease that can be transmitted through food handling. See: [List of Infectious and Communicable Diseases which are Transmitted through the Food Supply](#) at 69 Fed. Reg. 59237 (October 4, 2004). For a discussion of actions an employer may take in compliance with the ADA when an applicant or employee may have a disease transmissible through food handling, see EEOC's *How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers*, Questions 6-11, which is available at [http://www.eeoc.gov/facts/restaurant\\_guide.html](http://www.eeoc.gov/facts/restaurant_guide.html).

<sup>[3]</sup> A reasonable accommodation is any work-related modification that will permit an employee or prospective employee with a disability to participate in the job application process, to perform the essential functions of a job, or to partake in the same benefits and privileges of employment enjoyed by employees without disabilities. See EEOC Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (as revised October 17, 2002) at [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html) for more information about reasonable accommodation.



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<sup>[4]</sup> Note, however, that an employee who needs leave to care for a spouse, child, or parent may be entitled to leave under the Family and Medical Leave Act (FMLA). The FMLA, which covers private employers with 50 or more employees and state and local government employers, provides up to 12 workweeks of unpaid leave during any 12-month period to care for a spouse, child, or parent with a serious health condition. The U.S. Department of Labor enforces the FMLA. For more information, go to [www.dol.gov/esa/whd/fmla/](http://www.dol.gov/esa/whd/fmla/).

<sup>[5]</sup> See: *Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Related Distinctions in Employer Provided Health Insurance* (Interim Enforcement Guidance) at [www.eeoc.gov/policy/docs/health.html](http://www.eeoc.gov/policy/docs/health.html) for more information on this issue.

<sup>[6]</sup> Id.





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Suspicion vs. Evidence: (See: *Evidence: Belief vs. ...*)

Pretext: (See: *Removal Actions: Pretext, and Promotions/Selections/Hiring: Pretext*)

Unfairness: II, 2, p. 6; V, 3, p. 13-16

Experience (as evidence of qualifications): (See: *Promotions: Pretext: Evidence*)

## **F**



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Failure to Cooperate: III, 1, p. 3-4; V, 4, p. 10-11  
Failure to Hire, Promote or Select: (*See: Promotions/Selections/Hiring*)  
Failure to State a Claim: III, 1, pp. 5 and 13; III, 3, p. 5-6; IV, 4, p. 9-10; V, 1, pp. 7 and 7-8; V, 4, p. 7-8;  
VI, 1, p. 15; VI, 2, pp. 2-3 and 4-5; VIII, 2, p. 7-8; VIII, 3, p. 9-10; VIII, 4, pp. 4-5 and 8-9; IX, 2, p. 2;  
IX, 3, p. 2-3; **X, 2, p. 10**  
False Statements: (consequences of making): VIII, 2, p. 11; (*But See Also: Harassment: Corrective Action: Discipline of Victim*)  
Favoritism (as evidence of discrimination): (*See: Evidence*)  
FOIA Requests (denial of): **X, 2, p. 9-10** (failure to state a claim)  
Food Service Workers (applying *Americans With Disabilities Act* to): VIII, 3, p. 11-15  
Forced Retirement/Resignation (*See: Constructive Discharge*)  
Freedom of Information Act (denial of request): *See FOIA Requests*  
Forum (Choice of): (*See: Election of Remedies*)  
Friendship (as evidence of discrimination): (*See: Evidence: Favoritism*)  
Frivolous (complaints): VI, 2, p. 4-5; VII, 1, p. 7-9; IX, 3, p. 10-11 (article about)  
Future Harm or Injury (Risk of): (*See: Disability: Direct Threat*)

## G

Gender-Based Requirement or Policy: (*See "BFOQ"*)  
Gender Dysphoria: (*See: Disability: Type of; See Also: Trans-Gender Behavior*)  
Gender Stereotypes: VII, 1, p. 5-6  
Genetic Information (collection, use, and disclosure of): V, 1, p. 13-16  
Grievance Procedures: (*See: Election of Remedies*)

## H

Handicap: (*See: Disability*)  
Harassment (includes sexual and non-sexual):  
Automatic (Strict) Liability: VI, 2, p. 9 (fn.3); VI, 4, p. 4-5; VII, 4, p. 6-8; VIII, 1, p. 3-4; IX, 4, p. 9-10  
Anti-Harassment Policy (requirement for): II, 4, p. 11-15  
Article about: III, 3, p. 11-12; VII, 3, p. 11-12  
Because of Association: (*See: Association with EEO Protected Individuals*)  
Because of Gender: I, 1, p. 6; VII, 1, p. 5-6 VII, 3, p. 2-4  
Because of Disability: VI, 2, p. 8-10; VIII, 1, p. 25-28; **X, 2, p. 9**  
Because of National Origin: V, 4, p. 13-14  
Because of Race: I, 1, p. 6; II, 3, p. 4-5; V, 1, p. 9-11; VII, 3, p. 6-7; VII, 4, p. 10-11; **X, 2, p. 9**  
Because of Sex (*i.e.*, sexual in nature): III, 4, p. 8-10; IV, 3, p. 11-12; VI, 1, p. 10-12; VI, 2, p. 8-10  
VIII, 3, p. 7-8 and 9-10  
Because of Sexual Orientation: IV, 3, p. 13-14  
Because of Trans-Gender or Trans-Sexual Behavior: (*See: Trans-Gender Behavior*)  
By Co-workers: (*See: Harassment: Liability of Employer: Harassment Committed by*)  
By Patients: (*See: Harassment: Liability of Employer: Harassment Committed by*)  
By Supervisors: (*See: Harassment: Liability of Employer: Harassment Committed by*)  
By Subordinates: (*See: Harassment: Liability: Harassment Committed by*)  
Comments about Appearance: III, 3, p. 11-12  
Coerced Sex: VI, 4, p. 4-5; VII, 4, p. 6-8  
Confidentiality (pledge of): II, 4, p. 3  
Consensual Sexual Relationships: II, 1, p. 5; VII, 3, p. 11-12  
Continuing Violation: VI, 4, p. 6-8  
Corrective Action (*In General*): I, 1 14; VI, 3, p. 3-4  
Discipline/Negative Action (against victim): (*See: Reprisal: Discipline/Negative Action*)  
Discipline of Supervisors/Managers: III, 3, p. 11-12; III, 4, p. 20  
Reassignment of Harasser: VIII, 4, p. 9  
Reassignment of Victim: (*See: Reprisal: Reassignment of Harassment Victim*)  
Failure to Act as Retaliation: II, 1, p. 5  
Definition of: III, 2, p. 4-5; VII, 4, p. 10-11; VIII, 3, p. 7-8; **X, 2, p. 9**  
Disability: (*See: Harassment: Because of*)  
Discipline (of coworker-harasser): VI, 4, p. 3-4; VII, 1, p. 2  
Discipline (of victim): (*See: Reprisal: Discipline of Harassment Victim*)  
Elements of Proof: III, 4, p. 8-10  
"Equal Opportunity Harasser": I, 1, p. 6; IV, 3, p. 11-13  
False Claims: VIII, 2, p. 11 (*But See Also: Harassment: Corrective Action: Discipline of Victim*)  
Frequency of: (*See: Harassment: "Severe or Pervasive"*)  
Gender: (*See: Harassment: Because of*)  
Investigation of:  
Duty to Conduct: II, 4, p. 3; III, 1, pp. 13 and 14-15; VI, 2, p. 8-10



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- Duty to Cooperate: VI, 3, p. 9-10  
Alleged to be Discriminatory/Harassing: III, 1, p. 13; V, 2, p. 10; VIII, 4, p. 9  
Isolated Remarks/Incidents: (*See: Harassment: "Severe or Pervasive"*)  
Liability of Employer: (*See also: Harassment: Automatic Liability*)  
Harassment Committed by:  
    Co-workers: I, 1, p. 3-4 and p. 14; II, 3, p. 2-3; III, 4, p. 8-10; IV, 3, pp. 3-4, 4-5, and 6-7; V, 1, p. 9-11; VI, 1, p. 2-3; VI, 4, p. 6-8; VII, 1, p. 2 IX, 4, p. 9-10  
    Patients: IX, 3, p. 2-3  
    Subordinates: III, 1, p. 14-15; VI, 1, p. 10-12  
    Volunteers: I, 1, p. 4  
Harassment Committed by Supervisors (in general): I, 1, p. 10-11 and 14-15; II, 2, p. 8; III, 4, p. 4-5; VI, 2, p. 8-10; VI, 3, p. 3-4; VI, 4, p. 6-8; VII, 3, p. 6-7; VII, 4, p. 6-8; IX, 4, p. 9-10  
Affirmative Defense (employer's): II, 4, p. 6-7; VI, 2, p. 8-10; VI, 3, p. 3-4; IX, 4, p. 9-10  
    Duty of Employer to Prevent and Correct: III, 4, p. 8-10; VII, 3, p. 6-7; VIII, 1, p. 3-4; IX, 4, p. 9-10  
    Duty of Victim to Timely Report: III, 4, p. 8-10; IX, 4, p. 9-10  
    Duty of Victim to Avoid Harm: VI, 3, p. 3-4  
Management's Response: (*See: Harassment: Liability of Employer*)  
National Origin: (*See: Harassment: Because of*)  
Race: (*See: Harassment: Because of*)  
Rejection (of sexual advances): (*See: Harassment: Coerced Sex*)  
Report (duty of victim to): (*See: Harassment: Liability: Harassment Committed by Supervisors: Affirmative Defense*)  
Retaliation (against victim of): (*See: Reprisal: Discipline*)  
Romance (workplace): VII, 3, p. 11-12 (article)  
Rudeness (of supervisor): VII, 4, p. 10-11; VIII, 2, p. 7-8  
Sex (harassment because of): (*See: Harassment: Because of*)  
Same Sex: I, 1, p. 10-11; III, 4, p. 8-10  
"Severe or Pervasive": I, 1, p. 10-11; II, 3, p. 4; III, 2, p. 4-5; III, 4, p. 4-5; IV, 2, p. 2-3 IV, 3, pp. 4-5 and 11-13; V, 1, pp. 7 and 7-8; VI, 2, pp. 2-3 and 5-6 and 8-10; VI, 4, p. 6-8; VII, 1, p. 5-6; VII, 4, p. 10-11; VIII, 1, p. 2-3; VIII, 3, p. 7-8; VIII, 4, p. 9; IX, 2, p. 2; **X, 2, p. 9-10**  
Sexual Conduct: IV, 3, p. 11-13  
Strict Liability: (*See: Harassment: Automatic Liability*)  
Sexual Orientation: (*See: Sexual Orientation; See also: Harassment: Because of*)  
Submission (to sexual advances): (*See: Harassment: Coerced Sex*)  
Subordinates (romancing of): VII, 3, p. 11-12 (article)  
Tangible Employment Action: (*See: Harassment: Automatic Liability; See also: Harassment: Coerced Sex*)  
Touching Employees: III, 3, p. 11-12; III, 4, p. 4-5; IV, 3, p. 3-4, 4-5, and 11-13; VI, 2, p. 8-10; VII, 4, p. 6-8; VIII, 1, p. 2-3; IX, 3, p. 2-3  
Trans-Gender (Trans-Sexual) Behavior: (*See: Trans-Gender Behavior*)  
Unwelcome: I, 1, p. 10-11; IV, 3, pp. 3-4 and 4-5; VI, 3, p. 3-4  
Harm (need to show): (*See: Aggrieved*)  
Health Records (*See: Disability: Medical Records*)  
Hearing Impairments: (*See: Disability: Type of*)  
Hearing Process (cooperation during): III, 1, p. 3-5  
Heart Conditions: (*See: Disability: Type of*)  
Hiring: (*See: Promotions/Selections/Hiring*)  
**I**  
Illegal Drug Use (*See: Disability: Type of: Drug Use*)  
Impairment: (*See: Disability: Type of*)  
"Individual with a Disability": (*See: Disability: Type of*)  
Information (medical): (*See: Disability: Medical Records*)  
Injuries: (*See: Disability: Accommodation*)  
Intellectual Disabilities: (*See: Disability: Type of*)  
Interim Earnings (offsetting): (*See: Back Pay*)  
Intimidation: (*See: Reprisal: "Per Se" Reprisal*)  
Interference (*See: Reprisal: "Per Se" Reprisal*)  
Investigation (duty to cooperate with): VI, 3, p. 9-10  
Interviews: (*See: Promotions/Selections/Hiring; See Also: Disability: Interviews*)  
Involuntary Retirement/Resignation (*See: Constructive Discharge*)



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## **J**

Job Injuries: (*See: Disability: Accommodation*)  
Jurisdiction (lack of): (*See: Failure to State a Claim*)

## **K**

## **L**

Limited Relief/Remedies: (*See: Remedies: Limited*)  
Latex Allergies: (*See: Disability: Type of: Allergies*)  
Legal Representation: (*See: Representation*)  
Licensure: I, 1, p. 2; VII, 2, p. 8-10

## **M**

Manipulation (of the promotion/selection/hiring process): (*See: Promotions/Selections/Hiring: Manipulation of the Process*)  
Mediation: (*See: ADR*)  
Medical Condition/Impairment: (*See: Disability*)  
Medical Examinations/Inquiries: (*See: Disability: Medical Examinations/Inquiries*)  
Medical Information: (*See: Disability: Medical Records*)  
Mental Impairment: (*See: Disability: Type of*)  
Merit Systems Protection Board (appeals to): (*See: Election of Remedies*)  
Mistake of Fact: (*See: Settlement Agreements*)  
Mixed Case Complaint (election to pursue): (*See: Election of Remedies*)  
Moot(ness): IV, 4, p. 10-11  
MSPB Appeals: (*See: Election of Remedies*)  
Multiple Ailments: (*See: Disability: Type of*)

## **N**

National Origin: V, 4, p. 12-15; VI, 2, p. 2-3  
Negative Employment Actions: (*See: Disciplinary/Negative Actions*)  
Negative Employment References: V, 3, p. 10-12  
Negotiated Grievance Procedure (election to pursue): (*See: Election of Remedies*)  
Non Job-Related Injuries: (*See: Disability: Accommodation*)  
Non-Sexual Harassment: (*See: Harassment*)  
Numerosity: (*See: Class Action Complaints*)  
Nurses:  
Examinations (Nursing Board): IX, 1, p. 6-7  
GNT (Graduate Nurse Technician) Program: IX, 1, p. 6-7  
Licensure: I, 1, p. 2; VII, 2, p. 8-10  
Lifting Restrictions: (*See: Disability: Type of*)  
Nurse Professional Standards Board: I, 1, p. 16  
Performance: (*See: Nurses: Promotions (non-competitive): Performance*)  
Promotions (non-competitive): I, 1, p. 16; IV, 4, p. 2-3; VI, 2, p. 6-8  
Nurse Qualifications Standards: I, 1, p. 16; VI, 2, p. 6-8  
Performance (as justification for): IV, 4, p. 2-3; VI, 2, p. 6-8  
Proficiency Reports: I, 1, p. 16; VI, 2, p. 6-8

## **O**

Obesity: (*See: Disability: Type of*)  
"Observably Superior": (*See: "Plainly Superior"*)  
Offensive Remarks: (*See: Comments*)  
Official Time (to prepare for/participate in EEO process): VIII, 2, pp. 4-5 and 9-10; IX, 2, p. 7-8  
Offsets (to back pay awards): (*See: Back Pay*)  
"Opposition" (activity opposing discrimination): (*See: Reprisal: Protected EEO Activity*)  
Oral Agreements: (*See: Settlement Agreements*)  
OWCP Claims (denied or controverted): III, 3, p. 5-6; V, 4, p. 7-8; VIII, 4, p. 4-5  
OWCP Clearances (to return to full duty): (*See: Disability: Accommodation*)

## **P**

Paranoid Schizophrenia: (*See: Disability: Type of*)  
Parking Spaces (*See: Disability: Accommodation*)  
Participation (in EEO complaint process): (*See: Reprisal: Protected EEO Activity*)  
Performance (removal/termination because of): (*See: Removal Actions*)  
Performance Appraisals:



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- Pretext:
- Found:
  - Not Found:
  - Reason(s) articulated for --
    - Burden of articulation met (specific reason given for nonpromotion or nonselection)
    - Burden of articulation not met (no reason or nonspecific reason given)
      - I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 2, p. 3-4
    - Found not true (see Pretext Found)
    - Found True (see Pretext Not Found)
  - Use of (in promotion/selection actions): II, 3, p. 3
  - Performance Problems (need to document): V, 3, pp. 8-10 and 10-12; VI, 4, pp. 2-3 and 5-6
  - Physical Impairment: (See: *Disability: Type of*)
  - Pregnancy (discrimination because of): VII, 4, p. 8; IX, 2, p. 6-7
  - Pre-Selection: (See: *Promotions/Selections/Hiring: Pre-Selections*)
  - Priority Consideration: (See: *Promotions/Selections/Hiring: Priority Consideration*)
  - Privacy (right to): X, 1, p. 9-11 (urine screening)
  - Problem Employees: V, 3, pp. 8-10 and 10-12; VI, 4, p. 5-6; VII, 1, p. 9-10 (article); VII, 2, p. 3-4  
(See also: *Performance Problems*)
  - Procedural Dismissals: (See *specific ground(s) for dismissal – e.g., failure to state a claim, untimeliness, etc.*)
  - Promotions/Selections/Hiring:
    - Affirmative Action Plans (use of): II, 1, p. 7
    - Applications: II, 3, p. 3; V, 2, p. 2; VI, 2, p. 10-12; VIII, 4, p. 3-4.
    - Disqualification (by HR specialist): VI, 2, p. 10-12; X, 1, p. 8-9; **X, 2, p. 7**
    - Documentation (need to retain): III, 4, p. 5-6; IV, 4, p. 4-5; V, 3, p. 8-10; VI, 1, p. 5-6;  
VI, 4, pp. 2-3 and 8-9; VIII, 4, p. 10-11; IX, 4, p. 4-5
    - Education: (See: *Qualifications: Education*)
    - Experience: (See: *Promotions/Selections/Hiring: Pretext: Evidence*)
    - Innocence of Decision Maker: V, 3, p. 2-3;
    - Knowledge (of applicant's race, gender, etc.): **X, 2, p. 7**
    - Manipulation of the Process: V, 1, pp. 4-5 and 5-6 and 12; VIII, 4, p. 10-11
    - Mistakes: (See: *Promotion/Selections/Hiring: Pretext: Evidence*)
    - Nurses (non-competitive promotions): (See: *Nurses: Promotions*)
    - Panels (interview and rating): V, 3, p. 8-10; VII, 3, p. 10-11; IX, 4, p. 4-5
    - Performance Appraisals (use of): II, 3, p. 3
    - Position Descriptions: V, 4, p. 8-9
    - Pre-Selections: III, 4, p. 7-8; V, 3, p. 13-16; V, 4, p. 4-5; VIII, 4, p. 10-11 (article)
  - Pretext:
    - Evidence or Not Evidence of:
      - Affirmative Employment Plans (use of): II, 1, p. 7-8
      - Derogatory Comments: II, 2, p. 3
      - Education: (See: *Qualifications: Education*)
      - Experience: II, 1, p. 7; III, 1, p. 13; VI, 3, p. 4-5
      - Interview Not Granted as: II, 1, p. 7-8
      - Opinion (of complainant as to his/her qualifications as): (See: *Qualifications: Opinion*)
      - Mistakes: V, 1, p. 5-6; X, 1, p. 8-9
      - Performance Appraisals: V, 1, p. 4-5; VI, 4, p. 2-3
      - Priority Consideration (use of as ): (See: *Promotions/Selections/Hiring: Priority Consideration*)
      - Prior Nonselections as: II, 1, p. 7
      - Seniority: IV, 3, p. 9-11; V, 3, p. 8-10
      - Subjective Factors (use of by selecting official): IV, 3, P. 9-11
    - Found: I, 1, p. 15; II, 2, p. 2-3; II, 4, p. 9-11; IV, 3, p. 9-11; IV, 4, pp. 2-3 and 8-9; V, 1, p. 4-5 and 5-6; V, 3, p. 8-10; IX, 4, p. 4-5
    - Not Found: I, 1, p. 16; II, 1, p. 7; II, 2, p. 7; II, 3, p. 3; III, 3, p. 4-5; IV, 3, p. 9-11; IV, 4, p. 5-6; V, 3, 13-16; V, 4, p. 4-5; V, 4, p. 8-9; V, 3, p. 13-16; VI, 2, p. 10-12; IX, 1, p. 6-7; IX, 3, p. 6; X, 1, p. 8-9
  - Priority Consideration: III, 3, p. 4-5
  - Procedures/Policies (failure to follow): V, 3, p. 8-10; X, 1, p. 8-9
  - Proficiency Reports (nurses):
    - If issue involves use in noncompetitive promotions: (See: *Nurses: Promotions*)
    - If issue relates solely to the rating: (See: *Performance Appraisals*)
  - Rating Panels: V, 1, p. 5-6
  - Reason(s) articulated --



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Burden of Articulation Met (specific reason given for nonpromotion or nonselection)  
 Burden of Articulation not Met (no reason or nonspecific reason given)  
 I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 4, p. 2-3 and 4-5  
 Found not True (see Pretext Found)  
 Found True (see Pretext Not Found)  
 Inability to Accommodate: (*See: Disability: Accommodation or Religion: Accommodation*)

Risk of Harm or Injury (as reason cited): (*See: Disability: Direct Threat*)  
 Proof: (*See: Evidence*)  
 Proposed (vs. Completed) Actions (dismissal because of): VIII, 4, p. 5-7  
 Protected Activity: (*See: Reprisal: Protected EEO Activity*)  
 Punitive (damages): (*See: Compensatory Damages*)

## Q

### Qualifications

Applications (...not noted in): (*See: Promotions/Selections/Hiring*)  
 Disqualification (by HR specialist): (*See: Promotions/Selections/Hiring*)  
 Education (as evidence of): IV, 4, p. 6-7; V, 3, p. 13-16  
 Experience (as evidence of): (*See: Promotions/Selections/Hiring: Pretext: Evidence*)  
 Nurses (*See: Nurses: Qualifications*)  
 "Observably Superior": (*See: Qualifications: Plainly Superior*)  
 Opinion (of complainant as to his or her own): IV, 3, p. 9-11  
 Position Descriptions: (evidence of): V, 4, p. 8-9  
 "Plainly Superior": IV, 3, p. 9-11; IV, 4, pp. 2-3, 6-7, and 8-9; V, 3, p. 8-10; VI, 1, p. 5-6  
 Seniority (use of): (*See: Promotions/Selections/Hiring: Pretext: Seniority*)  
 Supplemental Qualification Statements: II, 2, p. 3

## R

Race (knowledge of applicant's): **X, 2, p. 7**  
 Racial Harassment: (*See: Harassment: Racial*)  
 Racial Profiling: V, 1, p. 8-9  
 Reannouncing Position Vacancies (to manipulate the process): (*See: Promotions/Selections/Hiring: Manipulation of the Process*)  
 Reasonable Accommodation (*See: Disability: Accommodation or Religion: Accommodation*)  
 "Reasonable Suspicion" Standard (as relates to untimeliness of complaint): VII, 4, p. 11-12  
 Reassignment (as a reasonable accommodation): (*See: Disability: Accommodation*)  
 Reassignment (of harassment victim): (*See: Reprisal: Reassignment of Harassment Victim*)  
 Recency (of experience): (*See: Promotions/Selections/Hiring: Pretext Evidence*)  
 Records (medical): (*See: Disability: Medical Records*)  
 Reductions in Force (involving Title 38 Employees): V, 2, p. 12-13  
 Regulations (*See: EEOC Regulations*)  
 Relief: (*See: Remedies*)  
 Religion:  
 Accommodation: IV, 1, p. 4-5; V, 4, p. 5-7  
 Beliefs (nature or sincerity of): III, 4, p. 10-11  
 Inquiries (about): IX, 1, p. 6-7  
 Seasonal Displays/Activities: III, 1, p. 5  
 Diversity Training (as allegedly violating beliefs): III, 4, p. 10-11  
 Undue Hardship: V, 4, p. 5-7  
 Remarks (inappropriate or offensive): (*See: Comments*)  
 Remedies:  
 Inappropriate: IV, 4, p. 8-9  
 Limited: V, 2, p. 2-4  
 Removal Actions:  
 Conduct (because of):  
 Pretext:  
 Evidence or Not Evidence of:  
 Found: IX, 1, p. 2-3  
 Not found: VI, 4, p. 3-4  
 Reason(s) Articulated --  
 Burden of articulation met (specific reason given for removal)  
 Burden of articulation not met (no reason or nonspecific reason given)  
 Found Not True (*See Pretext: Found*)  
 Found True (*See Pretext: Not Found*)



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## Job Performance (because of):

### Pretext:

Evidence or Not Evidence of:

Found: I, 1, p. 18; VI, 4, p. 2-3; IX, 1, p. 2-3

Not found: VII, 4, p. 2-3

### Reason(s) Articulated --

Burden of articulation met (specific reason given for removal)

Burden of articulation not met (no reason or nonspecific reason given)

Found Not True (*See Pretext: Found*)

Found True (*See Pretext: Not Found*)

## Other Reasons (because of):

### Pretext:

Evidence or Not Evidence of:

Found:

Not found: II, 3, p. 5-6; IV, 4, p. 9-10

### Reason(s) Articulated --

Burden of articulation met (specific reason given for removal)

Burden of articulation not met (no reason or nonspecific reason given)

Found Not True (*See Pretext: Found*)

Found True (*See Pretext: Not Found*)

## Representation:

Adequacy of: (*See: Adequacy of Representation*)

Right to:

## Reprisal:

Adverse Action Requirement: (*See: Reprisal: Per Se*)

Article about: I, 1, p. 19; IX, 1, p. 10-11; IX, 3, p. 10-11

“Chilling Effect”: (*See: Reprisal: “Per Se” Reprisal*)

Discipline/Negative Action (taken against harassment victim): II, 1, p. 5-6; III, 1, p. 9-10; VII, 1, p. 7-9;

VIII, 1, p. 2-3; IX, 2, p. 5-6; IX, 3, p. 2-3; (*See also: Harassment: Corrective Action: Reassignment of Victim*)

EEOC Compliance Manual (Section 8): I, 1, p. 20

Elements of Claim: I, 1, p. 20; II, 4, p. 7-8; IV, 4, p. 5-6; V, 4, p. 3-4; VI, 2, p. 5-6; VIII, 3, p. 3-5; **X, 2, p. 2**

Evidence of: I, 1, p. 13, 15, and 18; II, 2, pp. 3, 6, and 8-9; II, 3, p. 5; III, 2, p. 4; IX, 1, p. 2-3; IX, 4, p. 4-5

Frivolous Complaints (because of): IX, 3, p. 10-11 (article about)

Intimidation: (*See: Reprisal: “Per Se” Reprisal*)

Interference (with EEO process): (*See: Reprisal: “Per Se” Reprisal*)

“Material” Action: I, 1, p. 20

Protected EEO Activity:

Knowledge by Management of: III, 4, p. 3-4; IV, 3, p. 5-6; IV, 4, p. 5-6; VIII, 3, p. 3-5;

**X, 2, pp. 2 and 8**

Participation Type Activity: VIII, 1, p. 6-7; X, 1, p. 2

Opposition Type Activity: II, 3, p. 5; VIII, 1, pp. 2-3 and 6-7; X, 1, p. 2

RMO (responsible management official, named as): VIII, 1, p. 6-7

Threat to File Lawsuit (made by supervisor): VII, 3, p. 5-6

Threat to File EEO Complaint (*See: Reprisal: Protected EEO Activity: Opposition Activity*)

Time Span Between EEO Activity and Adverse Action: III, 4, p. 3-4; IV, 4, p. 5-6; V, 2, p. 8-10;

V, 4, p. 3-4; VI, 2, p. 5-6; VIII, 3, p. 3-5; IX, 1, p. 2-3; **X, 2, p. 2-3**

Treatment before Activity *vs.* Treatment after Activity: II, 2, p. 2

“Per Se” Reprisal: I, 1, pp. 12; and 20; II, 1, p. 8; II, 2, p. 3; III, 4, p. 2; VII, 1, pp. 6-7 and 7-9;

VII, 3, p. 5-6 and 10-11; VIII, 2, pp. 5-7 and 9-10; IX, 2, p. 6-7

### Pretext:

Evidence or Not Evidence of:

Found: I, 1, p. 18; II, 4, p. 8-9; IV, 1, p. 8-9; IV, 3, p. 5-6; V, 2, p. 8-10; VI, 4, p. 5-6;

VII, 2, p. 3-4; VIII, 3, p. 5-6; IX, 1, p. 2-3; IX, 4, p. 4-5

Not found: III, 1, p. 7-8; III, 3, p. 6-7; IX, 3, p. 2-3; **X, 2, p. 8-9**

Reason(s) articulated --

Burden of Articulation Met (specific reason given for nonpromotion or nonselection)

Burden of Articulation not Met (no reason or nonspecific reason given)

I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 4, p. 2-3 and 4-5

Found not True (see Pretext Found)

Found True (see Pretext Not Found)

Problem Employees: (*See: Problem Employees*)

Reassignment (of harassment victim): II, 1, p. 2; II, 3, p. 4; II, 4, p. 5; III, 1, p. 9-10

Supervise (impact of complaints on ability to): VII, 1, p. 9-10; VII, 2, p. 3-4



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Technical Violation: (*See: Reprisal: "Per Se" Reprisal*)  
"Ultimate" Action: I, 1, p. 20  
"Whistle-Blowing" Activities (reprisal due to): III, 3, p. 6-7  
Restraint: (*See: Reprisal: "Per Se" Reprisal*)  
Retaliation: (*See: Reprisal*)  
Reverse Discrimination:  
    Age: (*See: Age Discrimination*)  
RIFs (*See: Reductions in Force*)  
Risk of Future Harm or Injury: (*See: Disability: Direct Threat*)

## S

Same-Sex Requirement or Policy: (*See: "BFOQ"*)  
Same-Sex Urine Screens: (*See: Urine Screens*)  
Sanctions (imposed by EEOC judges): VI, 1, p. 5-6  
Sex-Based Requirement or Policy: (*See: "BFOQ"*)  
Sexual Harassment (*See: Harassment*)  
Sexual Identity: (*See: Trans-Gender Behavior*)  
Sexual Orientation: IV, 3, p. 13-14  
Selection Actions (*See: Promotions/Selections/Hiring*)  
Service-Connected Disability: (*See: Disability: Benefit Statutes: Veterans Compensation*)  
Settlement Agreements:  
    Breach of: VIII, 2, p. 3-4  
    Consideration (absence of): V, 2, p. 4-5  
    "Meeting of the Minds" (absence of): V, 2, p. 5-6  
    Mistake of Fact: (*See: Settlement Agreements: Meeting of the Minds*)  
    Oral Agreements: VIII, 2, p. 3-4  
Shortness of Breath: (*See: Disability: Type of*)  
Skin Conditions: (*See: Disability: Type of*)  
"Similarly Situated": (*See: Employees*)  
"Speak English Only" Rules: (*See: National Origin*)  
Stating a Claim: (*See: Failure to State a Claim*)  
Statistical Evidence: (*See: Evidence*)  
Stress: (*See: Disability: Type of*)  
Subjective Factors (use of): (*See: Promotions/Selections/Hiring: Pretext*)

## T

Tangible Employment Action: (*See: Harassment: Automatic Liability; See Also: Harassment: Coerced Sex*)  
Tangible Harm: (*See: Aggrieved*)  
Telework (as a reasonable accommodation for disabilities): (*See: Disability: Accommodation*)  
Temporal Proximity (in reprisal cases): (*See: Reprisal: Protected EEO Activity: Time between.....*)  
Temporary Disability: (*See: Disability: Temporary*)  
Terminations (*See: Removal Actions*)  
Threats (*See: Reprisal "Per Se"*)  
Timeliness (of complaints): (*See: Untimeliness*)  
Title 38 Employees (right of appeal to MSPB): (*See: Reductions in Force*)  
Trans-Gender (Trans-Sexual) Behavior (discrimination due to): VII, 1, p. 5-6  
Touching (of employees): (*See: Harassment: Touching Employees*)  
Typicality: (*See: Class Action Complaints*)

## U

Under-Representation: (*See: Evidence: Statistical*)  
Undue Hardship: (*See: Disability: Accommodation*)  
Unfairness (as evidence of discrimination): (*See: Evidence: Unfairness*)  
Union Officials (complaints filed by): V, 3, p. 12-13  
Untimeliness (dismissal of complaint due to): VI, 1, p. 9-10; VI, 4, p. 6-8; VII, 4, p. 11-12  
Urine Screens: X, 1, p. 9-11

## V

VA Disability Ratings: (*See: Disability: Benefit Statutes: Veterans' Compensation*)  
Veterans' Compensation: (*See: Disability: Benefit Statutes: Veterans' Compensation*)  
Veterans' Preference or Status (cited as a basis of discrimination): IV, 4, p. 9-10; VI, 1, p. 15  
Vision Impairments: (*See: Disability: Type of*)  
Voidance (of settlement agreements): (*See: Settlement Agreements: Consideration and Meeting of the Minds*)



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## **W**

“Whistle Blower” Complaints: (See: *Reprisal; Protected EEO Activity; Whistle Blowing Activities*)

Witness Credibility: (See: *Credibility*)

“WOC” Employees/Employment (without compensation): (See: *Employees*)