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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 decision or order 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 favoritism, sexual harassment, experience as a qualification, OWCP return-to-duty clearances vs. the duty to accommodate, and the concept of “similarly situated” in discipline cases.

Also included in this issue are two articles: the first discusses the employee’s duty to cooperate with official inquiries, and the second addresses common myths about the Federal sector EEO complaint process.

The *OEDCA Digest* is available on the World Wide Web at:
<http://www.va.gov/orm/oedca.htm>.

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I

PROOF OF "FAVORITISM" NOT NECESSARILY PROOF OF DISCRIMINATION

How many times have you heard a disappointed applicant state that a selecting official's decision in a promotion action was based on favoritism rather than qualifications? Allegations of favoritism often appear in EEO complaints and employees often point to evidence of favoritism in the belief that such evidence strengthens their case. However, as noted below, such evidence usually has quite the opposite effect.

In one recent case, an employee (hereinafter the "complainant") filed a complaint of race and gender discrimination, alleging that she was better qualified than the selectee for a Supervisory Security Specialist position. In addition, she claimed that the selectee was chosen because he was a "personal friend" of the selecting official, and that "everyone in the office knew that [the selectee] was going to get the job."

OEDCA issued a final agency decision finding no discrimination and the complainant appealed that decision to the Equal Employment Opportunity Commission. The EEOC agreed with OEDCA and upheld the finding of no discrimination. In its appellate decision, the EEOC noted that even assuming the complainant was, as she claimed, better qualified than the selectee - and there was considerable evidence in the record

to suggest that - the preponderance of the evidence indicated that the selectee's friendship with the selecting official was more likely than not the motivating factor behind the selectee being chosen. Although the selecting official's testimony concerning the relative qualifications of the candidates lacked credence, and his reason for not selecting the complainant was a pretext, the EEOC concluded that his reason was not a pretext to mask a discriminatory motive, but rather a pretext to mask a decision motivated solely by friendship.

Discrimination based on friendship, while certainly violative of merit principles, is not prohibited by civil rights laws such as Title VII, the Rehabilitation Act, and the Age Discrimination in Employment Act. To prove discrimination under such laws, one must demonstrate that race, color, religion, gender, national origin, age, disability, or retaliation for prior EEO activity was a motivating factor in the action being challenged. Indeed, by presenting numerous witnesses who testified that it was friendship that motivated the selecting official, the complainant effectively proved, albeit unwittingly, that it was not her race or gender that caused her nonselection.

The decisions by OEDCA and EEOC in this case should not in any way be construed as condoning the selecting official's action. He violated merit principles. The EEO complaint process, however, is not the proper forum to address such matters.



II

SEXUAL HARASSMENT NOT FOUND WHERE MANAGEMENT EXERCISED REASONABLE CARE AND THE COMPLAINING EMPLOYEE DID NOT

In the Spring 2003 edition of the *OEDCA Digest*, we reported on a case in which we found sexual harassment by a supervisor because the evidence demonstrated that the complainant acted reasonably in reporting the harassment to management. In the case that follows, we found against the complainant because the evidence demonstrated that management exercised reasonable care in preventing and correcting the harassment and the complainant failed to take reasonable steps to avoid harm.

The complainant, a female staff nurse, had attracted the attention of a male employee who worked as an Assistant Nurse Manager in a different unit. She described him as “charming” and “flirty.” She testified that she was flattered by the attention and returned the flirtation until April 1999 when she discovered that he was married with children.

A few months after learning that he was married, the complainant applied for a job in the unit where the male nurse worked. Upon learning of her interest in the job, he invited her to take a personal tour of his unit. Believing that he might have some influence over the selection in his unit, she accepted the

invitation and met him in an isolated area of the building. While there, he pushed her against the wall and kissed and fondled her. Although she testified that she told him to stop, she also said that she was “flattered” by this attention, that she later allowed him to accompany her to her car when they left the building, that she let him put his arm around her, and that she responded “I don’t know” when he asked her why they had not met sooner. She did not report the incident to management.

Some months later, the male nurse invited her on two different occasions to meet him in a vacant room. She agreed to do so. On the first occasion, he kissed her and she told him to stop. The second time, he kissed her again, and she again told him to stop.

A few weeks later, after the male nurse made an inappropriate comment to her in the presence of a patient, the complainant notified management of the harassing behavior. Immediately upon notification, management ordered the male nurse to stay away from the complainant. In addition, management relieved him of certain duties that would normally place him in proximity with the complainant, and further required that he be escorted by another employee if he had to enter an area where the the complainant was working. These measures were effective, as the complained-of behavior thereafter ceased.

An EEOC administrative judge found



sufficient evidence that the latter two kissing incidents occurred as alleged and were unwelcome, in that the complainant clearly communicated that fact to the harasser. The judge found that the earlier incidents were not unwelcome.

After reviewing the facts in the light most favorable to the complainant, the judge concluded that management was not liable for the conduct of the harasser. First, the judge noted that, because the harassment in this case involved an individual perceived as having some form of authority or power to influence a selection decision, and because it did not involve a tangible employment action¹, management could avoid liability if it could show that (1) it exercised reasonable care to prevent and correct promptly the harassing behavior, and (2) the complainant unreasonably failed to take advantage of any corrective or preventive opportunities provided by management, or to avoid harm otherwise.

With respect to the first prong in the above test, the judge found that the VA facility exercised reasonable care. As for preventive measures, every year it distributes written notice of its policy

¹ Although the complainant was not selected for the position in the harasser's unit, she never raised that nonselection as an issue in her complaint, and there was no evidence in the record linking that nonselection to the harassment. The nonselection occurred well before the last two kissing incidents, the only incidents the judge found to be unwelcome, and there was no indication in the record that the harasser actually influenced the selection decision.

prohibiting sexual harassment, and the policy conforms to EEOC's requirements regarding information on whom to contact if one is a victim of sexual harassment. As for corrective measures, the judge found that management took immediate, appropriate, and effective action when notified of the harassment to ensure that further incidents would not occur.

In addition, the judge found that the complainant failed to act reasonably under the circumstances, in that she waited too long to report the incidents and, particularly with respect to the last kissing incident, she unreasonably failed to avoid harm when she agreed to meet the harasser alone in a room after the earlier kissing incidents.

In this case, management was able to avoid liability by showing that the complainant acted unreasonably and that management acted reasonably under the circumstances.

III

MORE YEARS OF EXPERIENCE NOT NECESSARILY PROOF OF SUPERIOR QUALIFICATIONS

The following case illustrates a common myth, *i.e.*, that employees with more years of job-related experience are necessarily better qualified than applicants with fewer years of such experience. Sometimes, greater length of experience does equate with better



qualifications, but not always.

An employee (hereinafter referred to as “complainant”) applied, but was not selected, for a warehouse position as a Material Handler in February 2002. At the time he applied, he was a Food Service Worker in the Nutrition and Food Service. He claimed that the nonselection was in retaliation for his prior EEO complaint activity.

The selecting official denied the retaliation charge, claiming that he chose the best qualified applicant. As evidence of retaliation, the complainant argued that he was clearly the best qualified applicant, given his 14 years of experience working in warehouses between 1976 and 1990. The individual selected for the position had only two years of experience.

When questioned by the EEO investigator, the selecting official explained the rationale for her decision. She noted that the most important factors she considered were the ability of the applicant to work with vendors and get supplies into the warehouse. In addition, she needed someone with up-to-date computer skills, because receiving was now handled entirely by the “IFCAP” computer system. Finally, she wanted someone who would require little or no training. She stated that the individual she selected had been working as a Material Handler at the facility since 2000 and was familiar with the IFCAP system used in receiving. Moreover, he was already

familiar with the department, its operation, and its people.

While it is true that the complainant had many more years of warehouse experience, it was not current experience, as he had not worked in that field since 1990. Moreover, he had no experience with the IFCAP system used in receiving.

As the EEOC administrative judge noted, an employer has discretion to choose from among qualified candidates, so long as the decision is not based on an unlawful factor. Moreover, he cited several cases for the proposition that years of experience do not necessarily make an individual more qualified to meet the needs of an organization. Many jobs are such that the knowledge and skills required can be acquired in a few months or a few years. Beyond that period, more years of experience does not necessarily equate with better knowledge and skills.

In addition, the quality of an applicant’s experience is often far more important than the quantity of that experience. For example, it is not unusual for selecting officials to choose someone with fewer years of experience if the selectee’s experience is otherwise superior in terms of demonstrated ability, performance, achievements, *etc.*

Of course, recency of experience is always a critical factor in some fields, such as information technology, and in jobs that require skills in those areas.



IV

OFFICE OF WORKERS' COMPENSATION "CLEARANCE TO RETURN TO FULL DUTY" DOES NOT ELIMINATE MANAGEMENT'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATION UNDER THE REHABILITATION ACT.

This case illustrates the importance of making an independent assessment regarding an employee's request for reasonable accommodation after receiving notification from the Department of Labor, Office of Workers' Compensation Program (OWCP), that an employee is "cleared to return to full duty."

The complainant alleged that she was discriminated against based on disability when she was terminated from her temporary Licensed Practical Nurse position. The complainant suffered a work-related back injury that resulted in a permanent 15-pound lifting restriction and a four-hour workday. She received Workers' Compensation payments for a period of twelve months, after which time she was notified by the OWCP that there were no longer any residual affects of her back injury. Thus, she was "cleared to return to full duty."

Upon receipt of the OWCP clearance, the Acting Nurse Program Leader issued a memorandum to the complainant requiring her to report to full duty. The complainant informed the Acting Nurse Program Leader that despite the OWCP decision, her physician had not

released her from her physical restrictions. She maintained that she was still experiencing pain, she remained under a 15 pound lifting restriction, and she could only work a four-hour day. The complainant verbally requested reasonable accommodation from the Acting Nurse Program Leader in the form of leave without pay for four hours each day. The complainant was informed to return to full duty. The complainant did not report to work. She submitted SF-171's to request leave without pay.

The complainant submitted medical documentation to support her reasonable accommodation request and her OWCP appeal. Three physicians concluded that the complainant no longer suffered any residuals from her work-related injury. Two of the physicians, however, determined that her existing pain was associated with pre-existing degenerative disk disease, which was exacerbated by her work-related injury. The complainant's physician recommended that she remain on her lifting restriction and four-hour workday. The complainant requested a light duty position consistent with her physician's orders. She did not receive a response. She was charged absent without leave during the time-period that she did not report to work and subsequently terminated for failure to be reliable and dependable.

The Acting Nurse Program leader testified that he was aware that the physician's recommendation was at odds with the OWCP decision. He did not



recall seeing any of the complainant's SF-171 forms requesting leave without pay, and he indicated that the Office of the Business Manager was evaluating the situation. The Lead Employee Relations Specialist recalled seeing complainant's medical documentation, however, he testified that it was insufficient to support her request for reasonable accommodation and he testified that management was not obligated to inform the complainant of the need for further documentation.

After reviewing the evidence of record, OEDCA concluded that the complainant was an individual with a disability due to her pre-existing back condition despite OWCP's decision clearing the complainant for a return to full duty. OEDCA also concluded that management failed to provide reasonable accommodation of her disability. OEDCA noted that an OWCP decision clearing an employee for a return to duty associated with a work-related injury does not eliminate management's obligation to provide reasonable accommodation of a disability under the *Rehabilitation Act*. Whether an employee is considered "disabled" under the *Rehabilitation Act* should be determined separate and apart from an OWCP decision to return an employee to full duty.

This case illustrates that an OWCP clearance to return to full duty does not necessarily affect the complainant's status as an individual with a disability under the *Rehabilitation Act*. Consequently, management officials should

not rely solely on OWCP decisions when making reasonable accommodation determinations under the *Rehabilitation Act*.

OEDCA also responded to management's testimony that it did not have an obligation to inform the complainant that her medical documentation was insufficient. The *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, p. 8 (revised 10/17/02) provides that if an employee presents insufficient medical documentation, the employer should explain why the documentation is insufficient and allow an opportunity to provide the missing information in a timely manner. Management officials failed to do so in this case.

As we have noted in previous issues of the OEDCA digest, disability law is the most complex and misunderstood area of civil rights law. Managers and supervisors should always consult with the Office of Regional Counsel before taking any action, or refusing to take action, in connection with any matter relating to an employee's disability or alleged disability.

V

COMPARISONS WITH OTHER EMPLOYEES NOT VALID IF SITUATIONS ARE NOT COMPARABLE

This case illustrates why so many EEO



complaints involving discipline fail. A supervisor assigned the complainant, a Respiratory Therapist, to work in the Respiratory Intensive Care Unit (RICU) and to provide care for two broncodilator patients in that unit. The complainant objected to the assignment, stating that he felt “uncomfortable” working around one of the other patients in that unit. The supervisor assured him that he [the supervisor] would manage the other patient. The complainant nevertheless refused to carry out the assignment. As a result, the two patients did not receive necessary therapy until much later in the day.

The complainant subsequently received a 14-day suspension for failing to carry out his assignment in the RICU. He filed a complaint alleging, among other things, that the suspension was due to discrimination on account of his race.

After reviewing the Department’s investigative file, an EEOC administrative judge issued a decision without a hearing in the Department’s favor. The judge noted that the burden of proof in a discrimination claim rests with the complainant, and that the first step in meeting that burden is to establish a *prima facie* case of race discrimination. In complaints such as this involving discipline, establishing a *prima facie* case generally requires evidence that another employee of a different race was treated less harshly under similar circumstances. In other words, absent other evidence that might give rise to an inference of discrimination, the complain-

ant must show that another employee accused of the same or similar misconduct received no discipline at all – or less severe discipline.

Although the complainant pointed to two other employees who he contended were treated more favorably, the EEOC judge correctly determined that those two employees were not *similarly situated*. In other words, the circumstances in those cases differed significantly from the complainant’s situation. In one case, a therapist who failed to answer a page was not disciplined. This failure, however, is not the same as a refusal to carry out an order to accept a specified duty assignment involving the welfare and treatment of patients. A reasonable supervisor would not handle these two situations in the same manner.

The complainant’s other example involved a therapist who was not disciplined when she balked at accepting an assignment because it involved too much work. The evidence, however, showed that the employee, despite her initial objection, did the work assigned to her within the required time frame. Again, a reasonable supervisor would not have considered this event comparable to the complainant’s refusal to obey a direct order.

To be *similarly situated* for comparison purposes, the events in question must generally involve the same supervisor. For example, two employees who



engage in the exact same misconduct, but who work for different supervisors, might receive different punishment. This is not unusual. No two supervisors handle misconduct cases in the same manner. Some are more reluctant to impose discipline than others; and some tend to discipline more harshly than others.

In addition to considering the type of misconduct involved, supervisors must also consider an employee's work record and history of prior discipline when determining an appropriate punishment. A first time offender often receives lighter punishment for an infraction than an employee charged with a second or third offense; and greater length of service is often a legitimate factor used to justify less severe punishment.

As can be seen from the above discussion and examples, proving that another employee is *similarly situated* in a case involving discipline is not easy, as there are many factors that must be considered.

VI

COOPERATING WITH OFFICIAL INQUIRIES - THE EMPLOYEE'S DUTY TO "GET INVOLVED"

(The following article is 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.)

Several times during the last few months, federal managers (more than one) have told me that it is sometimes difficult to do anything about problem employees because other employees, who are witnesses, refuse to provide statements, saying that they do not want to get involved or take sides in a dispute. I am always surprised when I hear this because of the very clear and very strong message in decisions from the Merit Systems Protection Board and the Federal Circuit Court of Appeals upholding removals for employees who refuse to cooperate with official inquiries. As a general rule, unless the employee is exercising a Fifth Amendment right against self-incrimination in a criminal matter, or something that could become a criminal matter, the employee must answer official questions in an investigation. This applies whether the employee is a target of the investigation or just a witness. Employees who witness workplace misconduct have an obligation to answer questions about it and cannot refuse to "get involved." Managers have an obligation to enforce this workplace principle and should not let employees with relevant information simply decline to provide it. These principles especially apply to allegations of sexual harassment, where the law provides that failure to fully investigate could be the reason why your agency may have to pay a large judgment if an EEO complainant successfully prosecutes a charge of sex-based workplace



harassment.

VII

EEO MYTHS AND REALITIES

(The following appeared as the first chapter in the "2003 Federal EEO Handbook" and is reproduced here with permission of FederalHandbooks.com. All rights reserved.)

There are many myths surrounding the federal EEO process. This article covers the most common ones, along with the "realities" about the process.

Myth #1. You can file an EEO complaint about anything, even if it does not involve discrimination.

Reality. Many federal employees and their representatives mistakenly believe that they can file an EEO complaint over any workplace disagreement, regardless of whether the cause for the disagreement is unlawful employment discrimination. The reality is that EEO complaints can only be filed over workplace disagreements with agency management that relate to a term or condition of employment where the disagreement is caused by management's intentional discrimination against the employee because of his or her race, color, sex, religion, national origin, age, disability, and/or prior EEO activity (otherwise known as reprisal or retaliation).

An employee can also complain that an otherwise neutral agency policy has a

disparate impact on him or her because of race, sex, national origin, or religion. To date, the federal courts, which, along with the U.S. Equal Employment Opportunity Commission (EEOC), have jurisdiction to adjudicate employment discrimination complaints against federal agencies, have not definitively decided whether those so called "disparate impact" cases can be successful when the basis for the complaint is age or disability discrimination. In addition to requiring proof that the employer's actions against the employee were motivated by discrimination or reprisal, or otherwise had a disparate impact on the employee because of his or her membership in a protected group, employees must also show that the allegedly discriminatory practice by management was an actionable tangible adverse employment decision that affects a term or condition of employment.

For example, hiring, termination, and promotions (or other decisions impacting pay) are generally thought to be ultimate or tangible employment actions that affect terms or conditions of employment. On the other hand, performance appraisals and reassignments that do not affect pay may not constitute actionable employment decisions over which an employee can file a successful EEO complaint. Generally, the EEOC, which is the executive branch administrative agency charged with deciding administrative EEO complaints in the federal government, takes a more expansive view of what constitutes an actionable employment decision than do



many of the federal courts in which EEO complaints by federal employees may alternatively be filed. Therefore, depending on the circumstances of a given complaint, the forum in which an employee chooses to litigate his or her EEO complaint, *i.e.*, a federal court or the EEOC, may currently result in a different outcome, depending on the type of employment decision over which the complaint is filed. Regardless of the nature of the employment decision over which an EEO complaint can be filed, in order to be successful, the complaint must allege that the employment action at issue was motivated by discrimination against the complaining party based upon their race, color, sex, national origin, religion, age, disability, and/or prior EEO activity. Therefore, the myth that an employee can prevail on an EEO complaint over any negative personnel action that impacts them is not true. Moreover, if an employee files an EEO complaint about some management action that is not motivated by discrimination, that complaint may foreclose them from filing a complaint over the same personnel action under another complaint processing mechanism, such as a grievance. Thus, understanding the reality that EEO complaints can only successfully be filed over claims of unlawful employment discrimination regarding tangible employment actions is crucial to successfully processing and resolving such a complaint.

Myth #2. Only minorities, women, and lower-level employees can file EEO complaints.

Reality. Contrary to this myth among some white males and higher-graded employees, the EEO laws are there to protect against unlawful employment discrimination on any legally recognized basis. Therefore, non-minorities may have a cause of action in certain circumstances to the same extent as their female and minority colleagues. Also, the EEO complaint process is available for any employee who feels discriminated against, regardless of grade level, although it is true that the stakes may be higher as an individual's grade level goes up.

As previously stated, the various EEO laws protect against unlawful employment discrimination because of a person's race, color, sex, national origin, religion, age, disability, and/or prior EEO activity. Thus, for example, a white male, born in the United States, and of any religion, may have a valid EEO complaint if he feels that he has been treated less favorably by his employer than similarly situated non-whites, females, or those of a different national origin or religion because of his membership in one or more of those recognized EEO classifications. It should be noted, however, that the protection of the *Age Discrimination in Employment Act*, which prohibits unlawful age discrimination, does not begin until a person has reached the age of 40. Likewise, to gain protection under the *Rehabilita*



tion Act and the *Americans with Disabilities Act*, one must either be disabled or perceived to be disabled by one's employer and must be the victim of an adverse personnel action because of a disabled status in order to have a claim, other than one seeking reasonable accommodation for a disability. Under those theories, nonminorities have successfully pursued EEO complaints over the years.

As for higher-graded employees, as explained above, they too have the same EEO rights and protections as all other federal employees. However, allegations of discrimination may more easily lead to retaliation against such a complainant by agency management. This retaliation can be especially damaging to the career potential of higher-graded employees, particularly when their underlying claims of discrimination are not well supported by facts. Also, retaliation against higher-graded employees may be subtle and difficult to prove even though it is certainly illegal. Therefore, the decision to file an EEO complaint should be arrived at only after a reasonable investigation of the facts and a realistic assessment of how such a complaint could impact an employee's career potential within their employing agency. Consultation with a qualified attorney may be a smart decision before one initiates any EEO complaint.

Myth #3. Once an employee files an EEO complaint, he or she can do anything and management will not be able

to take any action, even if the employee has conduct or performance problems.

Reality. Unfortunately, some employees believe the myth that filing an EEO complaint will insulate them from future adverse employment actions by their employer because management may fear that such future actions could be viewed as retaliation against the employee due to his or her prior EEO activity. Although that strategy may work in some agencies or with particular supervisors, the reality is that an agency may still properly discipline an employee for proven misconduct or performance problems, regardless of whether that employee has previously filed EEO complaints, as long as the discipline was not taken because of that prior EEO activity or caused by discriminatory intent on management's part. In fact, even if a complaining employee can prove that discrimination or EEO reprisal partially motivated a given adverse employment action taken against him or her, if the Agency can still prove that it would have taken the same discipline against the employee due to his or her actual misconduct in the absence of discrimination or reprisal, that discipline will be upheld even though it was partially motivated by discrimination or reprisal.

The reality is that, even after they file EEO complaints, complaining employees still have the same performance and conduct obligations to their agency defendant as any other employee of the agency. For example, a complainant



cannot expect to become a professional complaint filer, not do any work, and expect not to be legitimately disciplined. Likewise, an EEO complaint does not exempt a complainant from employer work conduct rules. A problem employee can still be appropriately dealt with and a manager should not be afraid to do that, so long as the proper safeguards are in place. For example, a manager faced with a problem employee who has filed an EEO complaint against him or her should ensure that any future disciplinary or other adverse employment action taken against that complainant is based upon adequate documentation. Likewise, the manager should obtain advice from Employee Relations and the agency's General Counsel before taking actions adverse to a complaining employee.

Notwithstanding, a manager should not intentionally treat a complaining employee worse or differently than other employees who have not filed an EEO complaint. Although that concept may be difficult for a manager to deal with emotionally, especially when faced with a "frequent filer," it is the law. Managers who unlawfully discriminate or retaliate against their employees may themselves face discipline from their employer. Moreover, unlawful discrimination and reprisal is bad management because, not only is it unlawful, it erodes the confidence that subordinates place in their managers, destroys the workplace environment, and harms the successful accomplishment of the agency's mission.

Myth # 4. Management acts in concert to discriminate against employees and will protect a manager against whom a complaint is filed.

Reality. Although employees may believe that their agency's managers act in concert to discriminate against employees and will protect a fellow manager against whom an EEO complaint is filed, the reality is that such "conspiracies" are very hard to prove and may not be as likely to occur as some employees think. As stated above, managers may be subject to discipline up to and including termination for violating EEO laws. Also, although it may not be public knowledge to employees, agencies do discipline managers found to have engaged in, or conspired to protect other managers who have engaged in, discrimination or unlawful reprisal. If you think your agency will not impartially consider whether a manager should be disciplined for unlawful discrimination, you should consider contacting the Office of Special Counsel, an independent federal agency that has the authority to seek to have agency managers disciplined for violations of the merit system principles, including those principles against prohibited personnel practices like unlawful discrimination.

Also, in certain circumstances, federal agencies can be held responsible for their managers' discriminatory harassment of employees if the agency fails to adequately prevent or promptly stop such harassment. Hence, in those cir



cumstances, managers actually have an incentive not to act in concert to discriminate or otherwise to protect a fellow manager against whom a complaint is filed.

Notwithstanding, as discussed above and in more detail below, retaliation against employees who file EEO complaints is not uncommon in the federal government. A large number of the complaints received each year by the EEOC allege retaliation as the basis for the complaint. EEO retaliation can be devastating to an employee and his or her organization. Given that, one should always factor possible reprisal into the equation when considering whether to file an EEO complaint. With that said, EEO reprisal may be easier to prove and result in a larger award of monetary damages for pain and suffering than the underlying discrimination that led to the first complaint by an employee that caused the reprisal.

Myth # 5. Every complainant who files an EEO complaint gets \$300,000 in damages.

Reality. Under the Civil Rights Act (CRA) of 1991, federal employees who file successful EEO complaints are entitled to an award of compensatory damages in a proven amount not to exceed \$300,000. Since the passage of the 1991 CRA, some employees have succumbed to the myth that every complainant who files an EEO complaint gets \$300,000 in damages. The reality, however, could not be more opposite than that myth. In

fact, most filed EEO complaints are unsuccessful or fail to result in significant damages awards. It is true that the amounts awarded by the EEOC have risen over time. Discrimination cases involving allegations with clear merit and severe damages to the complainant often settle for confidential amounts of money. It is rare that a federal agency would agree to pay an individual complainant \$300,000 to settle a claim because that is the worst case scenario for an agency assuming the complainant successfully litigates the case all the way to a final EEOC or appellate court decision, which could be years away and is unlikely to occur.

The reality is that damages have to be proven in a successful discrimination case and it is hard to get a six-figure award. If you do not prove the underlying discrimination or reprisal, you do not receive any compensatory damages. It should also be remembered that the dollar value of a compensatory damages award is supposed to reflect payment in an amount equal to the amount of pain and suffering and other harm actually proven by the employee to have been caused by the government's discrimination. Punitive damages (monetary awards aimed at punishing a defendant found to have engaged in unlawful discrimination) are not awardable against the federal government. Thus, the "win the lottery" mentality applicable to a certain extent in the private sector does not apply to EEO complaints against the federal government.



Finally, although it is true to some extent that juries in court discrimination cases tend to award higher damages amounts to successful plaintiffs than does the EEOC, it is also true that most discrimination cases filed in federal court never get to the jury because they are dismissed or summarily decided by the judge in favor of the employer before the case is submitted to the jury. In addition, successful jury verdicts can be reduced by the judge and are subject to reversal by an appellate court. Hence, the vast majority of EEO complaints do not result in the complainant being awarded \$300,000 in damages.

Myth #6. It is weak to make a settlement offer or participate in mediation.

Reality. Another myth to which some EEO complainants and their representatives subscribe is that it is weak to make a settlement offer or participate in an alternative dispute resolution (ADR) process, such as mediation. The reality is that EEO complaints can take upwards of five to six years to fully litigate to completion and can cost complainants large amounts in attorneys' fees to prosecute. Meanwhile, the complainant is either still working for the agency in the same difficult environment that caused the complaint to be filed in the first place or may be unemployed altogether, depending on the nature of the case.

Furthermore, it is always the complainant's burden to prove the alleged discrimination in any case, which is not an easy thing to do, especially given the fact that few EEO cases involve direct or "smoking gun" evidence of discrimination and it is likely that the alleged discriminating official will not admit that he or she acted with an intent to discriminate against the complainant. Most EEO complaints must be proven through circumstantial evidence and all that is required of the agency is that it articulates one or more legitimate non-discriminatory reasons for its actions toward the complainant. Coupled with the sheer volume of EEO complaints in the EEOC and court systems and the perceived hostility toward such claims by certain federal judges, it makes perfect sense for an employee to engage in settlement negotiations and ADR early and throughout the case. When considering whether to engage in settlement negotiations or ADR, one should keep in mind that it is best for all parties if a case can resolve itself early. Also, when engaging in settlement negotiations or ADR, a complainant can always reject a settlement position taken by the agency and there is no requirement to actually reach a settlement in any case. Also, ADR is built into the administrative EEO process and is sometimes required in federal court.

Hence, there is no stigma in asking for ADR or participating in it. Given the inherent risks of any EEO complaint for the complainant, a settlement wherein he or she gets some of the relief sought



in the complaint is often better than risking everything on the outcome of a trial or EEOC proceeding. Also, settlement often helps the parties repair their employment relationship, which may have become damaged. The bottom line is that settlement negotiations and ADR are well worth the time and effort that should be devoted to them if you are an employee who has filed an EEO complaint.

Myth # 7. Agencies always settle EEO complaints.

Reality. Many a complainant has asserted that their agency always settles EEO complaints, so it will settle their complaint if it is filed. The reality is that, although some agencies have the reputation for always settling EEO cases, that reputation is not necessarily deserved or true. Complainants should never count on a case settling and should go into a complaint expecting to have to litigate it all the way and win to obtain the relief they seek. If a complainant is not prepared to litigate it all the way or cannot see how he or she will be able to prove discrimination, they should generally not file the complaint in the first place. As previously stated, complainants should usually attempt to settle their cases during the process, but they should be prepared to litigate should the agency not settle on terms acceptable to them. Remember too that the risks of an EEO complaint, including the length of time it takes to litigate the complaint (it can be a long haul) and the burden of proving discrimination, al-

ways fall disproportionately on the side of the complainant. Agencies realize that and may be less likely to settle an EEO complaint because of that reality than they would to settle a case where the burden of proof rests with the agency.

Myth # 8. It is emotionally easy to make the decision to file and pursue an EEO complaint.

Reality. Nothing is easy about the EEO process, emotionally or otherwise. One of the hardest things a person can decide to do is file an EEO complaint against his/her employer. This is especially true if the complainant is a manager. As citizens of the United States, we all want to believe that our government officials would not engage in unlawful employment discrimination. Also, federal employees are schooled in the notion that employment decisions in the federal government are supposed to be based upon merit principles and not, for example, on the color of a person's skin or his or her gender. Knowing also, however unfortunately, that reprisal often results from alleging discrimination, federal employees as a whole are understandably reluctant to file EEO complaints. Thus, agencies should not be so quick to allege that an employee's choice to file an EEO complaint was an easy one. In most cases, it was not.

Myth # 9. Managers do not care if an EEO complaint is filed against them by a subordinate.



Reality. It is generally a myth to say that federal managers do not care if an EEO complaint is filed against them by a subordinate. Some federal managers care a great deal about such complaints. Just as it is difficult for an employee to decide to file an EEO complaint, it is disconcerting on a personal level to most managers against whom an EEO complaint is filed to think that the complainant believes the manager discriminated against the complainant. Most federal managers are conscientious and are federal managers because they want to be in public service and ensure that federal laws are enforced not broken. Most managers also believe that they manage their subordinates fairly, based on merit principles. To face an allegation that one has violated federal law by discriminating against someone based upon, for example, their race, gender, or disability can be a sobering and emotionally difficult experience for any manager.

Notwithstanding a manager's personal reaction to an allegation that they have engaged in unlawful discrimination, the various EEO laws and 5 U.S.C. § 2302(b) make retaliating against the subordinate who complained equally unlawful. The effect of an EEO complaint and the application of the anti-retaliation provisions of the law create a very awkward situation for the accused manager. They have an obligation to manage the complainant unemotionally, as if no complaint had been filed, all the while knowing full well that a complaint has

been filed. Hence, the inherent difficulty of being a manager.

Myth # 10. There is no such thing as reprisal for filing an EEO complaint.

Reality. Unfortunately, as described above, the notion that there is no such thing as reprisal for filing an EEO complaint is also a myth. Reprisal is as true a reality in the federal government as it is in many other employer environments. As discussed above, it is difficult for a manager alleged to have engaged in discrimination not to have an emotional reaction to such an allegation, regardless of its merit. Despite the prohibitions in the law against reprisal, some managers just cannot resist the emotional reaction to use their inherent power to harm subordinates who complain about them. (Remember, such a complaint can do significant harm to a manager's career). Nevertheless, it should be clearly understood that any such reprisal is equally unlawful and potentially career ending for the manager involved.

To avoid the appearance of reprisal, federal managers and supervisors should make sure that they handle personnel matters related to the complaining subordinate in the same way they handle such matters with similarly situated employees who have not filed complaints. Accused managers should not unreasonably increase, decrease, or otherwise change the terms, conditions, or duties of the complaining employee's job. Finally, accused managers should



consult with human relations and their own supervisors as to how to properly manage the complaining employee.

