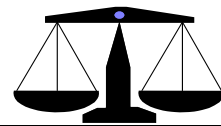


OEDCA DIGEST



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Department of Veterans Affairs
Office of Employment
Discrimination
Complaint Adjudication

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

Introduction

This issue of the OEDCA Digest features the final agency decisions or final orders finding discrimination that OEDCA issued between October 1, 2011 and March 31, 2011. Most of the cases highlighted involved either reprisal by management officials or management's failure to accommodate an employee's physical disability.

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I

Retaliation Found Where Supervisor Lowers Performance Rating

Complainant, a Food Service Worker, had a history of representing and advising other employees in EEO and grievance matters in her former capacity as a union representative. Many of the grievances raised issues of unlawful employment discrimination and, therefore, qualified as protected activity for purposes of EEO law. In 2007 and 2008, the complainant received “Fully Successful” performance ratings and as a result was not eligible for a cash award. Complainant believed that she deserved outstanding ratings and filed a complaint alleging that she received “Fully Successful” ratings in retaliation for her participation in EEO matters.

The EEO administrative judge found that complainant was retaliated against when she received “Fully Successful” ratings. The complainant’s supervisor testified that although complainant quit serving as a union representative “she still spends a lot of time talking to people, maybe advising them, giving them information or directing them.” In complainant’s performance evaluation, the supervisor expressed similar sentiments. There the supervisor stated, “She has retired as a union rep, yet still helps employees with a wide range of issues.” Complainant testified that she was assisting employees with EEO matters. The

judge, found that management retaliated against the complainant because her supervisor conceded that complainant received a fully successful rating because she offered EEO assistance to her co-workers.

This case clearly illustrates that it is improper for a supervisor to consider a complainant’s participation in prior EEO activity in making any decision involving that employee. Additionally, prior protected activity under Federal anti-discrimination employment laws can include participation in grievances, if the grievances raise issues of unlawful employment discrimination.

II

Shift Change Inconsistent with Complainant’s Medical Restriction Constitutes Reprisal and Disability Discrimination

In 2006, complainant, a former Licensed Practical Nurse, was assigned to the midnight shift. She believed the assignment was temporary and that she would return to the day shift after six months. During her assignment to the midnight shift, complainant’s migraine headaches became more frequent and were no longer controlled by medication. In late 2006, complainant advised her supervisor that she needed to return to the day shift in order to alleviate her migraines. She provided her supervisor with medical documentation that the midnight shift



triggered her migraines. Management did not grant her request for accommodation.

Because of the frequency and intensity of her migraines, complainant went on extended sick leave. While on leave, she called the VA Medical Center 94 times requesting a reasonable accommodation in the form of a non-midnight shift position. Instead, the VA Medical Center ordered the complainant to return to duty on the midnight shift. Complainant requested extended sick leave and after meeting with management officials in May 2008, they agreed to place her on the 3:30 p.m. to midnight shift. Although the shift was within her medical restrictions, complainant declined the offer.

The EEOC administrative judge concluded that management failed to engage in the interactive process and the complainant was not offered a reasonable accommodation until 2008. Additionally, the judge found that management refused to advise the complainant of the VA's formal reasonable accommodation process, even when the VA Medical Center's Human Resources department advised them to do so.

The judge also found that complainant was retaliated against because management offered her a job inconsistent with her medical restrictions and generally ignored her requests for reasonable accommodation. Complainant's prior EEO activity was her 2006 request to

be returned to the day shift as a reasonable accommodation.

This case illustrates the importance of promptly engaging in the interactive process as soon as management receives a request for reasonable accommodation. Additionally, management needs to be aware that a failure to follow agency policies or a departure from normal procedure may support a finding of discrimination.

III

Supervisor's Negative Opinion Regarding the EEO Process is Reprisal Per Se

Reprisal per se occurs when management officials make negative comments about, or take an action against, an employee who participates in the EEO process or makes negative remarks about the EEO complaint process itself. OEDCA found discrimination when complainant's supervisor made negative comments to her after she alleged that she was being discriminated against based on race. The supervisor testified that she told the complainant that she took "offense to her stating that she felt she was being discriminated against because of the fact she was white." The supervisor also testified that complainant had become "mixed up" with another employee who had an active EEOC case. At a meeting with her staff, the supervisor stated, "if you've got something going on with EEO or union, that's personal and you don't need to bring that to the



workplace.” Because such statements might dissuade a reasonable person from engaging in protected activity they violate the anti-retaliation provisions of Title VII of the Civil Rights Act.

No supervisor or manager likes when a discrimination complaint is filed against them. They may feel offended, angry, or disappointed that an employee would take such an action. However, it is never appropriate for managers and supervisors to publicly express hostility toward the EEO complaint process or the employee who filed the complaint.

IV

Training Required for Supervisors Who Made Retaliatory Remarks

Complainant testified that his coworkers informed him that his supervisors said that they had a history with the complainant and to keep an eye on him. Additionally, a new supervisor testified that he was told that the evening shift was not the best bunch of men, that he should be careful dealing with them, that management had a history with complainant, and that it was his conclusion that there was a great deal of history and “lots of old water under the bridge.” The EEOC administrative judge found that the history that they were referring to was complainant’s past EEO activity. Ultimately, the judge found that the foregoing

remarks were retaliatory in nature and ordered that the supervisors receive EEO training.

This case illustrates the importance of avoiding any actions, statements or discussions with complainant’s, witnesses, potential witnesses, representatives, or officials with EEO responsibilities that could reasonably be interpreted as an attempt to restrain or otherwise influence the processing of an EEO complaint. A complainant need not show that he was actually deterred from filing an EEO complaint. It is sufficient that the supervisor’s comments could have deterred him.

V

Pressuring Complainant to Withdraw Her EEO Complaint Deters EEO Activity

An EEOC administrative judge found that a supervisor retaliated against a complainant when she charged her with AWOL. Complainant had filed several EEO complaints including one in August 2007. In that complaint, she alleged that she was reprimed against when the Associate Director for Patient Care proposed to reassign, admonish, and detail her to another position.

In May 2008, complainant contacted an EEO Counselor regarding an 8 hour AWOL charge. Complainant alleged that the Associate Director granted her leave request, but the Associate Director testified that she



did not. Shortly after contacting the EEO Counselor, complainant alleged that the Assistant Chief Nurse asked her to withdraw her 2007 complaint at the behest of the Associate Director. According to the complainant, the EEO program manager also asked her to withdraw her 2007 complaint. The Associate Director then offered to withdraw the AWOL charge in exchange for complainant's withdrawal of the 2007 complaint and "foregoing a formal complaint related to the AWOL issue," but complainant declined the offer.

The Agency asserted that complainant was not pressured to withdraw her EEO complaint and that she was placed on AWOL when she did not report to work. The EEOC judge found, however, that the Agency's reasons for the AWOL change were pretextual because: (1) there was evidence that the Associate Director was motivated by complainant's participation in EEO activity; and (2) the Agency's reasons were unworthy of credence.

Specifically, the EEOC judge found that the Associate Director influenced two employees to pressure complainant to withdraw her pending 2007 complaint and that this action was reasonably likely to deter protected activity by complainant or other employees. Although Agency witnesses denied pressuring the complainant to drop her complaint, the EEOC judge did not find them credible. Additionally, the EEOC judge found that the Agency's

argument that complainant did not request and was not granted leave was not credible.

VI

Negative Comments about Complainant's EEO Activity Constitutes Reprisal

Complainant, a staff dentist at a VA Medical Center, filed an EEO complaint alleging hostile environment harassment based on reprisal. He had filed two prior complaints involving his non-selection to the position of Chief of Dental Services. An EEOC administrative judge found that the Medical Center's Chief of Staff and the Acting Director retaliated against the complainant when they placed him on administrative leave, launched an investigation based on allegations that he had harassed other employees, and lowered his performance evaluation.

In support of her finding, the EEOC judge noted that management's testimony was "vague, generalized and lacking in any kind of specific facts" that warranted their actions. Additionally, one management official testified that complainant's evaluation was lowered because "complainant had presented different complaints for different reasons, EEO complaints." That statement, according to the EEOC judge, constituted direct evidence of discrimination. Concerning the investigation of complainant for harassment, the EEOC judge noted that management



officials never produced the alleged document naming the complainant as a harasser and acknowledged that complainant was never named in the alleged document.

There are three lessons that management should learn from this case: (1) document your decisions and retain a copy of your documentation; (2) be able to provide clear, specific reasons for your decisions; and (3) refrain from commenting negatively about a complainant's EEO activity.

VII

Failure to Engage Complainant in the Interactive Process and to Conduct a Thorough Job Search Results in Finding of Disability Discrimination

Complainant suffered from degenerative discs in his spine and requested reassignment to another position as a reasonable accommodation. Facility officials determined that the complainant was not a qualified individual with a disability because he did not qualify for the position he held and because there were no funded vacant positions at the Agency for which he could qualify with or without a reasonable accommodation. OEDCA concluded that Agency officials did not make a good-faith effort to find a funded vacant position within the Agency for which the complainant could qualify with or without a reasonable accommodation.

The evidence of record showed that facility officials failed to engage in an interactive process with the complainant to determine what positions he might be qualified for within the facility or Agency-wide. Complainant attempted to engage facility officials in this process. There was also evidence that the complainant suggested several positions for which he believed he was qualified.

The evidence also showed that the Agency failed to conduct an appropriate search for possible positions to accommodate complainant's disability. Their search was inadequate and entailed sending out a generalized, Agency-wide e-mail inquiring whether any facility could accommodate a disabled individual with complainant's restrictions. The e-mail message did not include complainant's qualifications and insisted on a response by the end of the next business day. OEDCA concluded that had facility officials engaged the complainant in the interactive process, it is more likely than not, that an appropriate position would have been identified.

VIII

Withdrawal of Effective Reasonable Accommodation Violates Rehabilitation Act

Complainant, a Registered Nurse, was allowed to use an office to perform physical therapy for his legs and neck. When the Associate Chief Nurse asked



complainant for the key to the room, complainant provided her with documentation regarding his disability and therapy requirements and was allowed to continue using the room. Several months later, the Associate Chief Nurse asked that complainant return the key and again asked for medical documentation regarding his disability and therapy. Although complainant provided the documentation, the Associate Chief Nurse referred him to the physical therapy department for assistance with his physical therapy. Complainant was unable to avail himself of the physical therapy department's assistance because their hours conflicted with his work schedule.

An EEOC administrative judge found that the Agency withdrew a reasonable accommodation from the complainant that the Agency had previously provided, without engaging in the interactive process or identifying a suitable alternative. Although the Agency was free to choose the accommodation it would provide, that accommodation had to be effective. The referral to the physical therapy department was not effective because it did not fit complainant's work schedule. Therefore, the agency was obligated to provide another alternative.

The EEOC judge also found that a Nurse Specialist illegally accessed complainant's medical records on two occasions. The Rehabilitation Act strictly limits when a Federal agency

may obtain medical information, how the information can be used, and who can have access to it. In this case, the Nurse Specialist had no authority to access employee medical records nor did she meet any of the conditions that would allow her to do so. Therefore, the EEOC judge found that she committed a per se violation of the Rehabilitation Act when she accessed complainant's medical records.

IX

Management's Inaction Results in Failure to Accommodate Finding

Complainant had a medical condition that affected her ability to walk and control her hands and required her to be confined to a wheelchair. After a lengthy medical leave of absence, complainant met with her supervisors, the network contract manager, a representative from the ergonomics department, a physical therapist and an HR representative, to discuss ways to accommodate her return to work. This included adjustments to her workspace, access to the second floor conference room, and access to the women's restroom.

In preparation for her return to work, management made several adjustments to her work area, but did not make any improvements regarding access to her building or the second floor conference room. When complainant informed her supervisor that she was having difficulty opening the door to the women's restroom, her supervisor asked the complainant's



female coworkers to leave the bathroom door open so complainant could enter.

Despite being on notice that the complainant injured her arm attempting to enter her building, Agency officials took no steps to provide complainant with easier access. Agency officials provided no reason for their inaction on the request other than shifting responsibility to another office. The evidence also established that inadequate steps were taken to provide complainant with access to the women's restroom even after Agency officials were notified that her wheelchair was damaged when she attempted to open the bathroom door.

OEDCA also found that the Engineering Department failed to provide complainant or her supervisor with keys to enable complainant to use the elevator and open the hallway conference room. As a result, she was unable to attend staff meetings and training sessions in person. The Agency presented no evidence that these accommodations were either impossible or posed an undue hardship.

When necessary accommodations were not forthcoming, complainant contacted the EEO manager who was the appropriate person to contact under the VISN's reasonable accommodation policy. Under this policy, complainant's request was to be processed in a short time frame; however, in this case it was not.

Additionally, the EEO manager's response merely shifted the responsibility to other agency officials.

Although some efforts were made by complainant's supervisors to accommodate her, the Agency failed to show that reasonable actions were taken to provide effective accommodations for complainant. Moreover, Agency officials did not respond promptly to complainant's requests and failed to follow through in providing effective accommodations.

X

Complainant's Non-Selections Based on Age

The complainant applied and was found qualified for Housekeeping Aid and Health Aid positions. However, he was not selected for either position. Management officials testified that both selectees for the Housekeeping Aid positions were better qualified than the complainant. A review of complainant's work experience, however, revealed that he had significantly more experience than one of the selectees. The EEOC administrative judge found that the complainant's experience was so plainly superior to the selectee's that the selecting official "in the exercise of impartial judgment" could not have believed that the selectee was better qualified.

Management officials also argued that they were restricted to selecting veterans and that veterans were



considered first for the Housekeeping Aid position. They produced no evidence, however, that the selectee was a veteran. It was undisputed that the complainant was a veteran.

Management officials also testified that the four selectees for the position of Health Aid were better qualified than the complainant and that three of them were veterans. Three of the selectees were better qualified than the complainant because they had prior experience in health care and patient care. The fourth selectee's application did not show that she had any experience in patient care or that she was a veteran. Complainant's application, however, demonstrated that he had experience at other VA facilities working with patients in a health care setting. The selecting official's testimony that he based his selection decision on selectee four's application was found unworthy of belief because she had no relevant experience.

Normally, courts and administrative fact-finding bodies, such as the EEOC and OEDCA, will not disturb an employer's business judgment regarding the relative qualifications of applicants. Employers are free to exercise their own business judgment as long as that judgment is not based on discriminatory criteria. However, evidence of discriminatory motive may be established if a complainant can show that his qualifications are "plainly superior" to those of the selectee.

In this case, not only were complainant's qualifications plainly superior; there was also no documentary evidence to show that either selectee had as much experience as the complainant. Additionally, management officials were unable to produce evidence that one of the selectees was a veteran even though they testified that their selection was restricted to veterans.

XI

Management's Failure to Follow Agency Policies Results in Age Discrimination

Complainant, a Registered Nurse, alleged that she was discriminated against based on age and disability when she was not selected for the position of Living Center Nurse Manager. An EEOC administrative judge found discrimination based on age when management hired a younger applicant before interviewing the complainant, and deviated from past practice by offering the position to an applicant without a master's degree. Management officials asserted that the selectee distinguished herself from the complainant during the interview process and was, therefore, the best qualified candidate. The EEOC judge determined that management's testimony lacked credibility, finding that the complainant was interviewed after the younger applicant was selected.



XII

Management Official's Inaction When Coworkers Made Racially Derogatory Comments Results in Finding

Complainant was the most senior employee and the only employee of color in his section. An EEO administrative judge found that the complainant was discriminated against when his coworkers subjected him to unwelcome comments based on his color. The administrative judge also found that complainant's work environment was permeated with "a pattern of disregard and ridicule" as his coworkers referred to him using a nickname based on his color. Complainant's supervisor was aware of the derogatory comments and failed to take any corrective action to stop them.

XIII

The Rehabilitation Act Supersedes VAMC's Parking Policy

Complainant, a Police Dispatcher, alleged that management officials discriminated against him on the basis of disability when they denied his request for a parking space close to his office. As a result of several work related injuries, complainant was unable to walk long distances, and could not walk more than 30 yards before resting. For over two years, complainant's supervisors allowed him to park in the patients parking lot,

which was closer to his work area. This reasonable accommodation was then rescinded and complainant was directed to park in the employee parking lot. The employee parking lot was approximately 200 yards from complainant's office.

To address the complainant's inability to walk the extra distance from the employee's parking lot, the Chief of Police Services had the complainant's coworkers pick him up from the employee parking lot and drive him to his office. This was not an effective accommodation because the complainant had to rely on the availability of his coworkers to get to work. According to the complainant, it was often painful to climb into and alight from the golf carts used to transport him. Complainant also stated that his coworkers harassed him because they were required to transport him to and from his car.

When complainant filed a formal request for reasonable accommodation, the Human Resources Manager denied his request based on the facility's parking policy. OEDCA determined that the Rehabilitation Act of 1973 supersedes a medical center's parking policy if the policy, in its application, denies a qualified individual with a disability, reasonable access to the workplace. Management officials failed to present any evidence that allowing the complainant to park in the patient parking lot was an undue hardship.