



# 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 licensure requirements, "technical" findings of discrimination, burden of proving a disability, "material adversity" in reprisal claims, constructive discharge, and inability to interact with others as a disability. Also included in this issue are articles about the importance of making use of the Office of the General Counsel and the role of the "Responsible Management Official."

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

### ***FINANCIAL INABILITY AND OTHER EXCUSES NOT A JUSTIFICATION FOR NOT MAINTAINING CERTIFICATION***

Many jobs in the Federal government require employees to maintain their licensure, registration, or certification. As the following employee learned, the costs associated with maintaining them are the responsibility of the employee, not the employer.

The employee in question was a Supervisory Diagnostic Radiologic Technologist in the Radiology Service until her termination in 2005. In 2004, she injured her back and was off from work for approximately one year, during which time she received OWCP (Office of Workers' Compensation Program) compensation. Just prior to her injury, however, she received notice of a proposed suspension for several job-related deficiencies. Because of her injury, the proposed suspension was held in abeyance.

When she returned to duty in 2005, management attempted without success to verify her certification, as she was not listed on the American Registry of Radiologic Technologists (ARRT) website. The Chief of Radiology therefore instructed the complainant to provide evidence of certification within 48 hours, and further notified her that certification was a condition of employment, and that failure to meet that condition would result in termi-

nation.

In response, the employee's attorney stated that 48 hours was insufficient time to submit proof of certification, that the employee did not have sufficient funds at the moment to pay for the certification renewal, and that her Position Description makes no mention of having a current, active certification or registration. On the latter point, she argued that because she was a supervisor, she was not actually doing radiologic work; hence there was no real need for her to maintain her certification.

When she failed to present proof of certification, as directed, management officials rescinded the pending proposed suspension issued prior to her injury and instead issued a proposed removal notice. The new notice cited, among other grounds for removal, her failure to maintain a current, active, and unrestricted certification.

The complainant responded to the notice by applying for and receiving a one-year probationary certification. She was not eligible for a full, *i.e.*, unrestricted, certification, as she had failed to complete the required number of continuing education credits during the past reporting cycle. At the end of one year, if she completed the continuing educational requirements, she would be eligible for an unrestricted certification.

Despite the probationary certification, management officials terminated her employment. The employee then filed



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a complaint alleging that her termination was due to a disability and in retaliation for her prior EEO complaint activity.

After reviewing the evidence, OEDCA concluded that the termination was not motivated by prohibited discrimination or retaliation. Evidence in the record supported the grounds for termination cited in the notice. As for the certification issue, Department regulations clearly require that all employees in occupations requiring licensure, registration, or certification are responsible for maintaining an active, current, and full and unrestricted licensure, registration, or certification. Further, the cost of such maintenance is the sole responsibility of the employee.

## II

### ***“I DON’T RECALL” NOT A GOOD ENOUGH ANSWER TO AVOID FINDING OF DISCRIMINATION***

As the following case illustrates, even when complainants offer little in the way of evidence to prove their claim of discrimination, they may still prevail in some cases if management is unable to articulate with specificity a legitimate, nondiscriminatory reason for its actions. This case also illustrates why managers and supervisors must keep adequate records of the selection actions in which they are involved, to include the specific rationale for their recommendations or decisions.

The complainant in this case applied for the full-time position of Police Officer at a VA medical center. The announcement stated that two vacancies would be filled. When notified of her nonselection, she filed a complaint alleging gender discrimination. One of the selectees was male, the other female.

In support of her claim she pointed to her application, which showed her to be well qualified for the position, to the fact that she was not interviewed for the position, and to the lack of female officers in the Security Service.

She offered no direct evidence of gender discrimination and very little circumstantial evidence to support her claim. She was able, however, to meet her initial burden of establishing a *prima facie* case of gender discrimination because she was able to prove that she applied for the positions, that she was qualified, that she was not chosen, and that someone of a different gender was chosen for one of the positions. Not much evidence is required to establish a *prima facie* case.

However, once a *prima facie* case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its decision. As with the *prima facie* case, this burden of articulation is not onerous. The employer need not prove the absence of discrimination; instead it need only articulate with specificity the reason or reasons for its action(s). This means that (1) there must be an explanation, and (2) the explanation



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must be clear and specific enough to afford the complainant an opportunity to rebut it.

Thus, the mere claim by a selecting official that he chose “the best-qualified individual” for the position will not suffice, as the complainant does not have sufficient information to rebut the claim. It is generally presumed that selecting officials will choose the best-qualified person to fill a vacancy. Hence, saying as much says little. The selecting official must indicate why specifically he or she considers the selectee to be the “best qualified”. Of course, if selecting officials are unable even to recall the reason for their decision, it goes without saying that they will fail to satisfy their burden of articulation.

The consequence of management’s failure to meet its burden of “articulation” is grave; *i.e.*, the agency automatically loses the case! As long as the complainant has established a *prima facie* case, which again is not very difficult to do, even for someone with a weak claim, management’s inability to articulate a reason for its action(s) results automatically in a technical finding of discrimination. No further proof is required from the complainant.

In this case, the selecting official retired shortly after making his decision. He kept no written record of the selection action. When later asked by an EEO investigator to explain his rationale for not choosing the complainant, he was unable to do so. He re-

sponded to the investigator’s questions by simply stating that he did not recall the specific reasons for his decision or, in fact, any of the details surrounding the selection action. Such a response is clearly insufficient to satisfy management’s burden of articulation. OEDCA therefore found in the complainant’s favor on technical grounds, as required by law, notwithstanding the fact that the complainant did not appear to have a strong claim.

This case is a perfect example of why facility directors should mandate that managers and supervisors maintain a written record of personnel actions in which they are involved. The EEO complaint process is complicated and often lengthy. Responsible management officials may be called upon to recall, long after the fact, specific details surrounding a personnel action. Without notes or other documentation to refresh their memory, they risk an adverse finding against the agency. Such a finding can also have adverse career consequences for the manager or supervisor involved.

### III

#### ***COMPLAINANT, NOT THE EMPLOYER, BEARS THE BURDEN OF PROVING EXISTENCE OF A DISABILITY***

The case illustrates an often-misunderstood rule regarding the burden of proof in EEO claims based on disability. It also serves as a good reminder to managers and supervisors



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that an employee's or applicant's permission is required in order to obtain medical information concerning such individuals.

The employee in question claimed to have a disability, which he described as "allergies". He further claimed that the disability affected his ability to do certain groundwork, specifically, raking leaves, cutting grass, and generally coming into contact with tree pollens and outside dust mites. He requested that he be allowed to drive a shuttle or provide car service, duties he was initially hired to do prior to changes in his position description that added groundwork duties for two months out of the year.

The complainant offered no evidence to show that his allergies substantially limited any of his major life activities, including his ability to work. He failed to provide any medical records or other information regarding his allergies, despite a request by his supervisor that he do so. The supervisor explained the reason for the request, *i.e.*, to determine the nature of his impairment and whether the impairment constitutes a disability. The complainant refused to provide the information, claiming that it was the employer's responsibility to contact his private physician to obtain the information.

Management officials nevertheless attempted to accommodate the complainant. He did very little groundwork, was only required to do it in the winter, and he refused an offer of pro-

TECTIVE equipment that would have prevented allergic reactions. Instead, he filed a disability discrimination claim alleging a failure on management's part to accommodate his disability.

An EEOC administrative judge rejected his claim, noting that the burden was on the complainant to prove the existence of the claimed disability, which he failed to do. Management had no obligation to contact his physician to obtain medical information concerning his claim. Because he failed to prove that he was disabled, he was not entitled to an accommodation for his allergies.

Moreover, the judge correctly noted that an employer may not, without express written permission from an employee, obtain medical information about that employee from a physician or other health care provider.

## IV

***COMPLAINANT CLAIMING RETALIATION FAILED TO PROVE THAT ACTION COMPLAINED OF WAS "MATERIALLY ADVERSE."***

This case demonstrates that the anti-retaliation provisions of Title VII do not cover every action taken by an employer.

The employee in this case was a police officer. During the course of a staff meeting, his Sergeant (first line supervisor) informed all officers that



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only one officer would be permitted on each assignment. He then issued written assignment orders to all of his officers, which reflected the “one-officer-per assignment” rule.

The complainant claimed that despite the rule, he has seen two officers on one assignment, but offered no specifics regarding dates, times, and names of those supposedly violating the rule. He further claimed that when the Sergeant announced the rule, he (the Sergeant) was looking directly at him and the rule was merely an attempt to “isolate” him from his fellow officers because he believes that he is perceived to be a “troublemaker.” He claims that the rule was established for the sole purpose of retaliating against him because of his prior EEO complaint activity.

After reviewing the investigative record, OEDCA rejected his claim, finding no evidence of a retaliatory motivation. Specifically, OEDCA concluded that the complainant was unable to establish even his threshold burden of proving a *prima facie* case of retaliation, as he failed to show that management’s action in this case was “materially adverse”.

To show material adversity, a complainant need not prove that management took an ultimate or significant personnel action. In fact, the complainant is not even required to show that the action taken relates to employment or occurred at the workplace. However, a complainant must show that the action in question, tak-

ing into consideration the context of the situation, was one that would likely dissuade a reasonable employee or applicant from making or supporting a charge of discrimination. Minor or trivial matters will not suffice to prove material adversity.

Based on the facts of this case, OEDCA concluded that the action in question was not materially adverse. Given the context in which the “one officer per assignment” rule was established, and the fact that it applied to everyone, not just the complainant, OEDCA found that the rule was not the type of action that would likely dissuade a reasonable employee from making or supporting a charge of discrimination.

Even assuming for argument’s sake that the complainant did establish a *prima facie* case, the Sergeant articulated a legitimate, nonretaliatory reason for the rule – *i.e.*, to ensure maximum coverage of all areas on his watch – and the complainant was unable to offer any evidence that this explanation was a pretext for retaliation.

## V

### **FORMER EMPLOYEE WHO RESIGNED FOR BETTER PAYING JOB NOT CONTRUCTIVELY DISCHARGED**

It is not unusual for a worker to resign or retire and thereafter claim that the departure was coerced;*i.e.*, that the employee was forced to leave because



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of a hostile environment that was due to a prohibited discriminatory factor. As the following case illustrates, these types of cases are normally difficult for employees to prove -- especially when the facts surrounding the departure clearly suggest that nondiscriminatory reasons were involved. The following is a case in point.

The complainant was hired as a temporary, part-time worker (36 hours/week) in the Veterans Canteen Service as a cashier. As a temporary employee, the complainant was not eligible to receive benefits available to permanent employees (*e.g.*, health insurance, retirement package, *etc.*). Her temporary appointment was extended for several months, and for a period of time she was allowed to work 40 hours per week.

Eventually her supervisor changed her schedule back to a 36-hour week, at which point she complained that the reduction in hours and the lack of overtime pay for those weeks that she worked a 40-hour schedule were due to her national origin and disability. She also notified the supervisor that she was looking for another job and would be resigning shortly. Two weeks later she resigned. Her last day on the job was a Friday, and on the following Monday she started a new job at a nearby university with a higher salary and full benefits. Shortly thereafter, she filed an EEO complaint alleging that the above events were due to her national origin, disability, and prior EEO activity. She also alleged that her resignation

was involuntary and caused by a discriminatorily hostile environment. In other words, she claimed that she was constructively discharged.

After reviewing the evidence OEDCA concluded that the failure to pay overtime and the reduction in hours were not motivated by the complainant's national origin or disability.

As for the constructive discharge claim, OEDCA found that the complainant failed to prove any of the three elements required to establish a constructive discharge. In other words, she failed to show that (1) a reasonable person in her shoes would have found working conditions intolerable, (2) the intolerable conditions were caused by unlawful discriminatory conduct, and (3) her resignation was due to the intolerable conditions.

For conditions to be intolerable, a complainant must show more than mere displeasure with one's work situation. While the complainant was clearly unhappy with her work schedule and the lack of overtime pay, it cannot be said that these matters created intolerable working conditions. Any temporary employee hired under this type of appointment would have experienced much the same situation.

Moreover, it is obvious that the reason the complainant left her job with the VA was not because of a discriminatorily hostile work environment, but instead, because she found a better paying job with benefits.



## VI

### ***INABILITY TO FUNCTION IN LARGE GROUP MEETINGS NOT A DISABILITY***

A former VA employee (hereinafter “complainant”) failed to convince a U.S. district court that her service-connected bi-polar and post traumatic stress disorders constituted disabilities under *The Rehabilitation Act*.

The complainant worked in a Loan Guaranty Unit at a VA regional office. Beginning in 2001, employees in the unit were divided into teams, of which several were “employee-managed” teams and one of which was a “management-directed” team. The complainant was assigned to an employee-managed team.

Employee-managed teams discussed their performance at weekly meetings with the goal of improving team productivity. As might be expected, conflicts arose during these meetings over matters such as workload distribution, individual and team performance, perceived (or actual) slights, and vacation relief duties. Meetings were often contentious and voices were often raised.

The complainant sent a memo to her supervisor requesting to be excused from these weekly meetings for an indefinite period of time. She claimed that the meetings were too stressful and were adversely impacting her service-connected disabilities and her work. Initially, she and her medical advisers refused to identify the nature

of her disabilities, indicating that management only needed to know fact that she had two service-connected disabilities and was in need of an accommodation. Management insisted that it needed specifics, such as the nature of the medical impairments and which major life activities were substantially limited by the impairments.

Eventually the complainant relented and authorized release of medical information concerning her conditions. She claimed that the conditions substantially limited her ability to interact socially or function in large groups. After discussions with her second-level supervisor, it was agreed that management would play an expanded role in managing the agenda at her team meetings and would be present to ensure professional conduct by all team members.

Dissatisfied with this arrangement, the complainant filed an EEO complaint alleging, among other things, a refusal to accommodate in violation of *The Rehabilitation Act*.

After reviewing the record evidence, the district court concluded that the complainant was not an individual with a disability, as that term is defined in *The Rehabilitation Act*, and hence, not entitled to an accommodation. For a medical condition to constitute a disability, an individual must show that the condition “substantially limits a major life activity.” Although some courts and the EEOC have recognized that an inability to interact



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with others may constitute a disability, the district court in this case concluded that the mere inability to attend large group meetings did not substantially limit her inability to interact with others. There was no evidence presented that the complainant was unable to initiate contact with other people and respond to them at the most basic level, or that she demonstrated high levels of hostility, social withdrawal, or failures to communicate. As one court noted, simply being cantankerous or having trouble getting along with co-workers or supervisors is not sufficient to show a “substantial limitation.” As this complainant found out, simply experiencing stress in large group meetings is not substantially limiting and, hence, not a disability.

*(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.)*

## VII

### **MAKING USE OF THE OFFICE OF GENERAL COUNSEL**

Employees and managers deal every day in areas that have the potential for catastrophic consequences, both professionally and personally. Today’s headlines are often filled with the stories of people who unknowingly made a wrong choice and, as a result, face professional and personal ruin. This

is particularly true in the federal workplace.

With violations of federal regulations resulting in a wide range of penalties, from suspension to incarceration, federal managers must be particularly vigilant to ensure that their conduct - and the actions of subordinates taken at their direction - does not run afoul of these rules. One way to avoid this problem is to seek advice on potentially troublesome issues from the agency’s Office of General Counsel.

The Office of General Counsel (OGC) is responsible for providing legal advice to its agency on various matters pertaining to the agency’s operations. The attorneys in this department are highly skilled in very complex areas of law. The collective knowledge of this Office can be highly beneficial when a manager has a legal question. Many times, this is an issue that has arisen before within your agency. Consulting with OGC can save you time, while allowing OGC to ensure that the agency’s operations are consistent from department to department.

It is imperative that, in seeking the advice, you make full disclosure of all material facts to the OGC, and that you follow that advice as carefully as possible. Also, it is important to obtain a written opinion, whether by a formal opinion or by an e-mail. Since an investigation can occur months or years after the fact, it is easier to show that you consulted with, and received an opinion from, OGC if you have a



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document memorializing that conversation.

It is important to remember that the OGC does not represent the federal manager in a personal capacity. Nonetheless, if your conduct is found to run afoul of a federal regulation or statute, the fact that you were following the advice of agency counsel would be a strong factor leaning in favor of not pursuing disciplinary action or, worse, a criminal prosecution against you. In the unlikely event that an agency or prosecutor might decide to pursue disciplinary action or criminal charges, an “advice of counsel” defense can be raised to show that you did not have the requisite intent to violate any regulation or statute, often a factor that can clear you or at least mitigate the penalty.

In today’s climate, it is the wiser course to seek clarification on difficult issues if you feel that your actions could have significant legal ramifications. Consulting with OGC allows managers to focus on the performance of their responsibilities, while allowing their OGC to do what they do best.

## VIII

### ***THE ROLE OF “RESPONSIBLE MANAGEMENT OFFICIAL”***

It is an unfortunate fact that most federal managers will have at least one EEO complaint filed against them at some point in their careers. At the

same time, few federal managers take the time to understand the EEO process until they find themselves in the thick of the complaint process. The purpose of this tip is to focus on the federal manager’s role as an RMO in the federal EEO complaint process.

Generally, the manager who is alleged to have taken the action that is supposedly discriminatory is identified as the RMO. The term “responsible management official” or RMO is simply a way of identifying the manager who is the primary witness in an EEO complaint.

Even if you are named as the RMO, an EEO complaint is filed against your agency (in particular, the head of your agency in his or her official capacity) and not against you personally. Therefore, even if the complaint concerns your actions as a manager toward another employee, your involvement is as a witness in the case, not as the deep pocket with financial responsibility to the complainant.

The complainant who files a discrimination complaint has the burden of proving discrimination. In contrast, the agency’s burden of proof in responding to an EEO complaint is relatively low. The agency need only articulate a legitimate, nondiscriminatory explanation for whatever the complainant claims is an act of discrimination. As an RMO responding to allegations of discrimination, this means that you will have to explain why you did what you did and why it was not discriminatory. Because of



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this, you will be the agency's most important witness in an EEO case since your explanation literally forms the backbone of the agency's defense.

You may be brought into the EEO complaint process at one of several points. The first point is during the informal counseling phase, which occurs when the complainant initially brings an informal complaint to the agency EEO counselor. After the counselor meets with the complainant to learn what the allegations are about, the counselor will meet with the RMO to explain the complainant's allegations and see if resolution is possible. Sometimes, the complainant may elect alternative dispute resolution instead of counseling. If the complaint is not resolved during the informal phase and the complainant files a formal EEO complaint, the RMO will be asked to provide a sworn statement to the EEO investigator. After the investigation is completed, the report will be provided to the complainant, who can opt to have a hearing before an administrative judge at the EEOC. Your role in an EEO hearing will be as a live witness. During the hearing phase, you may be asked to provide information during the discovery process, to be questioned during a deposition, and to testify at the administrative hearing at the EEOC.

In all of these phases of the complaint process, your role as an RMO is the same: to articulate non-discriminatory reasons for your actions. As long as your actions as a manager are taken

for legitimate reasons, you should be able to overcome an EEO complaint.

The federal EEO process is long and drawn out and has many twists and turns. As with any administrative process, a little bit of knowledge goes a long way toward making it less difficult and scary for managers.





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Reason(s) articulated --



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## **E**

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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*)  
Interact with Others: (*See: Disability: Type of*)  
Interim Earnings (offsetting): (*See: Back Pay*)



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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*)

## **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 Advice: **X, 3, p. 9-10**  
Legal Representation: (*See: Representation*)  
Licensure (See also: Nurses: Licensure): I, 1, p. 2; VII, 2, p. 8-10; **X, 3, p. 2-3**

## **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*)  
Office of the General Counsel: **X, 3, p. 9-10**  
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



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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*)

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;



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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 --  
    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; **X, 3, p. 3-4**  
    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:



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- 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; **X, 3, 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 and Materially Adverse Action*)
  - 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*)
  - “Materially Adverse” Action: I, 1, p. 20; **X, 3, p. 5-6**
  - “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; **X, 3, 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)
- Problem Employees: (*See: Problem Employees*)
- 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



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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  
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

Responsible Management Official: **X, 3, p. 10-11 (article about)**

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*)

RMO: (*See: Responsible Management Official*)

## 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



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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)*

## W

"Whistle Blower" Complaints: *(See: Reprisal: Protected EEO Activity: Whistle Blowing Activities)*

Witness Credibility: *(See: Credibility)*

"WOC" Employees/Employment (without compensation): *(See: Employees)*