



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 harassment by psychiatric patients, complaints about changes in job location, current illegal drug use, effective accommodation for disabilities, evidence of discriminatory intent, and belated requests for disability accommodations. Also in this issue are articles on how to deal with frivolous EEO complaints and the EEO/legal problems caused by office romances.

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

INAPPROPRIATE BEHAVIOR BY PSYCHIATRIC PATIENTS AN EXPECTED PART OF PSYCHIATRIC NURSE'S JOB

The Equal Employment Opportunity Commission (EEOC) affirmed a decision by an administrative judge, which found that certain behavior exhibited by psychiatric patients did not constitute unlawful sexual or racial harassment, and that the complainant was not retaliated against because she complained to management about such harassment.

The complainant, who had been hired by a VA medical facility because she was an experienced psychiatric nurse, worked in the Psychiatric/Dual Diagnosis Ward, a locked facility with 26 patients. Six of the patients were in the "dual diagnosis" section because of alcohol and/or substance abuse problems. The Head Nurse of the ward testified that she terminated the complainant after six months for conduct and performance-related problems relating to patient safety, inability to interact therapeutically with patients, and her attitude.

The Head Nurse provided documentation concerning these deficiencies, and many of her assertions were corroborated by other witnesses, including the ward's two other Black nurses. For example, she was observed opening a window and then allowing a patient to close the window in an area where

suicidal patients were confined. She also gave sharp scissors to a patient. Both of these incidents violated policy in the ward. She also engaged in a loud, confrontational argument with a drug representative; left training sessions early and without permission; complained about every type of patient with which she was assigned to work; was observed giving a glass plate and metal fork to a suicidal patient, who then broke the plate by throwing it against the wall; made medication errors; and taunted patients.

The complainant did not necessarily deny that these incidents took place. Instead, she tried to explain them away.

The EEOC judge first found that there was no evidence to support the complainant's assertion that her termination was motivated by racial or gender considerations. Moreover, the judge rejected the complainant's harassment and retaliation claim, wherein she alleged that her patients sexually and racially harassed her, and that when she approached management officials to complain about the harassment, they fired her.

Although it was undisputed that two patients subjected her to some inappropriate racial comments and two instances of inappropriate touching of her buttocks, and while management was aware of those incidents, the EEOC judge concluded that the complainant was unable to demonstrate unlawful harassment because of the



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specific and unusual context in which the conduct occurred. The judge noted that the patients in the locked ward had severe mental illnesses. They were delusional, violent, had difficulty observing sexual limits, and generally lacked the capacity to understand the nature of their actions.

All of the other nurses on the ward testified that they accepted these behavioral problems as a normal part of their job because the behavior was a direct manifestation of the patients' mental conditions. Other witnesses testified that an essential part of the job of a psychiatric nurse is to deal with inappropriate behavior by patients from a therapeutic perspective.

In addition, other evidence showed that therapeutic treatment and philosophy called for the least restrictive means of treatment before considering options such as sedation, seclusion, or restraint. Thus, the judge, as did management, rejected the complainant's argument that these patients should have been "disciplined" or "discharged."

Care should be taken not to draw the wrong lesson from this case. There are cases in which health care facilities have been held liable for harassment of employees by patients. Each case must be judged on its own facts. Given the type of patients involved and the nature of psychiatric nursing, this was an unusual case.

II

COMPLAINT ABOUT CHANGE IN JOB LOCATION FAILS TO "STATE A CLAIM"

Often EEO complaints are dismissed for procedural reasons. Thus, the facts surrounding the dismissed claim are never even investigated. There are several procedural grounds for such dismissals. One of them is for "failure to state a claim."

Equal Employment Opportunity Commission (EEOC) Regulation 29 C.F.R. 1614.107(a)(1) provides that an agency shall dismiss an entire complaint that fails to state a claim. A complaint fails to state a claim if it was not filed by a covered employee or applicant for employment who is aggrieved because of discrimination on the basis of race, color, religion, sex, national origin, age, disability, or reprisal for prior EEO activity; or if it was not filed with the agency that allegedly discriminated against the complainant. Most complaints dismissed for failure to state a claim result from the inability of complainants to show that they were "aggrieved."

The Commission defines an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of the individual's employment for which there is a remedy. Thus, a federal agency is required to investigate EEO complaints only when filed by an individual who has suffered a direct, personal



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deprivation at the hands of the agency. In other words, the agency's act must have caused some concrete effect on the aggrieved person's employment status.

In one recent case a VA employee was reassigned to work on a different floor. His duties did not change; nor did his job title, grade, status, or responsibilities change. The working conditions associated with the new location were not materially different from those at the previous location. The only change was that his work location was different. Dissatisfied with the situation, the employee filed an EEO complaint claiming that the reassignment was due to his race.

Given these facts, the EEOC affirmed the VA's dismissal of the complaint for failure to state a claim. In a brief decision, the Commission held that the change in location did not result in a tangible harm or loss with respect to any term, condition, or privilege of employment. Hence, the complainant was not "aggrieved." Because he was not aggrieved, he failed to "state a claim."

III

CURRENT DRUG USER NOT AN "INDIVIDUAL WITH A DISABILITY"

The Administrative Officer of the Day (AOD) at a VA medical center approached the complainant, a food ser-

vice worker still in her probationary period, and took her and another employee away from the food service line to a conference room because of reports of erratic behavior noticed by other employees at the facility that raised safety concerns. There had also been a previous report from a discharged patient that the complainant had been dealing drugs at the facility.

According to the record, the complainant had a history of drug use and, prior to her employment, had been admitted to the domiciliary drug rehab program at the facility, a fact known to her supervisors and coworkers.

While undergoing questioning by a VA police officer and the AOD, she admitted to being a user of methamphetamines, but denied that she was under the influence of the drug while at work that day. She stated that she had last used the drug four days earlier on a scheduled day off, although the police officer testified that she admitted using the drug two days earlier, not four. In any event, the complainant did not understand why anyone would claim that her behavior was erratic on that day. The AOD testified that her behavior did not suggest to him that she was under the influence of a controlled substance. She denied the claim that she was dealing drugs at the facility.

The police officer testified that she refused a request to submit to a blood test, stating that she thought the drug used a few days earlier would still be



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in her system. She did, however, comply with an instruction to submit to a urine test, which came back negative.

Based on her admission to being a current user of a controlled substance, facility officials notified the complainant of the termination of her employment because of her current illegal drug use. The complainant responded by filing an EEO complaint alleging disability discrimination in violation of *The Rehabilitation Act* and *The Americans with Disabilities Act (ADA)* - i.e., that she was disabled under the above statutes because of her history of drug use, and that she was terminated because of that history.

After reviewing the investigative file, OEDCA issued a decision in favor of the Department, finding that the complainant's termination did not violate the above Act. It is true that the above statutes include within the definition of "individual with a disability" one who has a history of a substantially limiting impairment. However, the ADA specifically excludes from the definition of disability an individual who is currently engaged in the illegal use of drugs, when the employer acts on the basis of such use.

In this case the complainant was fired because she was currently using illegal drugs, not because of her history of such use. Because she was a current user, she was not an "individual with a disability" within the meaning of the ADA. Hence, she was unable to establish a *prima facie* case of disability

discrimination.

Supervisors should bear in mind that an individual who has successfully completed a drug rehab program or has otherwise been rehabilitated successfully and no longer uses is an "individual with a disability" and may not be discriminated against because of his or her history or record of drug use. Moreover, the ADA also protects individuals who are erroneously "regarded as" engaging in illegal drug use, but are not doing so.

The bottom line is this. Disciplinary action because of illegal drug use is limited to those situations in which such use is current, and may not be based simply on a history or record of such use or an erroneous perception of current illegal use.

Also, bear in mind that an individual who is currently using illegal drugs may not escape the consequences of such conduct simply by enrolling in a treatment program after the discovery of his or her current use. The Commission has long held that policy considerations dictate that individuals who are caught and disciplined for current illegal drug use may not invoke the protections of the ADA simply by showing "after-the-fact" treatment or rehabilitation. Hence, such individuals may not demand reasonable accommodation simply by enrolling in a treatment program prior to the effective date of the discipline.



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IV

DISABLED EMPLOYEE NOT ENTITLED TO NEW ACCOMMODATION IF CURRENT ACCOMMODATION IS EFFECTIVE

An employee had been working as a Registered Nurse (RN) when she suffered a recurrence of an earlier on-the-job injury to her back. As a result of the injury, she was unable to work for over four years. She eventually returned to work as a “Modified Licensed Practical Nurse”, a position specifically designed to accommodate her back problem (a herniated disc) and lifting restrictions. The complainant never claimed that the accommodation provided to her was ineffective.

Approximately one year after returning to work, she applied but was not selected for an RN position, the duties of which were not inconsistent with her medical restrictions. She then filed a disability discrimination claim alleging that her nonselection was due to her disability. She also claimed that she should have been placed into the position noncompetitively as an accommodation for her disability. In support of this claim, she cited her training, her preference for RN rather than LPN work, and the fact that she had previously worked as an RN before the recurrence of her injury.

An EEOC judge issued a summary judgment finding against the complainant. OEDCA accepted the judge’s

decision, and the EEOC later affirmed it on appeal.

First, the judge found no evidence that the complainant’s disability was a factor in the competitive selection action. The record showed that the selectee scored higher than the complainant and had more relevant experience.

The judge also rejected the complainant’s claim that management was obligated to award her the RN position noncompetitively as a reasonable accommodation. The judge correctly noted that the complainant was already being reasonably accommodated in the modified LPN position and the VA had no obligation to give her another accommodation that would have been more to her liking.

A disabled individual is entitled only to a reasonable accommodation - *i.e.*, one that is effective. The duty to accommodate does not entitle an individual to the accommodation of his or her choice. Management has the right to choose an accommodation that best suits its business needs and operations, provided the accommodation is effective.

In this case, the complainant did not claim, when given the modified LPN position, that it was not a reasonable (*i.e.*, effective) accommodation. Moreover, she did not claim, nor was there any evidence, that her modified LPN position had ceased to be an effective accommodation.



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V

EEOC AFFIRMS OEDCA'S REJECTION OF JUDGE'S FINDING OF DISCRIMINATION

The complainant (African American) was a Patient Services Assistant who also served as a union steward. According to the complainant, a coworker told her that a supervisor had been overheard saying that "it was wonder that he had not struck" the complainant. Shortly thereafter, the supervisor in question scheduled a mid-year performance evaluation for one of his subordinates. The subordinate demanded the presence of a union representative at the meeting, which was held in the supervisor's office.

According to evidence brought forth at the hearing, the supervisor was of the opinion that the employee was not entitled to union representation, but the complainant, in her capacity as a union representative, did attend along with another union official. The supervisor was visibly angered by the complainant's presence at the meeting. The supervisor instructed her not to stand in the doorway, as he wanted to close the door to ensure the privacy of the evaluation. The complainant, upset that the meeting had not been moved to a larger office, as she had demanded, refused to enter his office and remained in the doorway. The supervisor, now angrier than before, closed the door, which resulted in the door striking the complainant. In response, the complainant filed a dis-

crimination claim, alleging that the supervisor deliberately, and because of her race and gender, caused the door to strike her when he closed it. She also notified the VA Security Service, which promptly investigated the matter.

On the day of the incident, the facility Director placed the supervisor on authorized absence and barred him from entering the facility pending completion of the investigation. The Director also warned the supervisor that he would not tolerate such behavior. After reviewing the investigation report, the Director suspended the supervisor for fourteen days and demoted him from his supervisory position.

At the EEO hearing, the Department stipulated¹ that the supervisor had, in fact, intended for the door to strike the complainant when he closed it. It denied, however, that the supervisor did what he did because of the complainant's race or gender. Instead, the Department argued that the supervisor's conduct was due to the complainant's union activities and the fact that he did not like his authority being challenged, especially by the union. In short, the Department claimed that he did what he did because he lacked basic supervisory skills.

The EEOC judge rejected the Department's arguments, and instead found that the supervisor was motivated by the complainant's race and gender.

¹ A stipulation is an admission made in a legal proceeding.



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The judge relied on the fact that no other employee at the facility had ever been struck by the supervisor. Hence, the judge reasoned, if the incident had occurred simply because the supervisor lacked supervisory skills, he most likely would have struck other employees who are not Black and/or female. The judge also argued that the supervisor's initial statement to investigators that he did not intend to strike the complainant lacked credibility.

OEDCA rejected and appealed the judge's finding, because there was no evidence in the record, let alone substantial evidence², to support it. On appeal, the Commission did something it rarely does -- it reversed its own judge's finding of discrimination. In so doing, the Commission first noted that the Department had stipulated that the supervisor intended to do what he did; hence the judge's reliance on the supervisor's lack of credibility because of an earlier statement he made was misplaced and could not be used to support the judge's conclusion.

Second, the Commission agreed with OEDCA that there was no evidence whatsoever that what happened was due to the complainant's race or sex. The record clearly showed that, more likely than not, it was the presence of union representatives at the meeting

that prompted the supervisor to behave as he did.

In so concluding, the Commission flatly rejected the administrative judge's reasoning that the fact that the supervisor had not struck other employees was, in itself, proof of discrimination. The Commission, for obvious reasons, described the judge's logic as "flawed."

The evidence showed that employees of all races had complained about this supervisor in the past, and while no white employees had ever been struck by the supervisor closing a door, it was also true that no other Black employees were struck in that manner. Using the judge's reasoning, a finding of discrimination would always result for any employee in a similar situation. The judge's analysis was devoid of the most important inquiry in unlawful discrimination cases; *i.e.*, is there persuasive evidence of discriminatory intent. There was none in this case.

The EEOC generally upholds the decision of an administrative judge, provided there is some evidence to support it. In most cases there is some evidence to support a judge's finding of discrimination. In this somewhat unusual case, both OEDCA and the Commission found no evidence to support the judge's finding.

² When an EEOC judge holds a hearing, the Commission will affirm the judge's findings of fact on appeal if there is "substantial evidence" to support it. Substantial evidence can be much less than a preponderance of the evidence.

VI

BELATED REQUEST FOR AC-



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COMMODATION OF DISABILITY FAILS TO PREVENT PROBATIONARY TERMINATION FOR CONDUCT

“He who hesitates is lost”! Consider the following case involving a probationary employee who waited just a bit too long before requesting an accommodation for his medical impairment.

The complainant was hired in September as a Nursing Assistant. Because he had to serve a one-year probationary period, he was to receive frequent periodic evaluations of his performance during that first year. The first four evaluations he received in October, January, March, and June were all “successful”.

Beginning in June, however, complaints about his performance and conduct began pouring in from patients and staff. They accused him of rudeness, disrespectful and annoying actions, rough treatment, taking too many breaks, failing to wash patients, failing to change dressings, and leaving his duty station without notifying a supervisor.

In August, he received another evaluation, only this time it was “unsatisfactory.” A few days later, he received a two-week notice of his termination. The notice cited as reasons his poor performance in the areas of customer service and patient treatment. Three days prior to the effective date of the termination, his attorney submitted a letter to the facility request-

ing -- as a reasonable accommodation for the complainant’s depression -- postponement of the termination action. The facility denied the request. The complainant then filed a complaint alleging disability discrimination because of the refusal to grant his request for accommodation.

After reviewing the investigative file, OEDCA, and later the EEOC on appeal, found that the complainant’s rights under *The Americans with Disabilities Act* were not violated. In its appellate decision, the EEOC noted that the complainant had never requested accommodation prior to receiving the termination notice. The Commission pointed to language in its *Enforcement Guidance on Reasonable Accommodation*³ stating that it is in the employee’s interest to request accommodation before performance suffers or conduct problems occur. The Commission also noted that reasonable accommodation is always prospective, meaning that even once the employee discloses a disability and requests reasonable accommodation, he or she is entitled to accommodation only from the date of such disclosure. In other words, an employer is not barred from imposing discipline or terminating an employee for past misconduct related to a disability if there was no prior request for accommodation.

In this case, there is evidence that management was aware that the com-

³ This guidance appears in the *OEDCA Digest* in Vol. IV, No. 2 (p. 10, Q&As 4 and 5)



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plainant was depressed. However, the complainant never indicated that his behavior was linked to his depression, and he never requested an accommodation for it. Given these facts, was management under an obligation to initiate a conversation about the possible need for accommodation when it first noticed the performance and behavior problems? The answer is no. An employer is only obligated to initiate such a discussion when (1) it knows that the employee has a disability, (2) it knows or has reason to know that the employee is experiencing workplace problems because of the disability, **and** (3) it knows or has reason to know that the disability prevents the employee from requesting accommodation. There was no evidence that the complainant's condition was such that he lacked the ability to request an accommodation.

As demonstrated by this case, requests for reasonable accommodation should be made sooner rather than later, and the obligation to initiate a conversation about reasonable accommodation is generally on the employee, not the supervisor.

VII

(The following two articles are reproduced with permission of "FEDmanager", a weekly e-mail newsletter for Federal executives, managers, and supervisors published by the Washington, D.C. law firm of Shaw, Bransford, Veilleux, and Roth, P.C.)

LET THE EEO PROCESS WORK – HOW TO DEAL WITH FRIVOLOUS COMPLAINTS

There's a folk tale about a federal employee who once filed a frivolous Equal Employment Opportunity complaint against his manager that provides a lesson. Here's how it goes: a federal employee once argued before a judge that he was unlawfully discriminated against and harassed by his manager based upon his race. Naturally, the manager and the agency argued and presented evidence to the judge that all actions taken against the employee were based upon legitimate, nondiscriminatory reasons. After listening to the agency's argument and being convinced that he did not have the evidence to prove his case, the employee was at a loss as to how to proceed. After some quick thinking, the employee blurted out, "Judge, I agree that the evidence shows that I was not discriminated against because of my race. But, as you can see, my manager got so angry when I filed such a frivolous EEO complaint that he clearly retaliated against me!"

While we all hope that such an argument would never prevail, it is worthy of consideration. The law is well settled that in the workplace it is specifically unlawful for a manager to retaliate against an employee because the employee has participated in the EEO process. The EEO process exists to detect and remedy unlawful discrimination in the workplace and, therefore, permitting a federal manager to



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retaliate against an employee for participating in the EEO process creates an undesired chilling effect. Many federal managers working in the federal workforce long enough may have encountered that one employee who files frivolous EEO complaints any time things do not go the employee's way. Quite often, that federal manager must balance the need to make tough management decisions affecting the employee while ensuring that the employee is not retaliated against for participating in the EEO process.

Unfortunately, some federal managers shy away from the situation and decide to avoid managing the employee for fear of being the subject of a retaliation claim. Other federal managers decide to "clamp down" on the employee, at least as a partial response to the filing of an EEO complaint. So what is the federal manager to do?

First and foremost, the federal manager should never fail to manage any employee simply because an EEO complaint has been filed. Instead, the manager should continue to maintain open lines of communication with the employee. In addition, for any significant decision made that may affect the employee who has been or is participating in the EEO process, the manager should document all reasons for the decision so that if a retaliation claim is ever brought, the manager has an evidentiary record establishing the basis of the action and negating any inference of retaliation. Finally, as frivolous as some EEO complaints

might be, each manager should recognize the purpose, value and thoroughness of the EEO process to uncover actual discrimination in the workplace. If a complaint is filed against the manager, the EEO process eventually will sort through the evidence and resolve the complaint, and the manager will have an opportunity to respond during that process.

In short, managers who have had a frivolous EEO complaint filed against them should continue to do their job and supervise all the employees for whom they are responsible; refrain from retaliating against the employee who filed the complaint; and trust that the EEO process will weed out complaints that have no merit whatsoever.

VIII

OFFICE ROMANCES: RARELY A GOOD IDEA

Almost everyone has heard a story or two about the boss who marries his or her subordinate or the co-workers who find love and marriage that all started at a copy machine or on a coffee break while at work. But, as in fairy tales, reality almost never imitates fiction and this tip offers a pretty simple piece of advice: when thinking about asking a fellow employee out on a date, it's best to immediately put the thought on hold, get back to work, and leave your social life for the evenings and weekends with friends outside of work.



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Since the early 1990s, the federal workplace has educated itself relatively quickly about the laws prohibiting workplace sexual harassment, regardless of whether it is a request for sexual favors in exchange for employment benefits, promotions, or more favorable work conditions, or whether it is unwanted comments or actions motivated by gender. Employer liability has also been a hot topic for the Supreme Court, which has said in the last decade that employers can be held liable for their supervisor's conduct if it involves sexual harassment coupled with a tangible employment action (such as a promotion or other significant job benefit). Agencies thus need to be vigilant about an office romance that could turn sour and result in a major potential liability, both for the agency and for the individual supervisor.

As a result of the Supreme Court precedents, it is simply good practice to remind your subordinates and fellow employees to avoid office romances. While a relationship at work may be fine for a while, the employee and the agency risk great liability, in the form of an EEO complaint, a civil lawsuit, or an administrative investigation into allegations of sexual harassment. Even if both persons involved are perfectly happy and work well in the same agency, other employees may allege claims of discrimination by way of theories of "preferential treatment." In short, if the manager or fellow employee feels that strongly about the relationship, it's

best to consider transferring to a different position outside of the immediate division, office, or department.

Finally, even the Supreme Court has acknowledged that common courtesies, expressions of civility and kindness, and general politeness do not make a sexual harassment suit. Encourage your employees to foster a pleasant and friendly team-oriented work environment. When it comes to office romances, though, it's better to think twice and look for that fish in a different pond, or change ponds yourself.





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Disciplinary/Negative Actions:

Comparators: *(See: Disciplinary/Negative Actions: Similarly Situated)*

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Evidence of:

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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

Found not True (see Pretext Found)

Found True (see Pretext Not Found)

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H



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Report (duty of victim to): (See: *Harassment: Liability: Harassment Committed by Supervisors: Affirmative Defense*)

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I

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"Individual with a Disability": (*See: Disability: Type of*)
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J

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K

L

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- 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*)
- Office Romances: **IX, 3, pp. 11-12.**
- 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:
 - 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*)
- 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



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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

Education: (*See: Qualifications: Education*)

Experience: (*See: Promotions/Selections/Hiring: Pretext: Evidence*)

Innocence of Decision Maker: V, 3, p. 2-3;

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

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

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

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**

Priority Consideration: III, 3, p. 4-5

Procedures/Policies (failure to follow): V, 3, p. 8-10

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 --

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



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“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

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*)

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*)

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*)



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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

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

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
- Participation Type Activity: VIII, 1, p. 6-7
- Opposition Type Activity: II, 3, p. 5; VIII, 1, pp. 2-3 and 6-7
- 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
- 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
 - Not found: III, 1, p. 7-8; III, 3, p. 6-7; **IX, 3, p. 2-3**
- 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

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*)

RIFs (See: *Reductions in Force*)

Risk of Future Harm or Injury: (See: *Disability: Direct Threat*)

S

Sanctions (imposed by EEOC judges): VI, 1, p. 5-6

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*)



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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

V

VA Disability Ratings: (See: *Disability: Benefit Statutes: Veterans' Compensation*)
Veterans' Compensation: (See: *Disability: Benefit Statutes: Veterans' Compensation*)
Veterans' Preference (cited as a basis of discrimination): IV, 4, p. 9-10; VI, 1, p. 156VI, 1, p.
Voidance (of settlement agreements): (See: *Settlement Agreements: Consideration and Meeting of the Minds*)

W

"Whistle Blower" Complaints: (See: *Reprisal: Protected EEO Activity: Whistle Blowing Activities*)
Witness Credibility: (See: *Credibility*)
"WOC" Employees/Employment (without compensation): (See: *Employees*)