



### Employee's involuntary retirement violated the Rehabilitation Act

Ms. C, a Program Support Assistant, was an employee of the VA for over 20 years. At the time of her complaint, she suffered from bone degeneration and osteoporosis and was a qualified individual with a disability. Early in January 2008, Ms. C underwent left hip replacement surgery and did not return to work until April 2008. In May 2008, she requested 10 to 12 weeks of Leave Without Pay (LWOP) to undergo and recuperate from right hip replacement surgery. Her request was denied because she had exhausted all of her accumulated leave and all benefits available to her under the Family Medical Leave Act (FMLA). Ms. C's second level supervisor, Dr. J, maintained that her right hip surgery was elective and that she had abused her leave in the past. The record established, however, that Ms. C's requests for leave had always been granted and she had never been counseled about any leave abuse issues. Ms. C's first level supervisor, Ms. W, maintained that her absence for 10 to 12 weeks would cause the VA undue hardship because Ms. C performed a critical position providing data support and it was necessary to have a full time person providing the function.

Ms. C alleged that the Friday before her scheduled surgery Dr. J gave her three options when he advised her that her request for LWOP would be denied. According to Ms. C, he told her that she could continue working and earn enough leave to take off the 10 to 12 weeks required for surgery, she could proceed with the surgery and be considered AWOL and possibly face termination, or she could retire and have the surgery. Ms. C, who suffered from constant pain, elected to retire.

The Office of Employment Discrimination Complaint Adjudication (OEDCA) found that Ms. C's request for LWOP was a request for reasonable accommodation that was denied by the VA. OEDCA further determined that the VA violated provisions of the Rehabilitation Act when it failed to engage Ms. C in an interactive process to determine her entitlement to a reasonable accommodation. As a result, the VA gave the complainant no choice but to retire. Her involuntary retirement was found to be a constructive discharge based on her disability.

**BOTTOM LINE:** A request for LWOP may be construed as a request for reasonable accommodation and cannot be summarily denied. In this case, management should have immediately engaged Ms. C in an interactive process to determine whether or not she was entitled to a reasonable accommodation and what that effective accommodation might have been. Instead, the interactive process was ignored and her request for reasonable accommodation was denied by

categorizing her surgery as “elective” without any medical document to support that categorization.