



# 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 reprisal, dismissal of complaints due to a prior grievance, "employees" vs. "volunteers", "perceived" disabilities, Graduate Nurse Technician program, and unauthorized medical exams.

Also included in this issue is an article that contains some useful advice about handling EEO complaints. In response to consumer requests, the OEDCA Digest now includes a comprehensive cumulative index.

The *OEDCA DIGEST* is now available on the internet at:  
<http://www.va.gov/orm/oedca.htm>.

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## I

### ***FAILURE TO ACT UNTIL AFTER EEO PROTECTED ACTIVITY OCCURRED RESULTS IN FINDING OF REPRISAL***

The following case illustrates a common pitfall that managers should avoid when taking performance- or conduct-related action against an employee.

The complainant, African American, was hired in April 2002 as an Information Technology Specialist (Help Desk Technician). As a new hire, she was required to serve a one-year probationary period.

The Associate Chief, Information Resource Management Service was the complainant's immediate supervisor. A few days after being hired, the complainant informed the supervisor that she was being treated unfairly with regard to work assignments and training.

Two months thereafter, the supervisor issued a 90-day Performance Evaluation of the complainant's performance, which was a standard practice for newly hired employees serving in a probationary status. The supervisor noted that the complainant was progressing well.

A few months later, the supervisor issued an out-of-cycle performance evaluation for the complainant at the complainant's request. The complain-

ant passed on every performance element of her position. In addition, approximately one month later, she received a \$500.00 cash award for her performance on a project.

Approximately four months after receiving the cash award, the complainant contacted a union steward with complaints that the supervisor was treating her differently than Caucasian employees with regard to PC Duo computer usage. A meeting was held in January 2003 with the complainant, the union steward, the supervisor, and another African American employee who raised a similar complaint against the supervisor.

Immediately following this meeting, the supervisor sent a memorandum to the Chief of Human Resources outlining a sequence of events during the complainant's employment and questioning her suitability as a federal employee. On the following day, the Chief Information Officer forwarded a Request to Terminate the complainant to the Chief of Human Resources.

A few days thereafter, in response to that request, the Chief of Human Resources issued a notice of Termination of Appointment to the complainant. The notice stated that the complainant's termination was due to conduct and performance issues.

After reviewing the record, OEDCA concluded that the supervisor failed to explain adequately why the complainant was unsuitable for federal em-



ployment given the fact that (1) she issued two performance evaluations which indicated that the complainant was progressing well, and (2) gave her a \$500.00 performance award. The record revealed that the supervisor's stated reasons for her termination were inconsistent with her prior evaluations of the complainant's conduct and performance. Further, there was little indication in the record that the supervisor seriously questioned the complainant's suitability for federal employment before learning of the complainant's discrimination allegations. However, immediately after learning of those allegations, action was taken to terminate her employment.

Given these facts, OEDCA concluded that it was more probable than not that management's actions in requesting her termination were motivated, at least in part, by the complainant's allegations of discriminatory treatment.

Management argued strongly that there were, in fact, problems with the complainant's performance that justified her termination. They cited several examples, most of which allegedly occurred prior to the performance evaluations or cash award. A few allegedly occurred after the cash award. The problem in this case – and unfortunately in many other similar cases – is that those problems were tolerated or excused prior to the complainant engaging in EEO protected activity, but not after such activity. It was only

after the complainant engaged in that activity that management decided to do something about the alleged problems.

The lesson here for management is obvious. If you have an employee with performance or conduct problems, document those problems as soon as they begin to surface. Above all, be frank in performance evaluations. Of course, it goes without saying that cash awards should not be given to employees experiencing such problems.

## II

### ***UNION'S RIGHT TO FILE A GRIEVANCE DOES NOT EXTINGUISH EMPLOYEE'S RIGHT TO FILE AN EEO COMPLAINT***

One reason an EEO complaint may be dismissed procedurally (*i.e.*, without investigation) is that the employee previously raised the same matter(s) in a negotiated grievance procedure that allows for complaints of employment discrimination to be raised. However, as the following case illustrates, in certain limited situations, a previously filed grievance will not prevent an employee from pursuing an EEO complaint on the same matter.

The complainant, a Radiologist, was reassigned to another division despite his objections and those of the local union (AFGE). He thereupon filed a complaint alleging discrimination due



to his national origin, gender, and prior EEO complaint activity (reprisal). Prior to his filing of this complaint, however, the local union filed a grievance regarding the reassignment.

The VA dismissed the discrimination complaint pursuant to EEOC's complaint regulation that requires agencies to dismiss an EEO complaint if the complainant previously filed a grievance on the same matter pursuant to the terms of a collective bargaining agreement that permits claims of discrimination to be raised in the grievance procedure. The complainant appealed the VA's dismissal to the Equal Employment Opportunity Commission's Office of Federal Operations, arguing that he did not file a grievance. The Commission agreed with him, reversed the dismissal decision, and remanded the complaint to the VA for investigation.

In reversing the VA's dismissal, the Commission agreed that a previously filed grievance will generally require dismissal of a subsequently filed EEO complaint concerning the same matter. It noted, however, that this rule applies only to grievances filed by the employee. In this case, the union filed the grievance on behalf of all employees at the facility, not just the complainant, because of the union's concern that the reassignment violated the collective bargaining agreement. The evidence in the record confirmed that it was an AFGE grievance, not an employee grievance. The AFGE filed it; management recognized in its deci-

sion that it was "presented by AFGE" and that it related to AFGE's concerns for the "treatment of all radiologists." In addition, the Step II grievance specifically stated, "[T]his is a union grievance and not directly on behalf of a constituent." Finally, there was no evidence in the record that the complainant was in any way involved in the filing of the grievance, or that he elected the grievance process over the EEO process.

This case illustrates a narrow exception to the general rule that permits dismissal of an EEO complaint when there is a previously filed grievance on the same matter.

### III

#### ***TRAINEE IN CLINICAL PASTORAL EDUCATION PROGRAM NOT A VA EMPLOYEE***

Occasionally, cases arise in which student trainees at VA facilities file discrimination complaints in connection with incidents or events that occurred during the course of their training. The first question that arises in these cases is whether the student-trainee is an "employee" for purposes of Title VII and other civil rights laws. In other words, does the student have "standing" (*i.e.*, the right) to utilize the EEO complaint process to challenge the matter? As lawyers are wont to say, the answer is, "it depends." The following case illustrates the analysis used in reaching a determination.



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The complainant, a chaplain student, voluntarily accepted placement in the Clinical Pastoral Education Program (CPE) at a joint VA-Dept. of the Navy CPE Center. She agreed to undergo training for one year (1600 hours) at both a VA medical center and a nearby naval hospital. Five months into her training program, she filed a formal complaint of employment discrimination.

The CPE Center provides, among other things, a method of learning pastoral practice in a clinical setting under supervision. Completion of the 1600 hours of training is a prerequisite to certification as a chaplain by the Association for Clinical Pastoral Education.

As a student trainee, the complainant did not receive an SF-50 from the VA (*i.e.*, the standard personnel form issued in connection with employment events such as hiring, promotions, pay raises, *etc.*); nor did she receive any fringe benefits (*e.g.*, health or life insurance). She did, however, receive a nominal stipend from the VA for her services in the program.

According to the complaint file, the CPE Program was new. The complainant was one of five students admitted during the program's first year. The VA did not hire any of the trainees who completed the one-year training program. The Navy, however, hired one of the graduates.

Was the complainant an employee, or simply a student/volunteer? The Equal Employment Opportunity Commission (EEOC) has held that if a "volunteer" is performing services for the agency as part of an educational program and receives remuneration for the services, the proper test to apply is whether the "volunteer" position held would lead to a regular position. If the "volunteer" position is one that leads to regular employment, then the volunteer would have standing to file a complaint under Title VII.

For example, in *Phillips v. Veterans Affairs*, 89 FEOR 20388 (1989), a sociology student participated in an agency work-study program for certification as a counselor and received remuneration for his services. The Commission found that the student was a "volunteer" because the remuneration he received was nominal and incidental to the work-study program. In discussing whether or not the volunteer in *Phillips* had standing under Title VII, the EEOC examined whether or not there was a significant link between the volunteer work and regular employment with the VA. It found no evidence of such link. Hence, in *Phillips*, the student was a volunteer, but not an employee for Title VII purposes.

The same is true in this case. There is no evidence that the volunteer work performed by the complainant in this situation is a prerequisite to regular employment with the VA, or tends to lead to regular employment with the



VA, as evidenced by the fact that the VA did not hire any of the five trainees after they completed their training.

In future years trainee/volunteers who file complaints might have standing if evidence shows that the CPE training program has led to regular employment with the VA.

#### IV

#### ***FAILURE TO PASS NURSING BOARD EXAMINATION, NOT COMPLAINANT'S RACE OR RELIGION, CAUSED REJECTION OF HER EMPLOYMENT APPLICATION***

The complainant, an African-American Muslim, applied for a nursing position at a VA medical center several years after graduating from nursing school with a B.S.N. degree. In the interim, she had taken but failed the nursing board examination three times. Hence, she did not have an unrestricted RN license.

A review panel interviewed the complainant and recommended her for the next step in the process – an interview with the head nurse of the service that had advertised a vacancy. During this second interview, the head nurse (African-American Baptist) twice asked the complainant about a scarf she was wearing, first asking why she wore it, and later asking if she wore it all the time. The complainant explained that she wore it for religious reasons, as

she was a Muslim, and that she did wear it all the time.

Also during this interview, the complainant was asked why she did not yet have her RN license, given the fact that she had graduated from nursing school five years ago. The complainant explained that she had previously had difficulty with the nursing boards because of a stressful family situation. She went on to state that this problem no longer existed and that she was currently enrolled in a remedial course and would be retaking the boards in three to four months. Based on that explanation, the head nurse recommended hiring her as a Graduate Nurse Technician (GNT).

After reviewing this recommendation, the Executive Nurse (African-American Baptist), who was not aware of the complainant's race or religion, recommended to the VAMC director that the complainant not be hired. The reasons she gave was the length of time since the complainant had graduated from nursing school without being able to pass her boards, and the complainant's situation was inconsistent with the purpose and normal use of the GNT Program. The director approved her recommendation. The complainant filed a discrimination complaint alleging that the rejection of her application was due to her race and religion. The nurse eventually hired for the position is African-American (religion unknown).



After reviewing the evidence, an EEOC judge found no discrimination due to race or religion. First, the judge noted that there was no evidence of race discrimination, given that the nurses involved are also African-American, as is the individual ultimately hired. As for religion, the judge found that although the head nurse asked questions about the complainant's headscarf, she nevertheless recommended the complainant for hire under the GNT Program. Furthermore, the judge found that the Executive Nurse was unaware of the complainant's religion when she made her recommendation to the VAMC director. Hence, the judge found there was insufficient evidence to establish a *prima facie* case of discrimination due to race or religion.

Even assuming for the sake of argument that the Executive Nurse was aware of the complainant's religion, the evidence fails to demonstrate that her reasons for not hiring the complainant were a pretext for religious discrimination. The judge noted that the GNT Program is specifically designed for and used to attract recent nursing school graduates by assisting them in the transition from full-time student to full-time work while taking their boards and awaiting the results. The expectation is that the nursing graduate will take and pass the boards within six months of graduation. There was no evidence in the record that the GNT Program was designed for or ever used to hire individuals in the complainant's situation – *i.e.*, indi-

viduals who have been unable to pass their boards over a period of several years since graduation from nursing school.

## V

### ***APPLICANT'S REJECTION DUE TO PHYSICAL EXAM RESULTS NOT CAUSED BY PERCEIVED DISABILITY***

This case teaches that a refusal to hire based on the results of a pre-employment physical does not necessarily mean that the employer "perceives" the applicant as disabled.

The complainant in this case applied for a Pharmacy Aid position at a VA medical center. Prior to applying, she had been employed by a temporary employment agency, which placed her at the VAMC as a temporary Pharmacy Aid. The VA offered her a permanent position, contingent upon her passing a pre-employment physical. The physical is given to all new hires prior to their appointment. The complainant submitted to, but failed the physical, and was subsequently notified that she would not be hired.

She failed her physical because the examining physician determined that she was incapable of performing the repetitive hand and wrist motions required for the particular position for which she had applied. According to the physician, after only one week as a temp, the tendonitis in her right hand



had become symptomatic -- *i.e.*, was being aggravated. In response, she filed a disability discrimination complaint alleging that while she was not disabled, the VA nevertheless “perceived” her as disabled in violation of *The Rehabilitation Act*.

To prevail in a disability discrimination claim, an individual must, among other things, prove that he or she is disabled. The individual can prove this by showing that he or she has a physical or mental impairment that substantially limits a major life activity, or that he or she is “regarded as” -- *i.e.*, perceived as -- having such an impairment, or that he or she has a record of such an impairment. In this case, the complainant conceded that she was not disabled. She claimed that, contrary to the examining physician’s conclusion, her tendonitis did not substantially limit her ability to work. Instead, the physician erroneously perceived her as unable to work.

After reviewing the facts of the case, an EEOC judge disagreed with the complainant’s assertion. In order for the VA to have perceived the complainant as disabled, she would have to show either (1) the VA mistakenly perceived her impairment as substantially limiting, or (2) has an impairment that is substantially limiting only because of the attitudes of others, or (3) has no impairments at all, but is treated as if she has one that is substantially limiting.

In this case, the physician found only that she was physically unable to perform repetitive wrist motions of the type need to perform her duties as a Pharmacy Aid (*e.g.*, such a labeling). He did not find that she was substantially limited in her ability to do manual tasks in general, only that she could not perform repetitive hand and wrist motions. The latter is not a major life activity.

Moreover, he did not find that her impairment rendered her unable to work. In other words, he did not conclude that she was unable to perform a class of jobs, such a general clerical or sales jobs. Nor did he find that she could not perform a broad range of jobs in various classes as compared to the average person. Instead, he simply concluded that she was unable to perform the duties of the particular job in question because it required repetitive hand and wrist motion.

While the failure to hire in this case was clearly based on the complainant’s physical impairment, she was unable to prove that she (1) was disabled, or (2) had a record of a disability, or (3) was, as she alleged, “perceived” as disabled.

## VI

### **UNAUTHORIZED ACCESS TO EMPLOYEE’S MEDICAL RECORDS LEADS TO SERIES OF EVENTS RESULTING IN DISCRIMINATORY REMOVAL**



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The complainant, a disabled veteran under VA care, has epilepsy, which was controlled by medication at the time she was hired as a Health Technician. Hiring officials knew of her condition, but did not require her to take a pre-employment physical exam.

Weeks after the complainant began working, her Nurse Manager accessed her health record without authorization. Because of information contained in her record, the complainant was ordered to undergo a fitness-for-duty medical examination, even though there was no independent evidence that would have permitted such an examination. Management officials defended their actions by claiming that it was a “deferred” pre-employment exam, as opposed to a post-employment exam.

At the exam, the VA physician changed the complainant’s medication, which caused a marked deterioration in her condition. As a result, her absences increased, and management temporarily suspended her without pay, pending a review of her condition.

In addition, the complainant was placed on sick leave restriction, even though there was no suspicion or indication that she was abusing sick leave or feigning illness.

During this time frame, the complainant requested accommodation three times, which requests were endorsed by VA physicians. According to the record, similar requests of other em-

ployees had been granted in the past, but management denied the complainant’s requests without showing undue hardship.

The complainant’s employment was eventually terminated for excessive leave usage. The complainant thereafter filed a complaint alleging that her termination, and the events preceding the termination were in violation of *The Rehabilitation Act*.

After reviewing the record, an EEOC administrative judge agreed with the complainant’s claim and issued a finding in her favor. OEDCA accepted the finding and ordered implementation of the judge’s decision.

In this case, one improper action, —*i.e.*, the unauthorized access of an employee’s medical record, led to a subsequent chain of events resulting in an improper removal action. But for the unauthorized access, the complainant would not have had to undergo a post-employment medical exam, which in itself constituted a violation of *The Rehabilitation Act*. But for the improper medical exam, her medication would not have been changed, causing her absences to increase and thereby resulting in her being placed on sick leave restriction and causing her to request a reasonable accommodation. But for the improper refusal to provide the complainant with a reasonable accommodation with respect to her absences, the complainant’s employment would not have been terminated.



Despite management's claim that the fitness-for-duty exam was a "deferred" pre-employment physical, the exam took place weeks after the complainant began working. Hence, it was clearly a post-employment examination, subject to EEOC's regulations governing such exams. Those regulations permit a fitness-for duty medical exam of employees only when there is a reasonable belief that the employee's ability to perform a job will be impaired by a medical condition, or the employee would pose a direct threat due to the medical condition. There was no independent, objective evidence of either. The exam was prompted solely by the improper access to the complainant's health record.

## VII

### **ADVICE ON HANDLING AN EEO COMPLAINT**

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Any federal manager who has been around long enough will likely be named as a discriminating official in an Equal Employment Opportunity (EEO) complaint at some point in his or her career. The complaint could come from one of the manager's employees or from an individual who was not selected by the manager for a va-

cancy. Although the goal of the EEO process is to root out unlawful discrimination in the workplace, complainants sometimes use the EEO process to address any workplace dissatisfaction. Even if the employee does not believe that the action he or she is complaining about was based upon some prohibited factor, the EEO process is often one of just a few avenues employees have to address their concerns, and so they try to use it. Regardless of whether a manager disputes that any discrimination was involved, managers should remember several key points once they find out an EEO complaint has been raised against them.

First, under no circumstance should the manager take action against the employee because of the fact that an EEO complaint was initiated. While the natural reaction would be anger or frustration, taking action against the employee based upon that anger or frustration is unlawful. Not only will the employee possibly prevail in a complaint for unlawful retaliation, the manager also may be disciplined by the agency for taking unlawful action against an employee.

Second, the manager should understand that employees sometimes use the EEO process not necessarily because they feel they have been unlawfully discriminated against, but perhaps because they believe they have been treated unfairly, and the EEO process is the only recourse available to the employee. With this under-



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standing, once a manager learns that a complaint has been filed, the manager should take advantage of any alternative dispute resolution that may be offered during the EEO process. Even if the manager is confident that no discrimination was involved, mediation offers an excellent opportunity for the manager to listen to the reasons why the employee feels that he or she has been treated unfairly, and the manager also can try to communicate why certain decisions may have been made. Through this type of exchange, the manager might be able to work out some creative solutions with the employee that will not only address the employee's concerns but boost the morale of an employee to further contribute to the mission of the agency without engaging in lengthy litigation.





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Discrimination (because of): VII, 4, p. 2-3 (relationship between disability and personnel action);

Disparate Treatment (because of): (*See: Disability: Discrimination (because of)*)

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“Fitness-for-Duty” Exams: (*See: Disability: Medical Examinations/Inquiries*)

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Individualized Assessment: *See: Disability: Direct Threat*)

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Interviews (questions about disability): VII, 2, p. 2-3

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Reason(s) articulated --

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Burden of Articulation not Met (no reason or nonspecific reason given)  
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Found not True (see Pretext Found)

Found True (see Pretext Not Found)

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## **E**

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## F

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*Discipline of Victim*)

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Food Service Workers (applying *Americans With Disabilities Act* to): VIII, 3, p. 11-15

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Forum (Choice of): (See: *Election of Remedies*)

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Frivolous (complaints): VI, 2, p. 4-5; VII, 1, p. 7-9

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## G

Gender Dysphoria: (See: (See: *Disability: Type of*; See Also: *Trans-Gender Behavior*))

Gender Stereotypes: VII, 1, p. 5-6

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Grievance Procedures: (See: *Election of Remedies*)

## H

Handicap: (See: *Disability*)

Harassment (includes sexual and non-sexual):

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Because of Trans-Gender or Trans-Sexual Behavior): (*See: Trans-Gender Behavior*)  
By Co-workers: (*See: Harassment: Liability of Employer: Harassment Committed by*)  
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    Discipline of Supervisors/Managers: III, 3, p. 11-12; III, 4, p. 20  
    Reassignment of Harasser: VIII, 4, p. 9  
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Gender: (*See: Harassment: Because of*)  
Investigation of:  
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Liability of Employer: (*See also: Harassment: Automatic Liability*)  
    Harassment Committed by:  
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            4-5, and 6-7; V, 1, p. 9-11; VI, 1, p. 2-3; VI, 4, p. 6-8; VII, 1, p. 2  
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        III, 4, p. 4-5; VI, 2, p. 8-10; VI, 3, p. 3-4; VI, 4, p. 6-8; VII, 3, p. 6-7; VII, 4, p. 6-8  
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Race: (*See: Harassment: Because of*)  
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Report (duty of victim to): (*See: Harassment: Liability: Harassment Committed by Supervisors:  
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    Harassment: Coerced Sex*)



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Trans-Gender (Trans-Sexual) Behavior: (*See: Trans-Gender Behavior*)

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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*)

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Interim Earnings (offsetting): (*See: Back Pay*)

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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*)

Licensure: I, 1, p. 2; VII, 2, p. 8-10

## M

Manipulation (of the promotion/selection/hiring process): (*See: Promotions/Selections/Hiring: Manipulation of the Process*)

Mediation: (*See: ADR*)

Medical Condition/Impairment: (*See: Disability*)

Medical Examinations/Inquiries: (*See: Disability: Medical Examinations/Inquiries*)

Medical Information: (*See: Disability: Medical Records*)

Mental Impairment: (*See: Disability: Type of*)

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Mistake of Fact: (*See: Settlement Agreements*)

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MSPB Appeals: (*See: Election of Remedies*)

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## N

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Negative Employment Actions: (*See: Disciplinary/Negative Actions*)

Negative Employment References: V, 3, p. 10-12

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Non-Sexual Harassment: (*See: Harassment*)

Numerosity: (*See: Class Action Complaints*)

Nurses:

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## O

Obesity: (See: *Disability: Type of*)  
 “Observably Superior”: (See: *“Plainly Superior”*)  
 Offensive Remarks: (See: *Comments*)  
 Official Time (to prepare for/participate in EEO process): VIII, 2, pp. 4-5 and 9-10  
 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  
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   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  
   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



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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**  
 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  
 "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*)  
 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



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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**

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

Discipline/Negative Action (against harassment victim): II, 1, p. 5-6; III, 1, p. 9-10; VII, 1, p. 7-9; VIII, 1, p. 2-3

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**

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;



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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

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

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 Sexual Harassment Victim: II, 1, p. 2; II, 3, p. 4; II, 4, p. 4; 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*)

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*)



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## 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*)