OEDCA DIGEST



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*Summaries of Selected Decisions Issued by the Office of*

*Employment Discrimination Complaint Adjudication*

The Office of Employment Discrimination Complaint Adjudication (OEDCA) was

established in 1997. We are an independent quasi-judicial authority created by statute, 38 U.S.C. 319(a)(3). OEDCA is charged with impartially issuing high quality and timely final agency decisions and orders, based on the merits, on complaints of employment discrimination filed by agency employees and applicants for employment.

The OEDCA Director is a career appointee in the Senior Executive Service and reports directly to the Secretary or Deputy Secretary. OEDCA is staffed by lawyers with

experience and expertise in Federal sector equal employment discrimination law.

This issue of the *OEDCA Digest* features summaries of discrimination findings issued in 2015. The findings were either based on the record, or were the result of a hearing

conducted by an Equal Employment Opportunity Commission (EEOC) administrative judge.

Maxanne Witkin

Director

**I.**

**Disabled Employee Improperly Reprimanded**

The complainant, a Motor Vehicle Operator, was in an off duty car accident. He needed two surgeries on his back and shoulder and took Leave Without Pay (LWOP) under the Family and Medical Leave Act (FMLA). His FMLA leave was exhausted on July 19, 2013.

On July 22, 2013, the complainant asked to be put in a LWOP status as an accommodation. He requested LWOP until August 15, 2013 because he needed more time to recover from his surgeries. On August 13, 2013, he amended his LWOP request by asking that it be extended until October 1, 2013.

The complainant’s LWOP request was denied on September 3, 2013. Management officials testified that complainant’s prolonged absence would have a negative impact on patient care. They also believed they had no duty to approve the request because his injuries occurred off duty.

During the 43 days it took agency officials to process his reasonable accommodation request, the complainant did not report to work. He was subsequently charged with 163 hours of Absence Without Leave (AWOL), and issued a reprimand based on the AWOL charges.

OEDCA found that the facility failed to accommodate the complainant’s disability when it denied his request for LWOP. OEDCA further found that the complainant was discriminated against because of his disability when he was charged AWOL for his absences and then reprimanded.

**Bottom Line: The VA must provide an effective accommodation for an employee’s disability---whether it occurred at work or off duty.**

**II.**

**Racial Slurs Create Hostile Workplace**

Complainant, an African-American, had an acrimonious working relationship with a White co-worker. The co-worker used a variety of racial slurs in reference to the complainant including “monkey butt”, “monkey-boy”, and “gorilla”. Witnesses testified that the co-worker also described the complainant as “gang-like” “thuggish”, and as having a “prison type mentality”.

An administrative judge found that the complainant’s first line supervisor had actual knowledge of the co-worker’s statements because several other employees had complained about his conduct. The supervisor, however, testified that it was the complainant who created a hostile work environment by initiating “bogus complaints about things that really had no meaning “.

The supervisor testified that he tried to address the hostile work environment between the complainant and the co-worker through mediation and by directing the complainant and co-worker to stay away from one another. He further testified that despite his efforts and repeated requests to upper management to intervene nothing was done to remedy the situation.

The judge found that due to the agency’s failure to act, not only did the toxicity in the workplace persist, but worsened to the point that many employees were afraid for their safety. The supervisor testified that the work environment became so toxic that he resigned and moved out of state.

**Bottom line: Racial slurs are never acceptable in the workplace, and can impact not only the targeted employee, but also co-workers and supervisors.**

**III.**

**Safeguarding Employee Medical Information**

Complainant, a Medical Support Assistant, suffers from bi-polar disorder. In 2012, she was a patient at a mental health facility for six weeks and requested Family and Medical Leave (FMLA). In support of her FMLA request, she faxed her personal medical information to the attention of her supervisors. Although the fax was not addressed to her, a co-worker received it and shared the complainant’s medical information with other VA employees.

When complainant returned to work, she was subjected to comments about her disability. These comments included, “you know, everybody saying you crazy, they say I’m crazy too”, and “you were more popular when you were off, it’s crazy”. Also, three of her co-workers asked specific questions about her medical condition and she was treated by her co-workers as if she was unable to perform her duties.

Complainant testified that she also found a picture of the mental health facility where she was hospitalized on her computer monitor and that printouts about bi-polar disorder were queued to her printer.

The complainant informed management officials, including her supervisor, about the incidents. Although management officials investigated the improper disclosure of complainant’s medical documentation, they did not investigate her hostile work environment allegations.

OEDCA found that the co-workers’ conduct was sufficiently severe and pervasive to constitute hostile work environment harassment in violation of the Rehabilitation Act of 1973. OEDCA also concluded that management officials failed to take immediate and effective action to stop the conduct until the complainant was reassigned to another location six months later.

Finally, OEDCA found that the improper disclosure of complainant’s personal medical information was a *per se* violation of the Rehabilitation Act’s confidentiality provisions.

**Bottom line: Documentation or information concerning an employee’s diagnosis is medical information that must be treated as confidential. However, supervisors may be informed of an employee’s diagnosis if it is related to her work-related restrictions, need for accommodation, or medical leave. Also see *Haydee A. v. DHS (FEMA),* EEOC No. 0120132668 (January 19, 2016) and *Complainant v. USPS,* EEOC No. 0120112516 (April 2, 2015)**

**IV.**

**Witness Reprisal**

In 2006, the complainant was contacted by a co-worker and agreed to be a witness in his EEO complainant against their supervisor. The supervisor repeatedly told the complainant to “stay out of it” and that her involvement would be a conflict of interest.

When complainant went forward with providing testimony in support of her co-worker, her supervisor intensified her scrutiny of complainant’s performance and conduct. For example, the supervisor monitored complainant’s whereabouts, became abrasive in her interactions with complainant, and took away complainant’s duties and responsibilities.

An administrative judge found that the complainant was subjected to a hostile work environment and harassment. The judge wrote, “the record clearly establish that Ms. X harassed and subjected complainant to a hostile work environment through repeated personal confrontations, change of her work assignments, responsibilities, training opportunities and leave administration”

**Bottom line: It is illegal to retaliate against an employee because she testified as a witness in an EEO investigation and/or hearing.**

**V.**

**Harassment of Multiple Employees**

The three complainants were employed at a VA call center. They alleged that a co-worker, who was also a union official, sexually harassed them individually over a three year period.

Complainant one stated that almost every day for over a year, the co-worker made sexual gestures toward her. The co-worker also continually asked her out on dates, asked her to meet him at hotels, and blew on her neck. Complainant two alleged that the same co-worker sexually harassed her by making sexual gestures and comments, asking her to go to hotels with him, and making statements about her body. She testified that he harassed her two to three times a week. Complainant three testified that the co-worker wanted her to sit on his lap and referred to her as his “department wife”. He also commented on her clothing and body.

An Administrative Board of Investigation found that management officials had past and present knowledge of the sexual harassment, because the harassment was pervasive, the harasser was transferred to the call center because of his prior history of sexual harassment, and team leaders had earlier notified their supervisors about the harassment.

OEDCA found that the agency failed to take prompt, effective action to end the harassment. For example, it took management officials over two years to initiate and launch an investigation into the harasser’s behavior, and over seven months passed before his removal was proposed.

**Bottom line: Whether remedial action can be considered prompt depends in part on the amount of time that elapsed between the notice and remedial action. The EEOC has held that a delay of seven months in taking appropriate corrective action reflects a significant period of inaction. Moreover, an agency’s obligation to take prompt appropriate action is independent of the EEO process. Also see *Complainant v. Navy,* EEOC No. 0120130704 (September 16, 2015)**

**VI.**

**False Harassment Allegation and Discipline**

Complainant, a Housekeeping Aid, alleged that her first level supervisor subjected her to sexual harassment and a hostile work environment. An Administrative Investigation Board was promptly convened and found no evidence to support complainant’s allegations.

Management officials then proposed that complainant be suspended for 14 days for making unfounded allegations against her supervisor. A month later, the proposed suspension was rescinded.

OEDCA found that complainant’s proposed suspension constituted per se reprisal. The proposed suspension violated the letter and spirt of EEO laws which require agencies to promote and support the full realization of EEO. Although the proposed suspension was later rescinded, the threat of disciplinary action has a chilling effect and is likely to deter other employees from engaging in protected EEO activity.

**Bottom line: Proposing disciplinary action against an employee for asserting her right to report sexual harassment rises to the level of interfering and intimidating conduct. The employee need not show that she, herself, was deterred from filing an EEO complaint.**

**VII.**

**Pay Disparity Based on Disability**

In November 2008, complainant, a Radiologist, was hired on a full time basis at a salary of $240,000. He suffered from a back disability and was accommodated by not having to perform fluoroscopes, which required wearing a lead apron.

In February 2010, complainant realized he was the lowest paid of his colleagues and requested a salary increase. The request was denied. In October 2010, management officials told complainant that he would be allowed to work part time but his salary would be proportionately reduced. He was also told that if he maintained a full time schedule his salary would be increased to $270,000.

Complainant elected to work a part time schedule and his pay was proportionately reduced. Management officials testified that the complainant’s reasonable accommodations were reasons for not increasing his salary.

An EEOC judge determined that the complainant was discriminated against because the salaries of his non-disabled part time colleagues, who had no prior EEO activity, were not reduced. The judge wrote, “Here, the record overwhelmingly evidences it was Complainant’s medical impairments and accommodations and prior EEO activity that motivated the Agency to grant him a lower than expected base salary. Therefore, it is apparent Complainant was not punished because he was part-time, but rather because his reason for being part-time was related to his disabilities and requests for accommodation”.

**Bottom line: The Agency argued that federal regulations allowed it to offer part-time radiologists a lower base salary than full-time radiologists. The judge wrote that just because the regulations allowed the Agency to do so, did not mean it must, or that it would do so, absent unlawful factors.**

**VIII.**

**Denial of Effective Accommodation**

Complainant suffered from both physical and mental disabilities including tinnitus, PTSD, and a knee impairment. Loud and sudden noises aggravated his PTSD and tinnitus disabilities.

Complainant’s co-workers made constant and loud noises throughout the day, including singing, humming and hand clapping.

From April 2012 through February 2014, the complainant asked his supervisors, on 26 separate occasions, to move him to a quieter work area. The only option he was provided was to transfer to another building.

OEDCA found that management’s proposed accommodation was not feasible because complainant had recently undergone a knee replacement. Complainant testified that he used a walker or a cane and having to walk to another building would likely cause him to fall and injure himself.

OEDCA concluded that management officials violated the Rehabilitation Act by failing to make a good faith effort to provide the complainant with an effective accommodation for his disabilities.

**Bottom line: To determine the appropriate reasonable accommodation, it may be necessary for agency officials to initiate an informal interactive process with the employee in need of accommodation. While engaging in the interactive process in not mandatory, it is good practice to do so. An agency is liable if there is a finding that had a good faith interactive process taken place, the parties could have found a reasonable accommodation that would have enabled the employee to work.**

**IX.**

**“Running to the Union and EEO”**

Complainant alleged she was discriminated against based on race, sex, and reprisal when her workload increased and her telework day was changed.

She also alleged that she was subjected to a hostile work environment based on 16 incidents. Most of the incidents involved work-related events, for example she did not receive a copy of her 6 month evaluation review and her supervisor rescheduled a staff meeting.

However, one of the events included the following statement by the complainant’s supervisor, “You keep running to the Union and EEO for every little thing. That is your right, but you keep doing it and quite frankly, I don’t care if you go back and tell”. Two of complainant’s co-workers were present when the statement was made. The supervisor initially testified that she did not make the statement “to Complainant”, and later denied making the remark.

OEDCA found that the supervisor’s remark constituted reprisal per se. In its decision, OEDCA stated, “We find that the entire nature of the approach to be intimidating and confrontational; the supervisor is throwing down the gauntlet to employees she is clearly frustrated with, and while the language says go ahead, the context is more I dare you, which, coming from a direct supervisor, would reasonably be regarded as having a deterrent effect on an employee’s EEO activity”.

**Bottom line: Expressing hostility to the EEO complaint process by individuals in a supervisory or management position has been determined to be a per se violation of the letter and spirit of EEO laws and regulations. These laws and regulations require agencies to promote and support the full realization of equal employment opportunity in their policies and practices. Also see *Complainant v. DOJ (FBI),* EEOC No. 0120123111 (March 27, 2014)**

**X.**

**Denied Reassignment Based on Reprisal**

Complainant worked at a VA medical center. In February 2014, she reported to management officials that a co-worker was sexually harassing her. Management officials conducted an appropriate and prompt investigation. The investigation did not support complainant’s allegations.

In July 2014, complainant requested a reassignment to another facility within the local health care system. Several male employees at that facility told a management official that they did not want to work with the complainant. They expressed concern that she would make unsupported sexual harassment allegations against hem as evidenced by her February 2014 sexual harassment complaint.

Based on the concerns of the male employees, the management official, in consultation with a HR Specialist, denied complainant’s reassignment. OEDCA found that the management official retaliated against the complainant by denying her reassignment request based on the male employees’ speculative concerns that she might file sexual harassment complainants against them.

However, OEDCA also found that the management official was motivated by a lawful factor in denying the reassignment (complainant’s chronic absenteeism and need for close supervision).

**Bottom line: The evidence in this case established that complainant’s prior allegations of sexual harassment were a motivating factor in management’s denial of her reassignment request. As such, it constituted a violation of Title VII which protects employees from reprisal when they participate in the he EEO process. However, because there were legitimate business reasons for denying the reassignment, complainant was not entitled to compensatory damages.**

**XI.**

**Calling Former Patient As Witness Protected**

Complainant was a social worker. She filed an EEO complaint alleging that she was subjected to a hostile work environment. One of her proposed witnesses was a former patient.

The agency objected to the patient witnesses arguing that it would harm the patient by creating a dual relationship with the complainant. They also argued that by calling the patient witness, complainant was violating the National Association of Social Workers’ Code of Ethics, specifically a provision on conflicts of interest.

When the hearing was conducted, an EEOC administrative judge allowed the patient witness to testify. He noted that the witness was no longer complainant’s patient and that she appeared voluntarily.

Following the witness’ testimony, the agency reported the complainant to the Maryland Board of Social Work Examiners. The EEOC AJ determined that this action against complainant was reprisal on its face. The judge noted that one of complainant’s supervisors testified that he believed EEO cases were only filed for financial gain. The supervisor also testified that if the complainant had asked her former patient to testify on her behalf in a personal injury case, he would not have pursued the matter with the Maryland Board of Social Work Examiners.

**Bottom line: Reporting or threatening to report a complainant to a licensing board because of her prior protected EEO activity is reasonably likely to deter her or others from engaging in protected activity and constitutes reprisal.**

**XII.**

**Religious Comp Time**

Complainant, who is Jewish, worked at a medical center. She was a Program Specialist in the credentialing unit.

On March 13, 2014, she was placed on a Performance Improvement Plan (PIP). At the PIP meeting, she told her supervisor that she was thinking about requesting religious comp time to observe the upcoming Passover holiday. Her supervisor said it was unlikely that the request would be granted because of complainant’s poor performance and inability to work independently. The complainant testified that her supervisor also told her that “she doesn’t give any religious comp”. Complainant subsequently took annual leave to cover her absence.

Title VII requires employers to provide reasonable accommodation of an employee’s religious beliefs and practices when doing so does not impose an undue hardship on the employer. Accommodations for religious practices include, but are not limited to, flexible scheduling. Flexible scheduling can include the use of compensatory time to make up time lost due to the observance of religious practices.

In this case, OEDCA determined that the denial of complainant’s request for religious comp time violated Title VII. There was no evidence that granting the request would have caused an undue hardship on agency operations. Also, granting annual leave did not provide the accommodation that was the least disadvantageous to the complainant.

**Bottom line: The EEOC’s regulations clearly state when there is more than one means of religious accommodation available which would not cause undue hardship, the employer must offer the alternative which least disadvantages the employee.**

**XIII.**

**OK For Complainant to Discuss Own EEO Case**

Complainant worked at a medical center. She filed EEO complaints against the Nurse Manager and a Chief Nurse alleging disability discrimination and reprisal.

The Nurse Manager and Chief Nurse learned that the complainant was telling her co-workers that she was going to win $150,000 from her EEO complaints. The Nurse Manager testified that she though EEO complaints were confidential. The Chief Nurse told her that she would talk to the union president and, “see if they need to talk to the complainant and tell her that she should not be going around making comments like that in open public”.

The Chief Nurse further testified that she was concerned because the complainant was “out there talking about it in public and we were sworn to privacy , and I did not want us to be in the middle of it and us to be blamed for spreading rumors like that.” She also said because the complainant was a union member she “felt like they [the union] needed to talk to her and probably tell her that this was not the best thing to do”.

Subsequently, the Nurse Manager and the Chief Nurse contacted the union president and an HR official to complain about the complainant’s conduct.

OEDCA found that the management officials’ action was a per se violation of Title VII and the EEOC’s regulations. Their complaints about the complainant’s disclosure of her own EEO activity to her co-workers violated the letter and spirit of EEO law.

Citing to EEOC case law, OEDCA found that a supervisor’s statements or actions which intimidate an employee and/or interfere with her EEO activity in any manner constitutes reprisal per se. The fact that the supervisors did not contact the complainant directly to complain about her comments does not negate a finding of per se reprisal.

**Bottom line: Intent to retaliate is not a necessary element in a per se reprisal violation. Such a violation is possible even if management takes no adverse action against the complainant.**

**XIV.**

**Disability Discrimination Due to PTSD**

Complainant was hired as a temporary Claims Assistant pending a background investigation. Complainant completed a Declaration for Federal Employment and answered “no” to questions that asked whether he was fired or left a prior position by mutual agreement.

Complainant’s background investigation disclosed he suffered from PTSD and as a result of the disorder, he was involved in a violent domestic episode. He was subsequently discharged from military service.

After reviewing the background investigation, complainant’s supervisor terminated his employment based on his assessment that the complainant, because of his PTSD, posed a danger to himself and others in the workplace.

The supervisor also testified that complainant’s lack of candor during the application process was a factor in his decision to terminate the complainant.

OEDCA found that complainant was properly terminated for lack of candor. However, OEDCA also determined that agency officials violated the Rehabilitation Act by concluding that complainant posed a danger in the workplace without first conducting an individualized medical assessment of his current condition or the impact on his continued employment.

Complainant was not entitled to reinstatement or damages because the VA had established that it would have terminated him, absent its discriminatory conduct.

**Bottom line: In order to remove an employee on the basis of a possible future injury, the Agency bears the burden of showing there is a significant risk, i.e., a high probability of substantial harm. Such a finding must be based on an individualized assessment of the individual and not predicated on a speculative or remote risk.**

**XV.**

**Mixed Motive and Retaliation**

Mixed motive is a legal concept wherein a complainant can demonstrate that retaliation was a motivating factor in an employment action, even though other factors also motivated the practice. However, if an employer can demonstrate that “it would have taken the same action in the absence of the impermissible motivating factor”, it can restrict a plaintiff’s damages to declaratory relief and attorney fees and costs.

Complainant applied for a vacant Associate Director position at a medical center. Agency officials cancelled the vacancy announcement without making a selection. A month later the vacancy was re-issued. The complainant again applied, but was not interviewed because his application score was not high enough to qualify him for further consideration.

An EEOC administrative found that the VA was justified in not selecting the complainant. The judge wrote that complainant’s candidacy was doomed from the start because most of the managers and service chiefs, with whom he would have to interact with, actively disliked him.

However, the judge also found that Agency officials violated Title VII because they made disparaging remarks about complainant’s prior EEO activity during the selection process.

**Bottom line: It is illegal to discuss a candidate’s prior EEO activity during the selection process.**