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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. It is 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 2012. The findings are 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

EVIDENCE DID NOT SUPPORT "URGENT" NEED TO HIRE

Complainant was selected for a nursing position subject to a pre-employment physical scheduled for July 26, 2010. Prior to the physical, Complainant underwent surgery. Her doctor provided medical documentation that Complainant would be unable to begin work until August 21, 2010.

An agency physician subsequently conducted Complainant's pre-employment physical. While he "did not find any disqualifying features" he did not clear Complainant to work based on her doctor's note. The agency physician indicated that Complainant could be re-evaluated on or after the date her doctor released her to work. The Selecting Official rescinded the job offer testifying that she could not wait until August 21, 2010 to fill the position.

Complainant then submitted a note from her doctor releasing her to start working immediately, albeit with a ten-pound lifting restriction, but the decision to rescind the job offer remained. The position was offered to four other applicants. The ultimate selectee began working in February 2011.

The Selecting Official violated the Rehabilitation Act by rescinding the job offer based on her belief that Complainant would be unable to perform the duties of the position. The rationale for rescinding the job offer due to "urgency" was not supported by the evidence because the position remained open for six months before it was filled by another applicant.

II.

MANAGEMENT ERRS BY SELECTING LESS QUALIFIED CANDIDATE

Complainant, a GS-11 IT Specialist, had a back impairment that made it difficult for him to walk without a cane. He applied for a GS-12 IT Specialist position, but was not selected even though he was rated highest by the selection panel. The Selecting Official ignored the selection panel's recommendation and selected another candidate.

OEDCA found that management's reasons for not selecting Complainant were not credible. The Selecting Official testified that the selectee was rated higher in the initial interview when in fact Complainant was rated higher. He also stated that Complainant's acting supervisor and former supervisor both preferred the selectee and regarded Complainant's "productivity, output, knowledge and skills" as much lower than the selectee's.

The former supervisor, however, said that he did not recommend the selectee and was not consulted prior to the selection. The acting supervisor testified that he regarded the selectee and the Complainant as equally qualified. Finally, the Selecting Official testified that the selectee was more qualified because of his familiarity with a specific programming language. However, there was nothing in the position description requiring knowledge of the specific programming language.

III.

PLAINLY SUPPERIOR CREDENTIALS TRUMP DISCRIMINATORY SELECTIONS

In making hiring decisions, managers must choose the candidate who is most qualified for the position. If two candidates have similar

credentials or are equally qualified, managers have discretion to select the candidate who will be the best fit for the job. When a candidate is not selected, but possesses qualifications that are plainly superior to those of the selectee, an inference of discrimination may be found.

Two findings by EEOC Administrative Judges illustrate discriminatory selection processes. In the first case, the Complainant, an African American female, applied for a Program Specialist position. Despite her extensive work experience, outstanding performance appraisals, and many performance awards, she was not selected.

Compared to the Selectee, who only had two years of work experience, the Complainant had ten years of experience and was performing the duties of the position. Her supervisor's feedback was significantly more favorable than the Selectee's, but was purposely excluded from consideration by management officials.

The judge determined that the Complainant was discriminated against based on her sex and race because her qualifications were plainly superior to those of the Selectee. The judge further found that management failed to articulate legitimate, non-discriminatory reasons for her non-selection.

In the second case, the Complainant, a 48 year old woman, had a graduate degree in social work and 27 years of work experience when she applied for a Social Worker position. Despite her qualifications, she was not selected. The record established that she had served on numerous professional social work committees and work groups and had worked closely with intern social workers and physicians on patient care issues. Furthermore, she was a published author in her field and was a recipient of a "Social Worker of the Year" award.

In contrast, the Selectee, a male in his 20s, has less experience, expertise, and professional recognition than the Complainant. Nonetheless, the Agency selected the younger male candidate. Selecting officials attempted to justify their selection by stating that they preferred the more "eager" candidate.

The judge concluded that based on the Complainant's superior credentials and the qualifications of the position, she was the more qualified candidate.

Since the Agency failed to articulate a credible and legitimate reason for its selection decision, the judge found pretext on the bases of age and sex. The evidence clearly established a glaring disparity between the Complainant's qualifications and those of the Selectee.

IV.

REASONABLE ACCOMMODATION AND VIRTUAL EMPLOYEES

More and more employees will find themselves working from virtual locations on a long term or permanent basis as the VA reduces its leasing of office space. In a case of first impression, OEDCA determined that a VA virtual employee was subject to unlawful discrimination, based on her physical disability, when the Department failed to provide her with an ergonomic chair for her home office.

Unlike an employee who elects to telework one or two days a week, the Complainant was informed during the hiring process that she would be required to work at home on a full time basis until other employees were hired in the Denver area. She was further advised that the VA would then either rent space or find a telework center for its employees.

The Complainant submitted a telework proposal in March 2009 including a request for an

ergonomic chair as a reasonable accommodation for her back and shoulder conditions. The Complainant noted that when she had previously worked for the VA in a traditional office setting, she was provided with an ergonomic chair as a reasonable accommodation. After several inquiries by the Complainant, she was informed in November 2009 that her request for an ergonomic chair for her home office could not be granted. The VA cited its telework policy which provides that it is the employee's responsibility to provide the particular furniture she needs to work at home.

Subsequently, the Complainant contacted an EEO counselor. Shortly thereafter, she was reassigned to the Denver Federal Center as a reasonable accommodation and provided with an ergonomic chair. The Complainant then alleged that her reassignment was in reprisal for her protected EEO activity. She argued that she was hired to work from her home and that management retaliated against her by reassigning her to the Denver Federal Center.

In regard to Complainant's reasonable accommodation claim, OEDCA determined that the Rehabilitation Act takes precedence over the Department's telework policy. OEDCA found that Complainant was not a telework employee, but rather a virtual employee who was forced to work at home because of Agency needs. Thus, the Rehabilitation Act required the VA to modify the Complainant's work environment, including purchasing an ergonomic chair for her home office, to ensure that she could perform the essential functions of her position.

However, OEDCA found that the Complainant was not reprised against when she was moved to the Denver Federal Center. First, the Complainant was on notice when she was hired that she may eventually end up working at a VA facility or telework center as more employees were hired. Second, the Complainant's reassignment to the Denver Federal Center was made as a reasonable accommodation for her disability. The EEOC has held that an individual with a disability under the Rehabilitation Act has the right to an effective accommodation, but the accommodation may or may not be the accommodation of the employee's choice.

In this case, there were two available options to provide Complainant with a reasonable accommodation---either management could provide the ergonomic chair for her home office or she could be reassigned to an office location and provided with an ergonomic chair. OEDCA found that either option was an effective accommodation and that management was not required to provide the accommodation preferred by the complainant.

V.

GOOD FAITH EFFORTS MUST ADDRESS ALL REASONABLE ACCOMMODATION REQUESTS

The Complainant, a Radiologist Technician, suffered hearing loss in both of her ears and wore hearing aids to help amplify sound.

She was verbally counseled after failing to respond to her pager when she was on-call. At that time, she made management aware that the pager was not effective in alerting her. She stated that she was unable to hear it at night when her hearing aids were removed.

Management immediately engaged the Complainant in the interactive process. It took the initiative of contacting the Joint Accommodation Network (JAN) who assisted with identifying options of more effective ways of contacting the Complainant when she was on-call. The options included providing a vibrating Bluetooth bracelet pager, a different type of pager which was used by physicians, and a higher quality pager with varied pitches, and capabilities of ringing several different

phones. Although the first two options proved to be ineffective, management continued to work with the Complainant to identify an effective accommodation.

Complainant asked for a second accommodation involving the installation of sound panels in the lab where she worked. Management denied the request on the basis that an evaluation conducted by OSHA determined that the lab was within normal sound decibel limits.

Management stated that although the sound might be a nuisance, it was not a health hazard. After management was informed of OSHA's findings, they concluded that they were not responsible for providing an accommodation to the Complainant and ignored her request for six months until the she again asked that sound panels be installed in the lab.

Federal regulations provide that employers have an obligation to engage an employee in an interactive process and provide an effective reasonable accommodation if the employee is able to perform the essential functions of the job. OSHA's evaluation of safety requirements didn't exempt management from providing Complainant with an accommodation.

When management finally attempted to address Complainant's request for accommodation in the lab, the options they proposed were ineffective. As a result of management's delayed response, OEDCA determined that management failed to act in good faith.

VI.

INTERACTIVE PROCESS NOT PROVIDED TO EMPLOYEE WITH PTSD

The Complainant was a Veterans Service Representative (VSR) for the Gulf War on Terror Team. The Complainant initially performed his assigned duties well, however, when his duties were expanded to include speaking directly with suicidal veterans, his PTSD symptoms were exacerbated.

Complainant testified that he experienced increased levels of anxiety which made it difficult for him to complete his work assignments. As a reasonable accommodation, he requested reassignment to another service team. The Complainant's accommodation request was denied and he was placed on a Performance Improvement Plan (PIP) due to poor performance.

OEDCA found that the Complainant was discriminated against when his reasonable accommodation request was denied. OEDCA cited management for failing to engage the Complainant in the interactive process as the basis for the finding. Specifically, management should have engaged complainant in the interactive process to determine if there were alternative accommodations which would have met his medical needs.

While reassignment is usually an accommodation of last resort, managers should note that reassignment is an option that must be explored in the event that (1) no other accommodation will enable the employee to perform the essential functions of his current position or (2) all other accommodations would impose an undue hardship. See 29 C.F.R Section 1630.

VII.

NO UNDUE HARDSHIP FOR LWOP TAKEN AS A REASONABLE ACCOMMODATION

After sustaining an on-the-job back injury in 2008, Complainant was reassigned to a light duty position in the Eye Clinic. The Complainant had a history of depression since she was 16. In February 2009 she suffered an episode of depression that was exacerbated by her co-workers' treatment. She was hospitalized for one week in February 2009 and one week in May 2009.

In June 2009, the Complainant had an emotional episode at work and went to the emergency room. Her physician advised management that she would not be able to return to work for four to six weeks. While Management allowed Complainant to take LWOP as a reasonable accommodation, she was later terminated because her absences were impacting the clinic's operations and creating an undue hardship.

An EEOC Administrative Judge concluded, that Complainant's use of LWOP was not excessive and that allowing her to take LWOP as a reasonable accommodation did not result in an undue hardship for the facility.

The AJ also reasoned that because the Complainant provided sufficient medical documentation indicating a reasonable anticipated return date she should not have been terminated.

VIII.

EXTENDED ABSENCE MAY NOT SUPPORT TERMINATION

Complainant, a temporary Housekeeping Aid, was terminated due to extended absences. Management was aware of his 100% service related disability when he applied for the position. He subsequently applied for a permanent Housekeeping position, but his supervisor told HR not to consider it because of the Complainant's time and attendance problems.

After the Complainant contacted HR to inquire about his application, he was told that he was not selected and that he was being removed from his temporary position because of his attendance problems.

While the Complainant admitted to being absent, most of his absences stemmed from medical treatment and hospitalization related to his disabilities. The Complainant submitted medical documentation to his immediate supervisor but was advised that he would still be terminated. It wasn't until after his first level supervisor issued a Notice of Termination, that the second level supervisor realized that the Complainant did indeed have supporting medical documentation and should not be terminated. The Notice of Termination was rescinded.

Although his termination was rescinded, the Complainant filed a complaint concerning it. Several months later, the Complainant was issued a written counseling advising him that if his attendance did not improve, he would be placed on sick leave restriction. Two weeks after receiving the written counseling, the Complainant was informed again that he was being terminated due to excessive absenteeism.

Excessive absenteeism does not always constitute a legitimate business reason for terminating an employee. An EEOC Administrative Judge ruled that because Complainant submitted medical documentation to substantiate his absences, his termination was unreasonable. The judge found that because his supervisors were aware of Complainant's 100% disability rating, they

should have anticipated that he would be absent due to illness or hospitalization.

The AJ also concluded that the Complainant was treated disparately based on reprisal. The judge found that there were other employees who were granted LWOP, but were not subjected to harassing conduct, and not disciplined for excessive absences after providing medical documentation. The fact that the Complainant missed too many days of work, the judge concluded, did not justify his termination.

Before terminating an employee, supervisors must take into consideration medical reasons which may necessitate an employee's use of frequent leave. Leave is a form of reasonable accommodation which should be explored before terminating an employee.

IX.

RECOVERING ALCOHOLIC SUBJECTED TO DISABILITY DISCRIMINATION

The Complainant, a recovering alcoholic and registered nurse, was subjected to discrimination on the basis of disability. Although Complainant admitted that she had an alcohol problem and took the proper steps to treat her addiction, she was under constant scrutiny and faced hostility while on the job.

Prior to voluntarily entering into the Health Providers Services Program (HPSP), Complainant successfully completed treatment through a local outpatient program. After nearly a year of providing urine samples to test for alcohol through the HPSP, Complainant was notified that she failed to provide one sample when she was called. Complainant believed that she never missed an appointment and there are no records from the office to confirm that she missed an appointment.

Complainant later submitted two samples that were diluted and did not provide accurate results. Complainant believed that her results were diluted because of diet soda she consumed during her 12 hour work shift. However, because she provided two diluted samples and missed one appointment, she was dismissed from HPSP and was no longer allowed to have patient contact in her position as a registered nurse.

In order to prove her sobriety, complainant underwent two reevaluations with the local treatment program that corroborated her state of "alcohol dependence in full remission". Despite proving her sobriety, Complainant's supervisor offered her an ultimatum of signing a last chance agreement or be terminated. The agreement stipulated that Complainant would be terminated from her position if she violated vaguely described conditions. Complainant refused to sign the document and was terminated.

Under the Rehabilitation Act of 1973, employers are prohibited from discriminating against qualified disabled individuals. In this case, complainant was a recovering alcoholic who was treated disparately based on her alcoholism, which is a disability. The Administrative Judge found that the agency never investigated the accuracy of HPSP's allegations against the Complainant, and that no agency official verified whether such documentation existed to determine whether Complainant missed tests. The judge also held that in the absence of an individualized assessment, the VA could not show that concerns regarding any potential risk posed by the Complainant's disability were supported by the facts of her condition.

X.

MALE-TO-MALE SEXUAL HARASSMENT REQUIRES PROMPT AND EFFECTIVE MANAGEMENT RESPONSE

The Complainant, male, complained to his supervisor that a male co-worker made negative comments about his sexuality, used homophobic gestures, and spoke in a feminine voice to ridicule him. The co-worker also placed his hand on the Complainant's thigh and asked if he "preferred white or black boys." The Complainant testified that he was embarrassed and uncomfortable by the co-worker's conduct.

The supervisor met with both the Complainant and the co-worker and concluded that despite the Complainant's characterization of the incidents as sexual harassment, it was simply a matter of unprofessional behavior between the two men. The Complainant and the co-worker remained in close proximity to each other because their cubicles faced each other. After continuing to complain for over a month, the Complainant was finally moved to another cubicle but still in the same work area as the harasser.

It took yet another month before the harasser was finally moved from the work area. Meanwhile, the Complainant was continually harassed and experienced extreme nervousness, fear, and depression.

OEDCA found that the Complainant was subjected to sexual harassment by his co-worker and that management officials failed to take effective and immediate actions to address it. The first major error was minimizing the serious nature of the events that took place and perceiving the events as misunderstandings and unprofessional behavior between two co-workers rather than sexual harassment. Management officials further erred because the actions they took were too little and too late as evidenced by the continued harassment of the Complainant.

XI.

FEMALE-TO-FEMALE SEXUAL HARASSMENT REQUIRES PROMPT AND EFFECTIVE MANAGEMENT RESPONSE

Complainant, female, was the subject of sexual harassment by a female co-worker. The harassment included frequent phone calls, stalking, invitations for an intimate relationship, and arranging business travel and logistics to coordinate with those of the Complainant.

After the Complainant told the coworker that her conduct was unwelcome, she continued to call the Complainant excessively (15-20 times within 3 days) and again expressed interest in having a sexual relationship. Also, during a business conference the Complainant was forced to change hotels due to the co-worker's stalking of her.

The Complainant reported these incidents to management officials, but they failed to take prompt effective action to address the harassing behavior. It took management officials four months to counsel the harasser and over a year to finally remove the coworker from her supervisory position. She was ultimately issued a letter of reprimand and required to undergo sexual harassment training.

XII.

DISCIPLINARY ACTIONS TO ADDRESS HARRASSMENT MUST BE EFFECTIVE OR VA LIABLE

While at a VA sponsored conference, two events occurred which the Complainant, a male, found sexually offensive. The first incident involved the facility EEO manager, who while

extremely intoxicated, made sexually explicit gestures and comments to the Complainant including grabbing his buttocks, lunging at him, and indicating that she wanted to "dry hump" him.

The next morning, the Complainant's supervisor called him over to his table at breakfast and asked him to turn around, and then made a comment about Complainant's buttocks and laughed. The Complainant testified that not only were these incidents humiliating and embarrassing, but they also made him feel so uncomfortable that he transferred to a lower paying position in a different department.

The EEO Manager was verbally counseled about her behavior and she offered to apologize to the Complainant. According to management officials, an oral counseling was sufficient discipline because they viewed the EEO Manager's conduct as isolated and resulted from her intoxication. No discipline was given to the Complainant's supervisor. Also, no investigation was conducted because management officials did not want to further embarrass the Complainant.

An EEOC administrative judge found that the Complainant was subjected to sexual harassment by both the EEO Manager and his supervisor. Although the EEO Manager's sexual harassment of the Complainant occurred only once, the judge determined it was blatant and would be viewed as severe by a reasonable person. The judge further concluded that Complainant's supervisor did nothing to remedy the situation, and instead made dismissive comments in public about what happened to the Complainant the night before.

The judge concluded that the VA was liable for the sexual harassment because agency managers knew about the conduct and failed to take prompt corrective action. And the action that was taken, an oral counseling, was an inadequate response to Complainant's sexual harassment allegations. Complainant's supervisor's comments, while less severe, were insensitive, dismissive, and indicative of management's view that the EEO Manager's conduct was not to be taken seriously.

XIII.

SUPERVISOR'S REPEATED WORKPLACE KISSING HARASSING

Harassment based on sex or other prohibited discriminatory bases is similar to hostile environment sexual harassment, except that it is not sexual in nature. In this case, the Complainant was subjected to unwelcome conduct by her supervisor who frequently yelled and threatened to take disciplinary action against her and then apologized by kissing her on the hand or forehead.

Although the kisses were of a non-sexual nature, they were unwelcomed by the Complainant who told her supervisor not to touch her in this way. The supervisor also admitted making chauvinistic comments about female employees referring to them as his underlings and telling them that they should obey men.

While the supervisor stated that his kisses were platonic and intended to show appreciation, his behavior was perceived by the Complainant and other female employees as abusive, disgusting and degrading. When the Complainant and other female staff complained to management officials, the supervisor was merely counseled and directed to take a course to improve his management skills.

OEDCA found harassment based on sex because management officials failed to investigate and take prompt and effective action. Additionally, the discipline of the harasser was not appropriate and immediate.

XIV.

WORKPLACE RUMORS LEAD TO HARASSMENT FINDING

Harassment, sometimes referred to as hostile work environment, continues to be the most frequent claim when discrimination complaints are filed against the VA. It may be found when co-workers or management officials make racial slurs or ethnic jokes, or engage in negative stereotyping based on an employee's protected basis, such as gender or age. To be legally actionable, the harassment must be both objectively and subjectively offensive, such that a reasonable person would find it to be hostile or abusive, and the employee perceived the environment to be hostile or abusive.

The VA may avoid liability for a hostile work environment caused by co-workers if it can establish that: (1) the conduct complained of did not occur; (2) the conduct complained of was not unwelcome; (3) the alleged harassment was not sufficiently severe or pervasive to alter the conditions of the victim's employment; and (4) immediate and appropriate corrective action was taken as soon as the agency was put on notice.

An Equal Employment Opportunity Administrative Judge determined that a former employee was subjected to unlawful harassment when he was the subject of workplace rumors that destroyed his professional career and personal reputation. The Complainant, a male who had no disability and was physically fit, was a supervisor at a Medical Center. However, due to personal stress unrelated to the workplace, he began losing a noticeable amount of weight in the spring of 2008.

On June 3, 2008, several of his co-workers began spreading rumors throughout the facility that the Complainant had AIDS and was gay. The co-workers included one of the Complainant's subordinates and a member of the facility's police department. According to the administrative judge's decision, "Like wildfire, the rumors spread quickly throughout the workplace. Fanned by the Complainant's recent weight loss, the rumors made their way throughout the Agency, evolving from Complainant's perceived health status to his perceived sexual orientation".

The Complainant promptly informed management officials on June 3rd about the rumors and asked that appropriate action be taken. Two investigations were initiated--- the first, a police investigation was concluded in late July 2008, finding that no threat or criminal activity had occurred. On July 29, 2008, an EEO investigation began.

As part of the medical facility's response, its director sent an email to all employees on June 20, 2008 under the generic caption "Director's Weekly Message" wherein he admonished them not to spread rumors in the workplace. The employees responsible for spreading the rumors were reprimanded and required to attend video EEO training in early September 2008. Complainant's subordinate, who had started the rumor, was reassigned.

In December 2008, six months after the rumors started, the facility updated its "Disruptive Behavior Policy". However, this policy update did not include disciplinary actions for making false statements to a third party, nor did it specifically address rumors in the workplace. Despite these actions, the rumors about complainant continued to circulate spreading to the local community.

According to the administrative judge's decision, the Complainant was told by a woman he asked out for a date that "she did not date gay men and people with AIDS". As late as

November 2008, after he had left employment with the VA, the Complainant was still confronting these rumors. In that month, he ran into a former co-worker who told him "They tell me you're sick, and you got AIDs".

At the hearing, testimony established that the Complainant's mental health deteriorated due to the unchecked rumors. He experienced paranoia and other emotional problems. He was unable to return to the workplace and was subsequently granted a disability retirement.

The administrative judge found the Complainant met his burden to show that he was subjected to hostile environment harassment based on perceived disability (HIV/AIDs) and gender. The judge also found that the remedial measures put in place by management after the Complainant brought the rumors to their attention were "ineffective and not immediate". The administrative judge concluded that the EEO training provided by the facility was ineffective because none of those who were required to attend could remember anything about it!

She also determined that the "Director's Weekly Message" email was not immediate and did not address the specific rumor spreading at the facility. In regard to the facility's "Disruptive Behavior Policy" update, the administrative judge wrote, "As the Agency was so saturated with serious falsehoods, gossip, and innuendos regarding the rumors circulating about Complainant, I find this policy was not an effective response".

XV.

AGENCY LIABLE FOR RETALIATORY HARASSMENT

The Complainant had a history of filing EEO complaints. When she subsequently requested a reasonable accommodation and leave under the Family and Medical Leave Act (FMLA), her supervisor refused to sign the reasonable accommodation forms, would not accept her medical certification for FMLA leave. and refused to sign her disability retirement application. The supervisor also charged the Complainant AWOL when she requested LWOP under the FMLA, issued her a proposed reprimand for AWOL, and reassigned her to a small room to do patient scheduling without a telephone. The supervisor also testified that she heard that the Complainant was a "trouble maker who filed EEO complaints".

Complainant testified that her supervisor's failure to accommodate her disability caused her an insurmountable amount of stress that ultimately led to her resignation.

OEDCA found that the supervisor's comments and actions created an unlawful hostile work environment and that the agency was liable for the supervisor's actions. The record established that although the Complainant complained about the harassment to management officials and the EEO Office, there was no investigation of her claims and no action was taken to stop the harassment. OEDCA further found that the Complainant's resignation was a constructive discharge because of the intolerable working conditions created by her supervisor.

XVI.

PER SE REPRISAL DISRUPTS THE EEO PROCESS

The Complainant, a Patient Service Assistant, was subjected to harassment when she was a witness in an EEO investigation. She was asked to provide a statement in connection with a sexual harassment complaint filed by a coworker against Complainant's second level supervisor.

A Human Resource employee subsequently contacted the Complainant by telephone. During the conversation, the Complainant

allegedly mentioned inappropriate behavior that the supervisor exhibited toward her. After the conversation, the HR employee asked Complainant to submit a written Report of Contact (ROC) to document the details of their conversation for the record.

The HR employee contacted the Complainant numerous times to complete the ROC. When Complainant finally submitted the ROC, the HR employee asked her to rewrite it because it did not contain the explicit details discussed during their phone interview. The HR employee put even more pressure on the Complainant by contacting her immediate supervisor about her lack of cooperation. The supervisor then threatened to revoke Complainant's Last Chance Agreement if she did not change her ROC.

OEDCA made a per se reprisal finding based on the HR employee's conduct. OEDCA found the conduct had a chilling effect on the EEO process and the HR employee's demands concerning the ROC were overbearing, threatening, and intimidating. Moreover, the HR employee's contact with Complainant's supervisor, who threatened the Complainant with disciplinary action if she failed to submit a re-written ROC, rose to the level of conduct of conduct reasonably likely to deter protected EEO activity.

XVII.

COMMENTS MADE BY SUPERVISOR CONSTITUTE PER SE REPRISAL

The Complainant, a Grounds Maintenance Laborer, was the only female in her work unit. After discovering a pornographic magazine in a unisex bathroom, the Complainant reported it to her immediate supervisor and VA police. The VA police conducted an investigation and found six pornographic magazines in the bathroom.

Following the investigation, the Complainant's supervisor threatened to remove her and accused her of being a "snitch". Complainant reported her supervisor's conduct and he was suspended. However, he continued to make threats against the Complainant and told her to "watch her back" because she filed an EEO complaint which resulted in his suspension.

An EEOC Administrative judge found that the supervisor's comments constituted per se reprisal because they interfered with Complainant's EEO rights even though upper level management officials did take prompt and effective action by disciplining him for his sexually harassing conduct of the Complainant.

XVIII.

AGENCY LIABLE FOR FAILING TO HIRE AND PROMOTE EMPOLOYEE TO HIGHER GRADE DUE TO RACE, SEX, AND AGE

The Complainant, a 48-year old, black male, was hired as a GS-4 Medical Support Assistant in a GS-4/5 career ladder position. The vacancy announcement provided that a four-year degree substituted for experience at the GS-5 level. The Complainant had a four-year degree. A 25-year old white female hired under the same vacancy began at the GS-5 level. She had experience as a Medical Support Assistant, but no four-year degree.

Management argued that the female applicant was hired at a grade higher than the Complainant because she had performed the same position in the private sector. OEDCA found however that this was not a legitimate, nondiscriminatory reason for failing to hire the Complainant at the GS-5 level.

Management also failed to promote the Complainant after his one year probationary period, but promoted a similarly situated, 32-year old white female employee who was hired

as a GS-4 under the same vacancy announcement as the Complainant. However, this younger, white female was promoted to the GS-5 level prior to completing one year as a GS-4 while the Complainant was not promoted to the GS-5 level until approximately four months after he completed his first year of employment.

OEDCA found that the Complainant was subjected to discrimination on the bases of race, sex, and age when he was hired as a GS-4 and when he was not promoted to a GS-5 upon completion of one year of employment.

XIX.

EQUAL PAY ACT VIOLATED WHEN MALE EMPLOYEE PAID LESS

To establish a violation of the Equal Pay Act, a complainant must show that he or she received less pay than an individual of the opposite gender for equal work, requiring equal skill, effort and responsibility, under similar working conditions in the same establishment

When management officials paid a newly hired female cardiologist more than a male cardiologist with 29 years of experience, an EEOC Administrative Judge ruled that the almost $20,000 difference in pay violated the Equal Pay Act.

The record established that the two employees performed the same duties and that the male doctor trained the female doctor to perform several types of procedures. While there were a few distinguishing factors in their credentials, these factors would have justified paying the male doctor a higher salary.

Management officials also claimed that the female doctor was provided a higher salary because would not take the position unless it was at least equivalent to the salary that she was making as a professor. Management officials also testified that because there was a critical need for cardiologist, it was necessary to pay the female cardiologist the salary she requested. The judge, found, however, that this was not an affirmative defense to an Equal Pay Act violation.