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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 dismissals of complaints for failure to cooperate, religious discrimination claims involving holiday season displays, complaints by alleged harassers about sexual harassment investigations, harassment of supervisors by subordinate employees, retaliation because of a sexual harassment complaint, the "direct threat" theory of disability discrimination, and other matters that frequently arise in Federal sector EEO complaints.

Also included in this issue is the first in a series of articles concerning frequently asked questions and answers pertaining to the rights and responsibilities of employees and employers with regard to disability accommodation.

The *OEDCA Digest* is available on the internet at: www.va.gov/orm.

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I

REHABILITATION ACT VIOLATED WHEN NURSE WAS NOT ALLOWED TO RESUME HER STAFF NURSE DUTIES FOLLOWING A BACK INJURY

The complainant was a registered nurse in the intensive care unit (ICU) when she injured her back helping a patient move from a bed to a chair. She was out of work for six weeks. When she returned, she was placed on a permanent 50 pound lifting restriction, with bending and lifting limited to 2 hours per day, and squatting limited to 4 hours per day. To accommodate these restrictions, management used her as a “float” nurse in various positions.

A few months later, the complainant re-injured her back while assigned to the ambulatory care unit. A VA physician examined her, determined that she was temporarily disabled, and ordered light duty for 7 days. Although the physician did not specifically state that the complainant would be able to safely resume her regular staff nurse duties in the ICU after the 7-day light duty period had elapsed, that is presumably what he intended.

In any event, if there was any doubt regarding that point, there was never any attempt by management to seek clarification or further medical advice. Instead, a few weeks after the light-duty period had ended, her supervisor assigned her to duties as a telephone care advice nurse. The complainant alleges that she was not disabled, that she could have resumed her regular duties as a staff nurse after the expiration of her light duty period, and that her per-

manent reassignment to telephone nurse duties violated the *Rehabilitation Act*.

After carefully reviewing the record, OEDCA agreed with the complainant, finding that management’s action was unsupported by any medical evidence. In its final agency decision, OEDCA found that the medical evidence in the record was insufficient to establish that the complainant actually had a disability within the meaning of the *Rehabilitation Act* and EEOC’s regulations implementing the Act. A 50-pound lifting restriction, as well as the time limitations on bending, lifting and squatting, did not substantially limit the complainant’s major life activities. However, even if she did not have an actual disability, it is clear that management perceived her as disabled -- *i.e.*, perceived her as having a condition that substantially limited her ability to work as a staff nurse performing patient care duties. Accordingly, OEDCA found that she was an “individual with a disability” within the meaning of the *Rehabilitation Act*.

Management argued that the complainant was not a “qualified individual with a disability” because she could not safely perform patient care duties as a staff nurse, as evidenced by her two back injuries and the previously-imposed restrictions on lifting, bending, and squatting. In other words, management was alleging, in essence, that the complainant’s back condition constituted a “direct threat” to her health or safety and the health or safety of patients.

OEDCA, however, disagreed, finding that management failed to satisfy its burden of proof as to the “direct threat”



defense. To assert such a defense successfully, management must demonstrate that it conducted an individualized assessment of the complainant's work and medical history that took into account such factors as the nature and duration of the risk, its severity, and the probability that harm would occur. It must further demonstrate that such assessment revealed a high probability of substantial harm. Fears based merely on conjecture and speculation, rather than sound medical evidence, will not suffice.

The supervisor's decision to reassign the complainant to permanent telephone care duties was not based on any medical advice, but rather, on her own opinion as to what would be best for the complainant. EEO case law requires management to conduct an individualized assessment of the complainant's work and medical history, an assessment that must take into account factors such as the nature, duration, severity, and probability of the risk. There was no attempt in this case to conduct such an assessment. The supervisor did not seek further medical advice from the VA examining physician, who had previously prescribed nothing more than 7 days of light duty. Hence, there was no medical evidence that complainant's continued performance of patient care duties would have created a high probability of substantial harm to herself or others.

Since the complainant was a "qualified individual with a disability," management had an obligation to attempt to accommodate her in her regularly assigned position. Only if such an accommodation would have created an undue hard-

ship on nursing operations could management then consider reassignment to other positions. Management officials admitted that they did not consider accommodating the complainant in her assigned position based on the belief that she was no longer qualified for it. They failed to offer any evidence that accommodating the lifting restriction, as suggested by the complainant, would have created an undue hardship for the nursing service.

OEDCA concluded, therefore, that reassignment of the complainant to telephone care duties violated the *Rehabilitation Act* and ordered that she be returned to her former staff nurse duties in the ICU and that she receive other appropriate relief.

The case highlights the necessity for management officials to seek advice from the VA's Office of Regional Counsel before taking action against an employee because of the employee's disability or perceived disability.

II

EEOC ADMINISTRATIVE JUDGES DISMISSING COMPLAINTS AT THE HEARING STAGE WHEN COMPLAINANTS FAIL TO COOPERATE

In several recent decisions, EEOC administrative judges have dismissed complaints on procedural grounds because the complainant failed to comply with the judge's order. Such dismissals are authorized under EEOC's regulations at 29 C.F.R. Sections 1614.107 and .109, and EEOC judges are showing no reluctance to exercise that



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authority when complainants fail to cooperate after having requested a hearing.

In one case, the administrative judge ordered the complainant and the agency to submit pre-hearing reports. The agency complied with the order, but the complainant did not. The judge's order warned both parties that "failure to comply with orders could result in sanctions, up to and including dismissal of the complaint." A similar warning had also been included in the judge's previously issued "acknowledgment order."

Because of the complainant's failure to submit the required report, the judge directed the complainant to "show cause" in writing why his complaint should not be dismissed. The judge sent the notice to the complainant at his last known address and to his attorney of record. Neither party responded. The Postal Service returned the complainant's copy with the label "moved, left no address." The attorney's copy was not returned. The judge, therefore, dismissed the complaint for failure to prosecute after determining that there was insufficient information in the administrative record to adjudicate the complaint.

In another case, the judge issued an order to the complainant and the agency regarding discovery and summary judgment. As in the above case, the judge's order warned both parties that failure to comply with the order could result in sanctions, including dismissal of the complaint. The agency complied with the order, but the complainant did not. Unlike the case described above, the judge in this case did not send out a subsequent "show cause" order. In-

stead, she simply dismissed the complaint because of the complainant's failure to prosecute it.

In what may be a first, at least as far as the VA is concerned, a judge in another case issued a "Default Judgment" in favor of the VA. On the day of his scheduled hearing, after having received an order from the judge to appear, the complainant failed, without explanation, to show up. The complainant had also previously failed, without explanation, to participate in a pre-hearing teleconference ordered by the judge. The VA representative, on the other hand, complied with the judge's orders and was present on both occasions. In light of the complainant's conduct, the judge issued a "Show Cause Order" directing the complainant to submit a written explanation for his failure to comply with the judge's earlier orders to participate in the teleconference and to appear at the hearing.

In this case, rather than procedurally dismissing the complaint for failure to prosecute, the judge instead availed himself of the authority in EEOC's regulations at 29 C.F.R. Section 1614.109(f)(3)(iv) to issue a default judgment in favor of the VA. In other words, without holding a hearing or even considering the evidence in the investigative file, the judge found that the VA did not discriminate against the complainant as alleged.

The lesson to be learned from these cases is clear. Complainants who request a hearing before an EEOC administrative judge must be prepared to cooperate when prosecuting their complaints. Otherwise, they risk procedural



dismissal or a default judgment in the VA's favor, if they fail to comply fully and in a timely manner with the notices and orders issued by EEOC administrative judges. Complainants should consider these possibilities carefully when deciding whether to request a hearing and decision by an EEOC judge, rather than a decision without a hearing from OEDCA.

III

EEOC ADMINISTRATIVE JUDGE DISMISSES CHAPLAIN'S RELIGIOUS DISCRIMINATION CLAIM WHERE MEDICAL CENTER DISPLAYED A CHRISTMAS TREE AND A MENORAH, BUT NOT A CRÈCHE

The complainant, a VA chaplain, filed a complaint alleging discrimination because of his religion, which he identified as "Presbyterian or Protestant", with regard to a medical center's failure to display a crèche – a nativity scene -- while allowing the display of a Christmas tree and a menorah in the hospital's lobby. More specifically, the complainant alleged that, because the hospital had displayed the Jewish menorah, his understanding and interpretation of constitutional law indicated to him that the hospital was also required to display a crèche.

An EEOC administrative judge disagreed and dismissed the Chaplain's complaint on procedural grounds for failure to state a claim. The judge correctly noted that, in order to state a claim of employment discrimination under EEO laws and regulations, a complainant must present some evidence

that he or she has been "aggrieved" by the matter(s) in dispute. The U.S. Supreme Court has interpreted the term "aggrieved" to mean a personal harm or loss with respect to a term, condition, or privilege of employment. Absent such personal harm or loss, a complainant, notwithstanding his or her allegation of discrimination, is not "aggrieved" and, hence, fails to state a claim of employment discrimination.

In this case, while the chaplain was clearly dismayed by the absence of a crèche in the seasonal display, he presented no evidence that he suffered a personal harm or loss with respect to a term, condition, or privilege of his employment. Absent such evidence, he failed to state a claim of religious discrimination. OEDCA, therefore, accepted and implemented the EEOC Judge's decision dismissing the chaplain's claim.

IV

OEDCA DISAGREES WITH EEOC JUDGE WHO FOUND NO DISCRIMINATION IN A DISABILITY CASE

In one of the first VA cases decided under EEOC's new regulations that give EEOC administrative judges "decision" authority, OEDCA disagreed with and rejected a judge's decision that favored the agency. Strangely enough, although OEDCA took final action favoring the complainant, the new regulations nevertheless required the VA to "appeal" the judge's decision to the Commission.

The case involved a disability discrimination claim in which the complainant



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alleged that management had failed to accommodate her disability. The complainant was diagnosed with dyspnea, often referred to as chronic respiratory disease. Her symptoms included shortness of breath and difficulty breathing. The administrative judge found, albeit incorrectly, that the complainant was not discriminated against when the agency denied her request for a handicapped parking space. The judge based this finding on two erroneous conclusions. First, he found that the complainant was not an “individual with a disability,” as that term is defined in EEOC’s implementing regulations. Second, he found that management had demonstrated that the accommodation requested – a handicapped parking space -- would have created an undue hardship on its operations.

OEDCA disagreed with the judge on both points. First, OEDCA concluded that the complainant was, indeed, disabled. Under EEOC’s regulations, the term “disability” means, with respect to an individual, (a) a physical or mental impairment that substantially limits one or more of the individual’s major life activities; or (b) a record of such an impairment; or (c) being regarded as having such an impairment. “Major life activities” means, but is not limited to, functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The EEOC judge mistakenly focused solely on the last function – working – to reach his conclusion that, because the complainant was able to do her job, she was therefore not disabled. However, EEOC’s regulations make it clear that,

even if an impairment does not prevent an individual from doing his or her job, it is nevertheless a disability if it substantially limits any other major life activity. In fact, if an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, a blind person (*i.e.*, a person substantially limited in the major life activity of seeing) is disabled, even if the disability does not prevent that person from doing his or her job.

In this case, there was sufficient evidence in the record to show that the complainant’s medical condition substantially limited her ability to breathe and walk, and that it was this condition that prompted her request for a parking space closer to her work area. Hence, the EEOC judge’s conclusion that she was not disabled was incorrect as a matter of law.

Because the complainant was disabled, she was entitled to an accommodation, provided the accommodation did not impose an undue hardship. The EEOC judge concluded, again incorrectly, that the requested accommodation – a handicapped parking space – would have created an undue hardship on the agency. The judge cited two reasons for this conclusion. First, he accepted management’s contention that granting the space might have generated grievances from other employees who were also denied such spaces. However, fears concerning possible grievances or a possible negative impact on the morale of other employees do not constitute a valid reason for refusing to accommodate a disabled employee.



The second reason cited by the judge concerned management's claim that providing the space would have required termination of a building expansion project. However, there was no evidence in the record to support this claim. The construction project resulted in the creation of 12 handicapped parking spaces and only eight of those spaces were filled at the time. There was no evidence that assigning one of those vacant spaces to the complainant would have required termination of the expansion project.

This case highlights a significant flaw in EEOC's new regulation – namely – that an agency is not allowed to issue its own separate decision in cases where a judge has issued an erroneous decision against a complainant. Instead, the agency must “appeal” the judge's decision -- a lengthy and clearly unnecessary exercise that is inconsistent with the EEOC's desire to make the Federal sector EEO complaint process fair and efficient.

This case also demonstrates the fact that OEDCA does not simply “rubber-stamp” decisions from EEOC administrative judges when such decisions favor the VA. The decision and record in each such case are carefully reviewed to ensure that the judge's decision is factually and legally correct.

V

SUSPENSION OF CANTEEN SERVICE EMPLOYEE CHARGED WITH THEFT OF GOVERNMENT PROPERTY NOT DUE TO EMPLOYEE'S RACE OR COLOR

The complainant was employed as an operations clerk at a Veterans Canteen Service (VCS) facility located within a VA medical center. Following an investigation into the theft of VCS property, the VA Police and Security Service issued a citation to the complainant and referred her case to the United States Attorney for prosecution. It also reported the matter to her VCS manager, who, in turn, proposed that the complainant be suspended indefinitely. A few days later, a regional VCS official placed the complainant on indefinite suspension. A week later, the complainant requested and was allowed to take an early retirement. She subsequently filed an EEO complaint wherein she alleged that her retirement was involuntary and that her suspension and forced retirement were the result of discrimination because of her race and color.

After carefully reviewing the evidence, OEDCA concluded that the complainant was not discriminated against, as alleged. The complainant was unable to point to any similarly situated employee of a different race or color who was treated more favorably under similar circumstances. In addition, the record indicated that an employee who was of a different race and color was treated in exactly the same manner under similar circumstances – *i.e.*, allowed to resign in lieu of termination after being charged with theft of government property.

The complainant did present some evidence of discriminatory bias on the part of her VCS manager. She claimed that the manager at times used racial epithets when referring to members of the complainant's race and color. In addi-



tion, a former VCS employee testified that the manager had told her to keep an eye on employees of the complainant's race and color because they were stealing from the canteen. However, even accepting this testimony as true, the preponderance of the evidence persuasively demonstrated that it was the complainant's conduct, and not her race or color, that prompted the actions taken against her. It was the Police and Security Service, not her manager, which investigated the matter and charged her with the offense. VCS management, upon being informed of the matter, had an obligation to take appropriate action and did so. Their actions resulted from the investigation. There was no evidence that the VCS treated the complainant less favorably than they treated any other employee under similar circumstances. Although the manager's negative attitudes and racial stereotypes are reprehensible, there was no evidence that they had any bearing on the actions taken against the complainant.

This case illustrates an important and often misunderstood principle concerning evidence of bias or stereotypical attitudes about certain groups. Evidence of such bias or attitudes, by itself, may not be sufficient to prove discrimination. Instead, a complainant must also prove that the bias or attitude in question influenced or caused the action complained of. In this case, the preponderance of the evidence suggested otherwise.

VI

NO RETALIATION FOUND WHERE EMPLOYEE ALLEGED THAT SHE WAS DELIBERATELY MISLED CON-

CERNING THE AMOUNT OF THE ANNUITY SHE WOULD RECEIVE IF SHE RETIRED

The complainant applied for and accepted a \$25,000 early retirement buy-out. She subsequently filed an EEO complaint alleging that an Employee Relations Specialist deliberately misled her concerning the monetary benefit she would receive if she retired. Specifically, she alleged that the personnel specialist provided her with a retirement annuity estimate that was much higher than the amount she eventually received. She claimed that this was done with the intent of encouraging her to leave because of her prior EEO complaint activity.

OEDCA, after reviewing the entire record, agreed with and accepted an EEOC administrative judge's decision finding no retaliation.

First, the judge noted that the actual amount of a retirement annuity is calculated by the Office of Personnel Management (OPM), not the VA. Second, the judge found that the written retirement calculation given to the complainant by the VA personnel specialist clearly indicated that it was only an estimate based on information contained in her Official Personnel Folder (OPF) and was not intended to represent the actual amount she would eventually receive.

Finally, the judge noted that the reason the complainant received far less than VA's estimate was due to an order in a divorce decree which granted a "community interest" in her civil service pension to her former husband. The com-



plainant was aware of this order and, in fact, had attached it to her retirement application. She claims, however, that the VA personnel specialist should have attempted to interpret the terms of the divorce decree and figure out the actual amount she would eventually receive.

The personnel specialist testified that she did not have the legal background to interpret legal documents and that she specifically advised the complainant to seek the advice of an attorney regarding the impact of the decree on her retirement benefits. The complainant did not seek such advice before retiring and accepting the \$25,000 buyout.

Even if it is assumed that the personnel specialist had been aware of the complainant's prior EEO complaint activity, there was no evidence that the estimate she provided was an act of retaliation or otherwise intended to induce the complainant to retire.

This case highlights another important and often misunderstood principle of EEO law – namely – that an employer's action is not discriminatory if it is based on a reasonable belief that the information it considered or provided at the time was accurate, even if it is later shown that the information was incorrect.

VII

RETALIATION FOUND WHERE MANAGEMENT FIRED AN EMPLOYEE BECAUSE OF HER “UNSUBSTANTIATED ALLEGATIONS” OF SEXUAL HARRASSMENT AGAINST A CO-WORKER

After complaining to a supervisor that a co-worker was sexually harassing her, the complainant's immediate supervisor informed her that she was being involuntarily reassigned in order to separate her from the alleged harasser.

Management convened an Administrative Board of Investigation to look into her allegations. The Board eventually issued a report concluding that there was insufficient evidence to substantiate her claim.

Shortly thereafter, her service chief counseled her for not adequately focusing on patient care, a problem never previously brought to her attention. In light of the Board's report, she filed a formal EEO complaint alleging sexual harassment. Shortly after filing this complaint, management officials began to solicit unfavorable information concerning her work performance. A few months later, management notified her that she was being terminated. The reasons given in the notice involved performance-related problems, her “conduct” (the nature of which was not specified), and her “unsubstantiated allegations about a coworker” (*i.e.*, her sexual harassment complaint).

After carefully reviewing the record, OEDCA found, as did the Board, that the evidence did not support the complainant's allegation that she was sexually harassed by a coworker. OEDCA did find, however, that her termination was in retaliation for raising those allegations. There was clear, direct evidence of retaliation in the termination notice itself, which cited those “unsubstantiated” allegations as a reason for her termination.



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The management official who signed the termination letter claims that he did not read it carefully before signing, did not realize that that reason was cited in the letter, and therefore did not intend to retaliate against the complainant because of her sexual harassment complaint. OEDCA, however, found that explanation disingenuous. Someone in management obviously made a decision to insert that reason in the termination letter, and it must be presumed that a responsible management official would have read a document as important as a termination letter before signing it.

In addition to the direct evidence contained in the termination letter, one of the complainant's supervisors acknowledged that "had it not been for the sexual harassment [claim], there would not have been a termination."

OEDCA also found that the other reasons mentioned in the termination notice concerning the complainant's performance and conduct were vague, undefined, inconsistent with other evidence in the record, and insufficient to justify a termination. For example, the record showed that she had recently received a fully satisfactory performance appraisal. In addition, her supervisors presented no documentation to support the vague assertions relating to her performance and conduct. Moreover, there was no evidence that her supervisors ever counseled her about such matters prior to her EEO protected activity. Finally, management did not begin soliciting negative information about the complainant until after she complained of sexual harassment.

Finally, most of the alleged performance problems, even if true, occurred subsequent to, and were the result of, the involuntary reassignment, which was an inappropriate and retaliatory response to her allegations. Thus, but for her sexual harassment allegations and the subsequent improper reassignment, there would have been no performance or conduct problems. Hence, she would not have been terminated -- a fact that one of her supervisors conceded during the agency's investigation.

This case highlights some important principles concerning the prohibition against retaliation when there is an underlying sexual harassment complaint. First, although the underlying complaint may be meritless, frivolous, or even vindictive, management cannot use that as a basis for taking an adverse action against the complainant. The prohibition against retaliation applies regardless of the validity of the employee's underlying complaint, and employees can, and sometimes do, prevail on a reprisal claim, even when they have been unsuccessful in prosecuting the underlying complaint.

The second principle to bear in mind is that the involuntary reassignment of an employee because of a sexual harassment claim -- regardless of management's motive -- is not only inappropriate, but will almost always be construed as an act of reprisal by the Equal Employment Opportunity Commission. If the complainant does not consent to the reassignment, management must find some other means of dealing with the situation.



VIII

TERMINATION OF DISABLED EMPLOYEE BECAUSE OF A PERCEIVED RISK OF FUTURE INJURY VIOLATED THE *REHABILITATION ACT* WHERE THERE WAS NO INDIVIDUALIZED ASSESSMENT OF COMPLAINANT'S WORK AND MEDICAL HISTORY, AND NO ATTEMPT TO ACCOMMODATE HER IN HER ASSIGNED POSITION

(This case was previously reported in the Fall 1998 issue of the OEDCA Digest. It is being presented again because of the frequency with which this type of issue arises in VA hospitals.)

Complainant, a staff nurse on a psychiatric unit, filed a complaint alleging, among other things, that her termination from employment was due to discrimination because of her disability (degenerative joint disease of the cervical and lumbar spine and left knee).

Management asserted that it terminated the complainant because she could not safely perform a functional (physical) requirement of her position, namely heavy lifting. Hence, she posed a risk of future harm or injury to herself and/or others. The decision to terminate her was based primarily on the recommendation of a Physical Standards Review Board that examined her fitness for duty. The board essentially concluded that, since the ability to lift 45 pounds is a functional requirement for all staff nurse positions, the complainant's 25-pound lifting restriction rendered her incapable of safely performing an essential duty.

In its final decision, OEDCA determined

that the medical documentation submitted by the complainant was insufficient to establish that she actually had a disability within the meaning of the *Rehabilitation Act* and EEOC's regulations implementing the Act. A 25-pound lifting restriction, by itself, does not constitute a disability, as such a restriction does not substantially limit any major life activities. Furthermore, it was not clear from the medical evidence whether her impairment was permanent or temporary. Nevertheless, OEDCA found that, even if she did not have an actual disability, management clearly perceived her as disabled – *i.e.*, perceived her as having a physical impairment that substantially limited her ability to work as a nurse. Accordingly, OEDCA concluded that the complainant was an "individual with a disability" within the meaning of the *Rehabilitation Act*.

Management argued that the complainant was not a "qualified individual with a disability" because she could not perform the functional lifting requirements for staff nurse positions, thus suggesting that the physical requirements of the position equated with the essential elements of the position. Management's argument, in essence, was that no one with a 25-pound lifting restriction could perform staff nurse duties. OEDCA noted, however, that identification of the essential elements of a position requires a fact-specific inquiry into both the employer's description of the duties (*i.e.*, the "PD") and how those duties are actually performed in practice.

The complainant provided credible testimony, supported by other evidence in the record, to show that there was less heavy lifting in the psychiatric unit as



compared with other units, and that she could, with reasonable accommodation, perform the essential duties of her position. As for lifting, she noted that other nurses were always available to help her with incapacitated patients; and that more than one nurse is normally involved when lifting heavy patients. OEDCA therefore determined that the complainant's inability to meet a functional lifting requirement did not prevent her from being able to perform the essential duties of her position, as they are actually performed in practice.

Management further argued that the Complainant was not a "qualified individual with a disability" because of the risk of future injury - in other words - her back condition constituted a "direct threat" to her health or safety and the health or safety of patients. OEDCA found, however, that management failed to satisfy its burden of proof as to the direct threat defense. To assert such a defense successfully, management must demonstrate that it conducted an individualized assessment of the complainant's work and medical history that took into account such factors as the nature and duration of the risk, its severity, and the probability that harm would occur. It must further demonstrate that such assessment revealed a reasonable probability of substantial harm. Fears based merely on conjecture and speculation, rather than sound medical evidence, will not suffice.

The board's recommendation to terminate was conclusory at best. Management failed to conduct an individualized assessment of the complainant's work and medical history that would have taken into account the above-cited fac-

tors. Hence, there was no medical evidence that complainant's continued performance of nursing duties would have created a reasonable probability of substantial harm to herself or others. Management's claim that "it would be difficult for complainant to work as an RN", and its belief that her condition would worsen in the future, even if true, do not satisfy the requirement for an individualized assessment.

Because the complainant was a "qualified individual with a disability," management had an obligation to attempt to accommodate her in her assigned position. Only if such an accommodation would have created an undue hardship on nursing operations could management then consider reassignment to other positions. Management officials admitted that they did not consider accommodating the complainant in her assigned position based on the belief that she was no longer qualified for it. They failed to offer any evidence that accommodating the lifting restriction, as suggested by the complainant, would have created an undue hardship for the nursing service. Instead, they simply terminated her after determining that she was not qualified for any job vacancies at the facility.

OEDCA thus found that management's failure to accommodate the complainant, and the subsequent decision to terminate her employment, violated the *Rehabilitation Act*.

As previously noted, management officials should always seek advice from the VA's Office of the Regional Counsel before taking any action against an em-



ployee because of the employee's disability or perceived disability.

IX

DECISION BY HR SPECIALIST NOT TO REFER PROMOTION APPLICANT TO SELECTING OFFICIAL NOT DUE TO DISCRIMINATION

The complainant, a GS-5 Travel Clerk, applied under an advertised vacancy announcement for the position of Prosthetics Purchasing Agent, GS-6. Because she lacked the required one-year of specialized experience in purchasing and contracting, a Human Resources Management specialist notified her that she was ineligible for the position and would not be referred to the selecting official for consideration. She thereafter filed an EEO complaint alleging that the HR specialist refused to qualify her because of her age and gender.

The HR specialist denied the allegation, noting that she disqualified 9 out of the 11 applicants, and that of the two applicants found to be qualified, both were female and one was older than the complainant.

The complainant did not dispute that she lacked the required experience. Instead, she simply claimed that the HR specialist failed to "look at the complete picture of [her] application."

After reviewing the record as a whole, OEDCA accepted an EEOC administrative judge's decision finding no discrimination. The judge summarily rejected the complainant's allegations, finding instead that she presented no evidence

whatsoever that the HR specialist was influenced by the age or gender of any of the applicants.

This case illustrates an important requirement that complainants frequently overlook -- namely -- that they must prove discrimination, and not simply allege it, if they wish to prevail.

X

COMPLAINANT NOT HARASSED WHEN MANAGEMENT INVESTIGATED ALLEGATIONS THAT HE HAD SEXUALLY HARASSED A CO-WORKER

When accused of sexual harassment, some employees believe that a good offense is the best defense. Hence, they occasionally respond by filing their own harassment complaint against the Department official who is investigating the allegations being made against them.

In a recent case, a VA employee accused of sexual harassment by a co-worker made just such a claim. The supervisor responsible for investigating the sexual harassment claim was unable to substantiate it and, hence, took no action against the complainant. The complainant, however, considered the investigation to be an act of harassment against him and filed a complaint against the supervisor.

An EEOC administrative judge issued a decision in the Department's favor, which OEDCA accepted. Specifically, the judge found that the supervisor's investigation did not constitute harassing



behavior. In fact, as the judge noted, this was a classic case of the Department doing precisely what it was legally obliged to do – investigate allegations of sexual harassment. Because agencies have an affirmative duty to provide employees with a procedure for raising allegations of sexual harassment, they may not refuse to investigate the allegations. Thus, an allegation that such an investigation took place, without more, fails to state a claim of discrimination or harassment.

XI

MANAGEMENT FOUND LIABLE FOR ALLOWING EMPLOYEE TO HARASS HIS SUPERVISOR

In what is clearly not your typical harassment case, OEDCA recently accepted an EEOC administrative judge's decision finding that an employee had created a hostile environment for one of his supervisors by engaging in a pattern of racial and religious harassment directed against the supervisor.

The preponderance of the evidence in the record demonstrated that the subordinate employee frequently insulted his supervisor's race and religion (African-American, Islam) by using racial slurs, including the "N" word, when addressing the supervisor; referring to Islam as a "devil's religion" and a "N...religion"; warning the supervisor that the employee's "Jewish friend" would take care of him (a reference to Jesus Christ); wearing a Confederate hat in the workplace despite facility uniform regulations and instructions from the supervisor not to wear the hat; telling the supervisor

that God has cursed black people and that he did not have to accept assignments or direction from the supervisor because white people are superior to black people; and other incidents or comments of a similar nature.

The evidence also indicated that, although the supervisor had the authority to counsel subordinate employees regarding their work performance or behavior, he had no power to impose formal discipline on subordinates, such as written reprimands, suspensions, and removal. Such authority was reserved to higher-level officials.

Finally, the evidence indicated that the supervisor frequently complained to his superiors about his subordinate's conduct. In response, they suspended the employee for five days. However, they rescinded the suspension several months later because the employee had filed a discrimination complaint against the supervisor. During this period, the employee continued to harass the supervisor, but management officials, although aware of the continued harassment, failed to investigate and took no action against the employee. Instead, they simply told the supervisor to "be cool" and that dealing with such incidents is part of the job of being a supervisor. When asked why they took no further action despite the continued harassment, they expressed the fear that any such action might prompt the harasser to file a reprisal complaint against them.

The administrative judge found, as did OEDCA, that management could be held liable for the harassment, notwithstanding the fact that the victim was the



harasser's supervisor. The key issue in such cases is whether the supervisor has sufficient authority to impose measures that would end the harassment. In this case, it was clear that the supervisor lacked that authority. Hence, it was the responsibility of higher-level management officials to respond promptly, appropriately, and effectively when they became aware of the continued harassment. This they failed to do.

Moreover, the EEOC judge and OEDCA found that management's defense for not doing so – *i.e.*, fear that the harasser might file a reprisal complaint – was not a legitimate reason for not investigating the supervisor's claims and taking appropriate action.

XII

FREQUENTLY ASKED QUESTIONS AND ANSWERS CONCERNING AN EMPLOYER'S DUTY TO ACCOMMODATE AN EMPLOYEE'S DISABILITY

(Complaints concerning an employer's failure to accommodate an employee's disability account for a significant number of discrimination cases in both the private sector and the Federal sector EEO complaint process. Unfortunately, this area is one of the most difficult and least understood areas of civil rights law. In this issue of the OEDCA Digest, we present some frequently asked questions and answers concerning the basic principles pertaining to the reasonable accommodation requirement. In future issues of the digest, we will present additional Q&As that explore these rights and responsibilities in more detail.)

Q 1. What is reasonable accommodation and why is it required?

A 1. Title I of the Americans with Disabilities Act of 1990 (the "ADA") and Section 501 of the Rehabilitation Act of 1973, require an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of "reasonable accommodations":

(i) modifications or adjustments to a **job application process** that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) modifications or adjustments to the **work environment**, or to the **manner or circumstances under which the position held or desired is customarily performed**, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy **equal benefits and privileges of employment** as are enjoyed by its other similarly situated employees without disabilities."



The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs, which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Q 2. Who is entitled to reasonable accommodation?

A 2. Reasonable accommodation is available to qualified applicants and employees with disabilities. Reasonable accommodations must be provided to qualified employees regardless of whether they work part-time or full-time, or are considered "probationary." Generally, the individual with a disability must inform the employer that an accommodation is needed.

Q 3. What are some examples of possible accommodations that an employer might have to provide to a qualified individual with a disability?

A 3. There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and

when a job is performed. These include, but are not limited to:

- making existing facilities accessible;
- job restructuring;
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to a vacant position.

Q 4. What are some examples of modifications or adjustments that are not required as a reasonable accommodation?

A 4. There are several modifications or adjustments that are not considered forms of reasonable accommodation. An employer does not have to eliminate an essential function, *i.e.*, a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a "qualified" individual with a disability within the meaning of the ADA and the Rehabilitation Act. Nor is an employer required to lower production standards -- whether qualitative or quantitative -- that are applied uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. While an employer is not required to eliminate an essential function or lower a produc-



tion standard, it may certainly do so if it wishes.

In addition, an employer does not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eye-glasses, hearing aids, or similar devices, if they are also needed off the job. Furthermore, an employer is not required to provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities. However, items that might otherwise be considered personal may be required as reasonable accommodations where they are specifically designed or required to meet job-related rather than personal needs.

Q 5. How do you judge whether a modification or adjustment satisfies the "reasonable accommodation" obligation?

A. 5. A modification or adjustment satisfies the reasonable accommodation obligation if it is "**effective.**" In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, an effective accommodation will enable an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job. Finally, a reasonable accommodation will be effective if it allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.

Example A: An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY to call a relay service operator, who can then place the telephone call and relay the conversation between the parties. This is a reasonable accommodation because it is effective. It enables the employee to communicate with the public.

Example B: A cashier easily becomes fatigued because of lupus and, therefore, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue. This reasonable accommodation is effective because it removes a workplace barrier -- being required to stand -- and thus gives the employee the opportunity to perform as well as any other cashier.

Q 6. Are there any limitations on an employer's obligation to provide reasonable accommodation?

A 6. The term "reasonable accommodation" is a term of art that Congress defined only through examples of changes or modifications to be made, or items to be provided, to a qualified individual with a disability. The statutory definition of "reasonable accommodation" does not include any quantitative, financial, or other limitations regarding the extent of the obligation to make changes to a job or work environment. The only statutory limitation on an employer's obligation to provide "reason-



able accommodation" is that no such change or modification is required if it would cause "**undue hardship**" on the employer.

Q 7. What is meant by "undue hardship?"

A 7. "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but also to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. An employer must assess on a case-by-case basis whether a particular accommodation would cause undue hardship. The "undue hardship" standard under the ADA and the Rehabilitation Act is significantly different from, and should not be confused with that applied by courts under Title VII of the Civil Rights Act of 1964 for religious accommodation.

