OEDCA DIGEST



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| Vol. XVII | Department of Veterans Affairs  Office of Employment Discrimination  Complaint Adjudication | Summer  2015 |

*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 2014. 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.**

**Confidentiality of Medical Information**

The complainant, a Medical Support Assistant, worked in the neurology service at a medical center. He received eye care services at the same facility. He alleged that his supervisor, without his authorization, accessed his medical records on five occasions in violation of the Rehabilitation Act of 1973.

An investigation by the medical center’s Information Security Officer and its Privacy and Freedom of Information Act Officer found that the supervisor acted outside the scope of her duties by accessing the complainant’s VA medical records. The supervisor testified that she had accessed the complainant’s medical records for the sole purpose of verifying that his medical appointments coincided with his leave requests.

The Rehabilitation Act limits an employer’s ability to make disability-related inquiries. The EEOC has held that an employee’s medical information may only be accessed and/or disclosed for legitimate business needs that are job-related. OEDCA found that a per se violation of the Rehabilitation Act occurred in this case because the supervisor’s actions were not consistent with business necessity.

**II.**

**Reasonable Accommodation and Office Morale**

In January 2012, while at home, complainant broke his ankle. He returned to work in May 2012 and to his position of Administrative Officer of the Day (AOD). AODs work rotating shifts. Subsequently, complainant was in a car accident attributed to medication he was taking because of his broken ankle. After the accident, complainant asked for a fixed tour of duty as a reasonable accommodation. He stated he could no longer drive and had to rely on public transportation to commute to work.

Complainant’s supervisor approved a 90 day fixed schedule. The supervisor testified that he was unwilling to extend the fixed schedule for more than 90 days because it might cause morale problems with other staff members.

The record established that after 90 days, the complainant still needed a fixed tour of tour based on his medical condition. Management officials denied the extension and informed the complainant that his only options were: (1) request a different reasonable accommodation; (2) request a reassignment; (3) “explore retirement options”; or (4) return to his prior schedule, i.e., rotating shifts.

OEDCA determined that complainant was a qualified individual covered by the Americans with Disabilities Act. OEDCA further noted that the EEOC has held a request for a modified schedule, such as daytime hours, is an appropriate reasonable accommodation. OEDCA determined that management officials failed to engage in an interactive process with the complainant when he requested an extension of his 90 day fixed schedule accommodation. Instead, the interactive process was cut off when management officials notified the complainant to resume a rotating shift schedule, retire, or be reassigned.

As discussed above, management officials had argued that providing complainant with a fixed permanent schedule would be seen by other employees as preferential treatment and could lead to lower morale. OEDCA held that management officials provided no evidence that staff morale suffered when complainant was on a 90 day fixed schedule. Furthermore, OEDCA wrote that “the potential of lower staff morale is not the type of undue hardship considered by the Rehabilitation Act.”

**III.**

**Reasonable Accommodation and Direct Threat**

Complainant was a Motor Vehicle Operator at a medical center. He spent 50% of his workday driving a patient/staff shuttle and 50% doing other activities such as landscaping and maintenance work. He suffered from a number of disabilities including anxiety and a panic disorder. Stressful situations caused him to have shortness of breath and lightheadedness. He was also susceptible to passing out when he was stressed.

In July 2010, complainant told his first level supervisor that he was uncomfortable driving the shuttle bus with people sitting behind him. Complainant testified that his supervisor offered no assistance to him.

In August 2010, the complainant injured his back while assisting a shuttle bus passenger. He was put on medication and restricted from driving the shuttle bus. He was placed on light duty which was unrelated to his mental disabilities.

In September 2010, complainant requested a reasonable accommodation for his anxiety disorder. He advised his supervisors that he could no longer have people sitting behind him on the shuttle. As a reasonable accommodation, he requested to be assigned duties other than driving the shuttle bus.

When complainant’s light duty restrictions ended, he was placed on a paid indefinite suspension pending the results of a fitness for duty exam. The exam was ordered to ascertain whether complainant was physically capable of performing his duties as a Motor Vehicle Operator.

In November 2010, the complainant stated that he was unable to work at any position at the medical facility.

An EEOC administrative judge found that management officials ignored complainant’s reasonable accommodation request. The judge determined that complainant’s supervisors

assumed that his anxiety disorder posed a direct threat thus rendering him unable to perform the duties of his Motor Vehicle position. The judge noted that management officials never attempted to reassign complainant or allow him to continue performing light duty that he was assigned to because of his back injury.

**IV.**

**Reasonable Accommodation and HIV**

Complainant, an Accounts Receivable Technician, was required to work front desk duty for four hours, one morning a week, to handle walk in inquiries. Complainant was diagnosed as HIV positive and took medication for his condition. The side effects of the medication caused complainant to experience fatigue, severe diarrhea, and lack of concentration.

Complainant was granted 3 months of Family Medical Leave because of his illness. In June 2010, as his FMLA leave was ending, he told his first level supervisor that he could no longer participate in rotating front desk duty because of his immune system deficits. He also asked for a reasonable accommodation to allow him more frequent restroom breaks.

In that same conversation, complainant was told to return to work or he would be placed in an AWOL status. Complainant returned to work and met with his first and second level supervisors. He again told them he could no longer meet directly with veterans because he feared bacterial and viral infections from ill patients. His supervisors told him it would be unfair to his co-workers if he did not take his turn performing rotating front desk duty.

After complainant’s return to work, he was subjected to heightened scrutiny regarding his attendance and bathroom use. Complainant missed 5 to 7 days a month because of his fatigue. When he arrived at work, he frequently had to use the restroom because he had soiled himself and needed to change his clothes. He was charged AWOL 5 times during the summer of 2010.

In June 2010, his first level supervisor directed one of complainant’s co-workers to monitor his restroom breaks and time away from his desk. This monitoring continued for 10 months. In December 2010, complainant submitted a written request for a reasonable accommodation for his HIV. He requested less direct contact with contagious patients, and less scrutiny about his bathroom use. In April 2011, he reminded his second level supervisor that his requests for reasonable accommodation had not been acted upon. In July 2012, complainant took a disability retirement.

An EEOC administrative judge found that the complainant was discriminated against based on his disability because he was denied a reasonable accommodation. The judge concluded that agency supervisors made no effort in June 2010 to discuss with complainant how to accommodate his need to avoid close contact with contagious patients. The judge explained that the supervisors’ reasoning that they could not treat complainant differently based on his disability when assigning him work violated the Americans with Disabilities Act which requires employers to treat their disabled workers differently by providing them with reasonable accommodations.

**V.**

**SEXUAL HARASSMENT AND CORRECTIVE ACTION**

Complainant was a part-time Pharmacy Technician at a medical center. She was subject to extreme sexual harassment by a Staff Pharmacist who was her co-worker. The harassment included, but was not limited to: asking complainant out on dates, requiring her to sit on his lap, and kissing and groping her. She reported the harassment to her first level supervisor and filed a police report. An agency investigation was promptly initiated and substantiated her sexual harassment claims. During the investigation, the co-worker and the complainant were assigned to different work locations and schedules. As a result, the complainant’s hours were reduced.

Shortly after the investigation ended, the complainant decided to resign. Her supervisor, however, asked her to remain until a replacement could be hired. Complainant worked an additional three months during which time the co-worker persisted in trying to see her by arriving at work when complainant was starting her shift and by visiting her new worksite.

Complainant testified that she resigned because of the continuing threat of sexual harassment by the co-worker. The record established that although the co-worker’s removal was proposed, he was never fired. Instead, he resigned because his pharmacy license was being suspended.

OEDCA found the complainant was discriminated against because of her sex. Specifically, agency officials failed to take appropriate corrective action as evidenced by the co-worker’s continued contact with the complainant and their failure to discipline him.

OEDCA concluded, “We find that the agency’s initial response in separating complainant and the coworker and investigating the charges was immediate and appropriate. Nevertheless, to the extent that the agency penalized complainant by reducing her hours to effect a separation, this action was not appropriate where it adversely affected complainant’s employment.”

**PRACTICE POINTER:** Appropriate corrective action must never disadvantage a sexual harassment victim. Thus, changing the complainant’s work schedule and reducing her work hours forced the complainant, a victim of sexual harassment, to bear the burden of her co-worker’s illegal conduct.

**VI.**

**Hostile Work Environment Based on Reprisal**

Complainant, an Engineering Equipment Operator, contacted an EEO Counselor in August 2010 alleging that his supervisor discriminated against him based on his race. Beginning in November 2010, the complainant alleged he was reprised against when his

supervisor regularly denied his leave requests, threatened to fire him, and berated him in front of his co-workers.

Another incident of race discrimination and reprisal occurred in December 2011 when the supervisor gave all the equipment operators, except the complainant, cold weather gear including jackets, pants, gloves, and boots. When complainant complained, he was told “You don’t need it”. His supervisor also told him “If you start acting right, you probably can get a lot more stuff.” A co-worker testified that after this incident, he heard complainant’s supervisor refer to complainant as a “lazy black ass”.

In February 2012, the complainant had an anxiety attack at work. Coworkers assisted him to the emergency room. Even though his supervisor knew that complainant was taken to the emergency room he was charged AWOL.

An EEOC administrative judge found that the complainant was subjected to a hostile work environment based on reprisal for his protected EEO activity. The judge determined that although the complainant repeatedly raised his concerns with upper management officials about his supervisor’s retaliatory treatment, nothing was done to stop it.

The VA argued that supervisors have a right to make daily decisions. While the judge agreed that in general this position was correct, it did not mean that a supervisor can tell an employee who has filed an EEO complaint that if he started to “act right” he would get “more stuff”. The judge also stated that a supervisor may not arbitrarily suspend an employee or deny him leave because of his EEO activity.

**VII.**

**Non-Selection Based on Race and Reprisal**

Complainant applied for a Fire Chief position at a VA hospital. Despite exceeding the qualifications and experience requirements for the position, he was not interviewed or selected.

Evidence of record showed that the selecting official asked a HR specialist to disqualify the complainant from consideration because of his prior EEO activity. It was further shown that the selecting official and other members of the selection panel improperly downgraded the complainant’s experience and qualifications and then added points to the selectee’s score that did not reflect his experience and qualifications. Their rationale for the scoring irregularities was that there were inadvertent “scoring errors”.

OEDCA found that the complainant established a prima facie case of reprisal because he had recently filed an EEO complaint against the selecting official. Further, there was direct evidence of reprisal as reported by the HR specialist. She testified credibly that the selecting official had tried to persuade her to disqualify the complainant from consideration because he had an EEO complaint pending in Federal Court.

The HR specialist also testified that she believed the selecting official’s request was unethical and reported it to upper management. She further stated that management officials did not follow-up on her concerns about the selecting official’s remarks, and denied her request to be removed from processing the vacancy announcement.

**VIII.**

**Harassment Based on Sexual Orientation**

Complainant, a female, worked as a Police Service dispatcher at a VA medical center. In early 2012, she learned that the Assistant Chief of Police, a male, had expressed his personal views about her sexuality to her co-workers. Three co-workers testified that the Assistant Chief of Police had referred to the complainant as a lesbian and a dyke. These remarks were made over a two year period.

After one of the co-workers reported the statements to the Police Chief, who was female. she confronted the Assistant Chief who denied making the remarks. The Police Chief testified that she told the Assistant Chief he needed to keep things “professional”, but did no further investigation into the veracity of the sexual comments made about the complainant. The Police Chief testified that both her supervisor, the Associate Director for Finance and Operations and a Labor and Relations Specialist told her that “too much time had elapsed and nothing could be done”.

After complainant sent an email complaining about the Assistant Chief’s harassment to the Associate Director, he spoke to the Assistant Chief who again denied making comments about the complainant’s sexual orientation. In response, the Associate Director told the Assistant Chief that there was “zero tolerance” for such conduct.

The Associate Director then directed the facility’s EEO specialist to arrange for EEO training for the entire Police Service. During this same time period, complainant requested a reassignment so she would not have to interact with the Assistant Police Chief, but it was denied by the Associate Director. He testified that he did not have authority to reassign her.

OEDCA found that the complainant was harassed based on her sex by the Assistant Police Chief and that management officials failed to take effective remedial action to end the harassment. First, OEDCA determined that the Assistant Chief, despite his denials, did make repeated negative comments and used slurs to describe complainant’s sexual orientation. OEDCA found that these comments were sufficiently severe and pervasive to create a hostile work environment.

Second, OEDCA found that management officials failed to exercise reasonable care to prevent and promptly correct the Assistant Chief’s harassment of the complainant. While EEO training was ordered for the entire Police Service, no action was taken to specifically address the Assistant Police Chief’s harassment of the complainant. For example, the Associate Director made no effort to talk to other witnesses or conduct a fact-finding investigation after he first learned about complainant’s allegations.

OEDCA rejected the Associate Director’s claim that he lacked authority to reassign the complainant. OEDCA cited to EEOC case law holding that if an employee requests reassignment to escape a hostile work environment, it is not permissible for management officials to reject the reassignment request because they lack authority to approve the reassignment.

**IX.**

**Parking Space as Reasonable Accommodation**

Complainant, a Veterans Claims Examiner, was a qualified individual with a disability due to several serious heart conditions and osteoarthritis. The VA Regional Office (VARO) had allowed her, as a reasonable accommodation, to park in a shed area for several years. The shed area was close to the VARO’s front door. However, in September 2011, the VARO Director instituted a new policy requiring all employees seeking disabled parking, as a reasonable accommodation, to reapply for spaces in the shed area.

In October 2011, the complainant submitted a written request to park in the shed area and provided supporting medical documentation. Despite the adequacy of her medical documentation her request to continue parking in the shed area was repeatedly denied and she was told she needed to provide additional medical documentation.

In January 2013, 15 months after the complainant submitted her original request for reasonable accommodation, she was allowed to park in the shed area as an interim accommodation. In July 2013, a determination was made that the complainant could also telework as a reasonable accommodation.

OEDCA determined that the 21 month delay in providing the complainant a reasonable accommodation was too long and violated the Rehabilitation Act. It further found that it was not an undue hardship to allow complainant to park in the shed area because other non-disabled employees, including members of the Director’s staff, were allowed to do so.

**X.**

**Reasonable Accommodation Not Processed**

In November 2011, the complainant, who is disabled, requested an ergonomic chair to alleviate her back pain. Her supervisor mistakenly processed the complainant’s request under the facility’s ergonomic program rather than as a request for a reasonable accommodation. In December 2011, the supervisor requested an evaluation of the complainant’s need for an ergonomic chair through the facility’s ergonomic program website.

Several weeks passed, but the complainant was not contacted about her reasonable accommodation request. In February 2012, her supervisor submitted a second request for an ergonomic evaluation of the complainant.

In late February 2012, the complainant resigned. Her request for an ergonomic evaluation was closed.

An EEOC Administrative Judge found that management officials failed to engage in an interactive process with complainant and failed to show that accommodating her request for an ergonomic chair would case an undue hardship.

**XI.**

**Destroyed Interview Notes Result in Finding**

In April 2011, the complainant, who is African-American and dark-skinned, applied for a position as a Supervisory Maintenance Mechanic. He was not selected for the position; instead, a Caucasian candidate was selected.

An EEOC Administrative Judge found several irregularities with the selection process. First, the selecting official, who is African-American and light skinned, was the complainant’s supervisor. He had consistently rated the complainant as outstanding in his annual evaluations.

Second, despite the complainant’s extensive experience, he was deemed to be only minimally qualified for the vacancy. Third, the complainant’s was never rated for the vacancy--he had no scores although the other candidates referred for selection were all rated.

More importantly, notes related to his non-selection were not part of the evidence of record, although the interview notes for the other candidates were provided.

Finally, the complainant credibly testified that the selecting official told him that the real reason he was not selected was because he didn’t want to show “favoritism” toward the complainant.

The administrative judge found that the VA intentionally destroyed the interview notes related to complainant’s application. As such, the VA violated the EEOC’s recordkeeping requirements by failing to retain the interview notes. The judge further drew an adverse inference against the VA by finding that had the interview notes been retained and produced, the notes would have been adverse to the VA’s case.

**XII.**

**National Origin Harassment**

The complainant, a Medical Support Technician, worked at a VA hospital. She was originally from Trinidad. At the time of her complaint, she was serving a two year probationary period.

Complainant’s co-workers subjected her to ongoing verbal harassment based on her color and national origin. She was criticized for her Caribbean nationality and told she was like everyone else except she had “nice hair and could swim”. When she asked what bologna was, a co-worker chided her and said “you probably didn’t grow up drinking red Kool-Aid either”.

As a result of the ongoing harassment, the complainant tried not to engage her co-workers in conversations that were not work related. They then stopped speaking to her and refused to answer her work related questions.

The complainant notified her supervisor about the harassment, but he did nothing. When she requested a reassignment, her supervisor told her she needed to get along with her co-workers like “family”.

The supervisor also told complainant that she may have misconstrued her co-workers’ jokes and opined that she might have “island pride” that kept her from communicating effectively with her co-workers.

Shortly thereafter, complainant was removed during her probationary period because she had “conduct issues that result in conflicts with fellow employees and disrupt the work environment”.

OEDCA found that complainant was harassed, based on her national origin and color, by her co-workers. OEDCA further found that management officials took no action to stop the harassment and that complainant’s removal was unlawful.

**XIII.**

**National Origin Harassment and Discrimination**

The complainant was employed as an Ophthalmologist at a medical Center. He alleged that he was discriminated and harassed based on his national origin (Korean) when he was routinely treated differently than two of his American co-workers. He testified that his co-workers made and circulated false information about him related to his attendance and record keeping. They also accused him of violating ethics regulations when he accepted a gift card from a patient which he used to purchase food for the clinic. He further testified that he was not included in decision making at the clinic and received low proficiency ratings that did not accurately reflect his work.

The complainant also alleged that his first level supervisor reprised against him after he reported harassment by his colleagues. According to the complainant, the reprisal included lowering his performance ratings and failing to investigate his harassment claims.

After conducting a hearing, an EEOC Administrative Judge found that the complainant was reprised against and harassed based on his national origin. He cited to the testimony of disinterested witnesses in concluding that the complainant was routinely treated differently than his American colleagues. He further determined that the agency conducted a cursory investigation of complainant’s harassment claims. The investigation lasted less than 48 hours and consisted of interviewing clerks in the complainant’s clinic. The complainant was not interviewed and no report was written or given to him.

**XIV.**

**Sexual Orientation Harassment**

Complainant is a female who identified her sexual orientation as lesbian. She was employed as a Medical Correspondence Clerk at a medical Center. She began working at the facility in November 2012 and was serving a probationary period. In September 2013, she was terminated because she was not meeting average processing metrics.

In her complaint, she alleged that her first level supervisor harassed and ultimately terminated her because of her sexual orientation. The complainant testified that in the summer of 2013, her supervisor made various derogatory remarks to her including “tell your wife to be nicer to you at night, so that you’re perkier in the morning” and “you were flirting with that female customer!”

The complainant further testified that her supervisor singled her out, due to her sexual orientation, when she placed information on her chair about same-sex health insurance benefits. Finally, the complainant stated that her supervisor refused to open the office door for complainant’s wife.

OEDCA found that management’s reason for terminating complainant was a pretext for discrimination. The evidence of record established that a similarly situated female employee, who was not a lesbian, also was not meeting the performance metrics, but she was not terminated. OEDCA determined that the real motivation for complainant’s termination was a bias against her because she failed to conform to female gender stereotypes.