



# OFFICE OF EMPLOYMENT DISCRIMINATION, COMPLAINT ADJUDICATION (OEDCA)



## 2017 EMPLOYMENT LAW DIGEST

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### Preface

The Office of Employment Discrimination, Complaint Adjudication (OEDCA) is delighted to introduce the 2017 edition of our annual *Legal Digest*. This edition features summaries of discrimination findings issued in 2016. 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.

Among the developments covered in this year's *Legal Digest* are: whether employees are permitted to bring service animals into a hospital setting; the confidentiality of employees' medical records; and limits on an Agency's ability to make medical inquiries or to require medical testing during the hiring process. The *Legal Digest* also considers a recent violation of the Equal Pay Act, and summarizes findings of hostile workplace harassment based on race, gender, and retaliation.

OEDCA is an independent Department of Veterans Affairs (VA) adjudicatory authority created by Congress. OEDCA's mission is to objectively review the merits of employment discrimination claims filed by VA employees and applicants for employment. The OEDCA *Legal Digest* is intended to provide an overview of significant cases and noteworthy developments in the area of employment law.

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### **Equal Pay Act Violation Found**

The Complainant, a GS-13 male employee, alleged that the Agency violated the Equal Pay Act (EPA) by compensating two female co-workers (both GS-14) at a higher rate for performing the same work.

The Agency argued that the difference in pay was based on a factor other than sex. Specifically, the Agency noted that the Complainant's position description (PD) and the PD for the two female co-workers differed in terms of the nature and complexity of work assignments, and the level of control or independence exercised.

In their decision, OEDCA noted that a difference in PDs is a defense to an EPA claim only where the PDs accurately reflect the actual job duties performed by the employees. OEDCA explained that where an investigation shows that people in different grades perform equal work, the PDs are artificial, and not a valid defense to an EPA violation.

The record reflected that since July 2011, the Complainant had been performing essentially the same duties as the two female comparators. Thus, while the Agency relied on its grade classification system to justify the pay differential, the classification system did not accurately reflect the actual duties performed by the Complainant and the female comparators.

Therefore, OEDCA found that the Agency violated the EPA by paying the Complainant less than similarly situated female employees, for performing the same work.

**Bottom line: An employee's actual job duties, not their position description of record, is the determinative factor in analyzing whether an employee is being paid less than similarly situated co-workers of a different gender, for performing substantially similar work.**

### **Per Se Retaliation Found**

The Complainant filed a formal EEO complaint alleging that during a staff meeting her supervisor stated, "This is what happens when you try to get people to work, they file EEO complaints against you." The comment occurred shortly after the Complainant had initiated EEO Counselor contact.

OEDCA noted that Title VII's anti-retaliation provisions protect individuals from any retaliatory action that would deter a reasonable person from opposing discrimination or participating in the EEO process. Thus, a violation will be found if an employer makes comments that are reasonably likely to deter employees from exercising their EEO rights. For example, the EEOC has found that a supervisor engaged in reprisal per se when he characterized an employee's allegations of discrimination as "unprofessional." See Complainant v. United States Postal Serv., EEOC Appeal No. 0120112858 (July 24, 2014).

Here, a management official made comments which conveyed hostility to the EEO process. Since those comments could have a "chilling effect" on employees' willingness to assert their rights under federal EEO law, OEDCA found that the comments constituted per se retaliation.

**Bottom line: The Agency has a continuing duty to promote the full realization of equal employment opportunity in every aspect of personnel matters. Therefore, supervisory comments expressing hostility to the EEO process constitute per se retaliation, because they are likely to deter employees from exercising their EEO rights. This is true regardless of whether the comments actually dissuade an employee from pursuing an EEO complaint.**

### **Hostile Workplace Harassment Found (Race)**

The Complainant alleged that she was subjected to workplace harassment on the basis of race (African American) when a co-worker threatened to “put [her] neck in a noose,” and then attempted to place a Velcro strap around her neck. The Complainant immediately reported the incident to her supervisor. Management referred the matter to the Office of the Inspector General (OIG) for criminal investigation. Management took no further action pending the outcome of the OIG investigation. Approximately seven months later, the co-worker was terminated based on the results of the OIG investigation.

Although based on a single incident, OEDCA stated that referencing and simulating a lynching was an inherently hostile and threatening event which was sufficiently severe to create an abusive work environment.

Further, OEDCA found that the Agency’s actions upon notification of the harassment were insufficient. While the Agency did quickly refer the matter to OIG for an investigation, it did not take any action to address the situation until seven months later, after the OIG investigation had been completed. During the interim period, the Agency could have temporarily reassigned the co-worker. Additionally, since the incident occurred in an open work environment, the Agency could have promptly provided all employees in the office with anti-harassment training and guidance in order to prevent others from engaging in similar actions.

Due to management’s failure to take prompt remedial action, the Agency was found liable for the harassment.

**Bottom line:** Simulating a lynching is such an inherently threatening act that even a single instance of such behavior may constitute racial harassment. Additionally, the Agency’s obligation to take prompt corrective action in response to workplace harassment is independent of any other investigatory process.

### **Sexual Harassment Found (Male)**

The Complainant alleged that a male coworker sexually harassed him by winking at him, saying that he knew the Complainant wanted to have sex with him, and using his cell phone to take pictures of the Complainant.

OEDCA concluded that the coworker’s conduct was unwelcome and was severe and pervasive enough to create a hostile work environment.

Regarding the Agency’s liability, the record demonstrated that the Complainant immediately reported the harassing conduct. Three months later, the Agency moved the coworker to a different work shift and initiated an administrative investigation (AIB). Approximately nine months later, the coworker was terminated.

In finding the Agency liable, OEDCA noted that the Agency did not initiate an investigation, or separate the coworker from the Complainant, until approximately three months after receiving notice of the harassment. Moreover, there was evidence that the harassment continued after the coworker was placed on a different shift. OEDCA noted that management officials failed to make follow-up inquiries to ensure that the Complainant was no longer experiencing sexual harassment.

OEDCA determined that the Agency’s failure to promptly and effectively address the harassment left the Complainant vulnerable to ongoing harassment and, therefore, the Agency’s response was inadequate.

**Bottom line:** Management has a duty to take prompt corrective action upon receiving notice of sexual harassment. Additionally, management officials are obligated to make follow-up inquiries to ensure that the sexual harassment has ceased. When harassment continues after the Agency has taken corrective action, the corrective action will be considered ineffective, and the Agency will be found liable for the harassment.

### **Sexual Harassment Found (Female)**

OEDCA found that the Complainant was subjected to sexual harassment when an Agency Police Officer continually asked her out on dates, made graphic sexual comments about her body, made unwanted physical contact, requested that she send him intimate photographs, and began waiting for her in the parking garage at the end of her shift.

In September, one of the Complainant's co-workers notified management of the sexual harassment. Management made no attempts to confirm the report. In October, the Complainant notified her first-level supervisor of the harassment. The Complainant's supervisor instructed her to let him know if the harassment "got to the point where she couldn't handle it."

In December, the Agency initiated an investigation after three other female employees complained of being sexually harassed by the same Police Officer. In May, the Agency suspended the Officer for five days. The only wrongdoing identified in the suspension notice was that the Officer engaged in consensual sexual interactions with two female employees during his shift.

Management declined to discipline the Officer for sexual harassment, based on their determination that it would be difficult to secure a conviction against him for criminal sexual assault – which is an entirely different type of claim than sexual harassment.

OEDCA found that the Officer's conduct constituted sexual harassment because it was sexual in nature, unwelcome, and was sufficiently severe and pervasive to alter the conditions of employment. OEDCA found that the Agency was liable because management failed to take prompt action to correct the harassment and to prevent it from recurring.

**Bottom line: Management is obligated to take action immediately upon receiving notice of possible harassment. Additionally, management has a duty to ensure that appropriate discipline is directed at the offending party.**

### **Retaliatory Harassment Found**

The Complainant met with the facility's EEO Chief to discuss his supervisor's inappropriate workplace comments. The EEO Chief arranged for mediation between the Complainant and his supervisor.

Immediately thereafter, the Complainant's supervisor began treating the Complainant differently by: telling other employees he disliked the Complainant; encouraging other people not to talk to the Complainant; and, singling the Complainant out for adverse work assignments.

The Complainant alleged retaliatory harassment. The Agency argued that the Complainant's meeting with the EEO Chief and his supervisor did not constitute prior, protected EEO activity — a necessary component of any retaliation claim.

In rejecting the Agency's argument, an EEOC Administrative Judge emphasized that it is not necessary for an employee to file a formal EEO complaint in order to be protected from retaliation. Here, the Complainant met with the EEO Chief and his supervisor to discuss possible workplace harassment. In response, the supervisor targeted the Complainant for abusive treatment. Therefore, the Judge found that the Complainant had been subjected to retaliatory harassment.

**Bottom line: Even an informal complaint about workplace harassment constitutes protected EEO activity. Penalizing an employee for expressing such concerns constitutes retaliation.**

### **Delay in Providing Reasonable Accommodation**

OEDCA found that the Agency violated the Rehabilitation Act when it unduly delayed in responding to the Complainant's request for accommodation and failed to provide effective interim accommodations.

The Complainant, who suffered from a vision impairment, was initially accommodated with a projector that enlarged printed items and a special computer monitor which allowed her to type and perform data entry.

Following a departmental reorganization, the Complainant was reassigned. During her initial training period, the Complainant notified management that she was unable to read black print on white paper and required accommodations.

The Agency did not provide the Complainant with accommodations until six months later. By that time, the Complainant had been reassigned to a different position, due to her failure to "grasp" the training. The Agency attributed the delay to funding constraints.

OEDCA found that the Agency's funding constraints did not justify the delay. OEDCA noted that management was required to find interim accommodations while it waited for a 27-inch monitor and projector to arrive. Moreover, OEDCA determined that it was unreasonable for the Agency to expect the Complainant to continue training without an effective accommodation and then permanently reassign her, which negatively impacted her promotion potential, because she did not "grasp the training."

**Bottom line:** When there is a delay in delivering a reasonable accommodation, the Agency must investigate whether there are interim measures that can be taken to assist the individual with a disability.

### **Failure to Provide Effective Accommodation**

Following a workplace assault, the Complainant's PTSD condition was exacerbated. The Complainant requested an opportunity to telework, on a temporary basis, as a reasonable accommodation. The Complainant submitted a statement from her physician strongly recommending that she be allowed to telework for at least 90 days, in order to prevent the worsening of her condition.

Management denied the Complainant's request. As an alternative accommodation, management offered the Complainant unpaid leave under the Family and Medical Leave Act, while they made physical alterations – which were neither requested nor required – to her office.

Management contended that they satisfied their obligations under the Rehabilitation Act by providing the Complainant with an alternative accommodation. In rejecting this argument, OEDCA emphasized that while an Agency is not necessarily required to provide disabled employees with the accommodation of their choice, the Agency is required to provide "effective" accommodations. The EEOC defines an effective accommodation as one which enables employees to perform the essential functions of their job. The Agency's offer of unpaid leave would not enable the Complainant to perform her job.

Accordingly, OEDCA found that the Agency denied the Complainant reasonable accommodation.

**Bottom line:** While the Agency is not necessarily required to provide disabled employees with the reasonable accommodation of their choice, they are obligated to provide effective accommodations.

### **Disability Related Medical Inquiry/ Examination**

The Complainant, a Police Officer diagnosed with HIV, received a job offer at a VA Medical Center. After reviewing the Complainant's medical records, an Agency Official requested that the Complainant provide additional medical documentation.

The Complainant complied with the request, clarified that she was currently serving as a Police Officer without issue, and that she did not require an accommodation. The Agency requested that the Complainant undertake a stress test, and provide updated lab results. Shortly thereafter, the Agency withdrew its employment offer.

The Complainant alleged that the Agency discriminated against her based on disability (HIV). During the ensuing hearing, the Agency official testified that she requested additional medical information because the Complainant had the "possible potential" for heart disease due to her HIV condition. The Agency official stated that she was trying to ascertain whether the Complainant might need a future accommodation.

Based on medical testimony indicating that the requested stress test was medically unnecessary and that the Complainant could perform her essential job duties, the Administrative Judge found that the Agency discriminated against the Complainant by requiring her to submit unnecessary medical information and then withdrawing an offer of employment when she did not undergo a medically unnecessary stress test.

**Bottom line:** If an employer withdraws a job offer based on medical information, it must show that the reason for doing so was job-related and consistent with business necessity. This standard is met when an employer has a reasonable

belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by the medical condition; or, (2) an employee will pose a direct threat due to a medical condition. Such a belief requires an assessment of the employee and cannot be based on general assumptions.

### **Service Animals in the Workplace**

The Complainant's offer of employment as a Nurse was revoked after he disclosed that he utilized an emotional support animal.

The Agency argued that allowing the Complainant to bring a service animal into a hospital setting would present a health hazard. The Agency did not perform any analysis to verify these concerns.

OEDCA found that the Agency had not evaluated whether, given appropriate restrictions, the service animal could be accommodated. OEDCA noted that multiple VA hospitals had policies in place for service animals, allowing them access to general hospital common spaces, patient rooms (subject to the consent of the patient), and other areas that did not require a sterile environment.

Since the Agency had not presented any reason why it could not allow the Complainant to bring his service dog with him to work, subject to reasonable limitations, OEDCA found that the Complainant was wrongfully denied a reasonable accommodation.

**Bottom line:** The Agency failed to prove that the requested accommodation would cause an undue hardship, and made only generalized conclusions regarding the impact of the accommodation on other employees and customers.

### **Job Termination Due to Disability**

The Complainant was hired for a position, contingent on passing a background investigation. During the ensuing investigation, the Agency learned that the Complainant had been discharged from the military for allegedly threatening to harm himself and others. The Agency was aware that the Complainant had been diagnosed with Post Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI).

The Agency withdrew its offer of employment due to concerns that the Complainant posed a threat to himself or others.

In order to exclude an individual with a disability on the basis that they pose a direct threat, the Agency bears the burden of showing there is a high probability of substantial harm. Such a determination must be based on an individualized assessment of the individual that takes into account: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

OEDCA found that the Agency did not make the requisite individualized assessment of whether the Complainant posed a direct threat to himself or others. Instead, the Agency withdrew its job offer based on the fear of a future risk of harm, in violation of the Rehabilitation Act.

**Bottom line:** In order to exclude an individual with a disability, on the basis that they pose a direct threat, the Agency bears the burden of showing there is a high probability of substantial and imminent harm. This determination cannot be based on a subjective belief. The Agency must base its decision on substantial information regarding the individual's work and medical history.

### **Denial of Reasonable Accommodation**

In 2001 the Complainant provided the Agency with medical documentation demonstrating her need to avoid fluorescent light because they induced migraine headaches.

Approximately seven months later, the Agency relocated the Complainant to a new office, as a reasonable accommodation. In the new office, the Complainant was dependent on artificial lighting. The Complainant requested that the Agency provide her with non-fluorescent track lighting.

More than two years later, the Agency installed non-florescent track lighting in order to accommodate the Complainant. However, the lights were too hot without shades and filters. The Agency ordered shades for the Complainant but discovered they were the wrong type. The Agency failed to demonstrate that ordering the correct shades would have been unduly burdensome.

An EEOC Administrative Judge determined that, as of March 2005, the Complainant had yet to be provided with an effective accommodation even though she had provided sufficient medical documentation as far back as 2001. Therefore, the Judge concluded that the Agency "utterly failed to meet its statutory obligations" under the Rehabilitation Act.

**Bottom line:** The Agency should act promptly to provide reasonable accommodations. If the Agency learns that an accommodation is ineffective, the Agency is obligated to continue seeking an effective accommodation in a timely manner. Unnecessary delays in the provision of an effective accommodation can constitute a violation of the Rehabilitation Act.

### **Medical Confidentiality Violated**

After a management official commented about the Complainant's previously undisclosed hospitalization, the Complainant requested that the Privacy Officer provide her with a report of the individuals who had accessed her medical records. The report indicated that the Complainant's medical records had been accessed by Agency employees who did not have a legitimate business reason to access such information.

The Rehabilitation Act requires medical records to be treated as confidential except in certain limited circumstances. The EEOC has found that the unauthorized access of an employee's medical records, without a valid business reason, constitutes a per se violation of the Rehabilitation Act.

The record demonstrated that the Complainant's medical information was improperly accessed by her supervisor and co-workers. Thus, OEDCA concluded that a per se violation of the Rehabilitation Act had occurred.

**Bottom line:** While supervisors may be informed of an employee's diagnosis if it is related to work-related restrictions, need for accommodation, or medical leave, the unauthorized access of an employee's confidential medical records, without a legitimate reason, constitutes a per se violation of the Rehabilitation Act.

### **EEOC Judge's Order Overly Broad**

An EEOC Administrative Judge found that the Complainant was subjected to retaliation when he was terminated from his position five days after reporting workplace harassment.

OEDCA found that the Judge's decision was supported by substantial evidence. However, OEDCA found the portion of the Judge's decision requiring EEO training for "all employees" of the facility was overly broad.

OEDCA noted that an order for facility-wide action is considered overly broad when the record does not establish the existence of widespread discrimination/retaliation at the facility. Here, the retaliation was limited to one supervisor, who was not in a position to set a tone of leadership at the facility. Accordingly, OEDCA determined that the Judge's order for all employees to receive EEO training was overly broad.

On appeal, the Equal Employment Opportunity Commission's Office of Federal Operations (OFO) agreed with OEDCA's determination.

**Bottom line:** This case is part of a trend where EEOC judges are ordering expansive relief with respect to training and posting notices. While OEDCA fully supports holding officials accountable when findings of discrimination/retaliation are made, orders of relief should generally be tailored to the individual responsible for the retaliation.



