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. 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 2013. 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.**

**Sexual Harassment and Off Duty Conduct**

The complainant, a Health Technician, alleged that over a two month period a male co-worker sexually harassed her. The harassment included following the complainant when she went to lunch, asking her out on dates, waiting for her at a bus stop in the morning and following her to a bus stop in the afternoon, and using slurs in reference to her gender. The co-worker’s harassment culminated when he physically blocked the complainant’s exit from the workplace, and upon her return, proceeded to her office.

An administrative judge found that while the complainant may have welcomed the co-worker’s attention initially, but at some point, she found it unwelcome. The VA argued that any actions taken by the co-worker at the complainant’s bus stop could not be considered workplace harassment because the stalking did not occur on the VA campus. The judge found otherwise citing to Equal Employment Opportunity Commission (EEOC) case law that provides, in certain circumstances, that incidents that take place off or near the workplace can be considered part of an overall sexual harassment claim.

The judge wrote, “Here, the off-duty conduct (stalking as she walked to and from work) influenced the complainant’s working conditions. This holds true in this case especially since complainant was walking from work to the bus station or to work from the bus station. Fear of walking home from work or to work could reasonably interfere with the workplace environment.”

VA may avoid liability when a harasser is a co-worker by showing that it took prompt, appropriate, and effective remedial action as soon as it became aware of the harassment. According to the EEOC, the first thing a management official should do when she receives a complaint or otherwise learns of alleged sexual harassment is to promptly and thoroughly investigate the allegation. If the allegation is substantiated, the VA manager should then take immediate and appropriate corrective action by “by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and preventing the misconduct from recurring”. Discipline against the co-worker may also be necessary ranging from reprimand to discharge depending on the severity of the conduct. Finally, the VA manager should make follow-up inquiries to ensure the harassment has not resumed and the employee has not been retaliated against.

In this case, the administrative judge found that the VA was liable for the co-worker’s harassment. First, while an investigation of the complainant’s allegations was conducted it was faulty because no attempt was made to speak to the complainant. Second, while VA officials told the harasser to stay away from the complainant (which was proper), the officials also restricted the complainant to one area of her workplace in an attempt to make her feel more secure. This was improper because the victim of harassment should not be the individual to change his or her work station. In a 2007 case, also involving the VA, the EEOC had this to say about schedule changes “the agency’s remedy of changing the complainant’s schedule forced the innocent victim of sexual harassment to bear the burden of his supervisor’s illegal action and was not appropriate corrective action”.

**II.**

**Dentist’s Removal Discriminatory**

Complainant, a female African-American dentist, was removed during her two-year probationary period for unacceptable performance. She alleged that a male White dentist with a worse performance record was not terminated, and instead was provided remedial training.

An Equal Employment Opportunity Commission (EEOC) administrative judge ruled that the complainant was subjected to unlawful discrimination because of her race and sex when she was terminated. The judge found that during the complainant’s tenure, she received one performance evaluation where she was rated “Fully Successful” and received two performance bonuses.

Although VA officials testified that the complainant had performance issues, none were documented in her performance evaluation. Only one incident of the complainant providing substandard patient care was presented at the hearing. In contrast, witness testimony revealed that the White male dentist had more substandard patient care issues than the complainant including diagnosing tooth decay and tearing into a patient’s cheek resulting in a tort claim. Finally, the White male dentist’s dentistry skills were described as “horrendous” and when he was sent for remedial training he continued to have substandard patient care problems.

Based on the record, the administrative judge determined that the reasons offered by VA officials for terminating the complainant during her probationary period were “unworthy of belief, and therefore, were a pretext for unlawful disparate treatment discrimination”.

**III.**

**Grooming Standards**

Courts have held that grooming polices are typically outside the scope of federal employment discrimination statutes.  An evenly applied prohibition on certain hairstyles does not discriminate on the basis of immutable characteristics or certain fundamental rights protected by Title VII of the Civil Rights Act of 1964.  Individuals can change hairstyles, hair can be cut, and it is not an impermissible employment practice to determine dress codes for employees.  The Equal Opportunity Commission (EEOC) has held that grooming policies that prohibit corn rows, braids, or dreadlocks do not, on their face, equate to unlawful race discrimination.  Employers may impose neutral hairstyle rules, e.g., that hair is neat, clean, and well-groomed, as long as the rules respect racial differences in hair textures and are applied evenhandedly.

However, Title VII does prohibit banning a natural hairstyle that would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics. For example, employers are prohibited from discriminating against African American women who wear their hair in natural, un-permed “afro” styles.

An EEOC judge found that the VA discriminated against a female employee because of her hairstyle. Complainant, an African American woman, was a Supervisory Social Worker who applied for a Lead Supervisory Social Worker position.  Following the complainant’s interview, three of the interviewers engaged in a lengthy discussion of the complainant’s hairstyle, specifically her blond dreadlocks.  The chief selecting official considered the hairstyle “incongruent” with the complainant’s otherwise conservative and professional attire and repeatedly mentioned this to the other panel members. The fourth panelist lowered his initial interview scores for the complainant after listening to the other panelists’ negative comments.

The judge found that the complainant had superior credentials to those of the selectee and was not fairly evaluated because of race discrimination. He concluded that she would have been selected for the position but was not because of her race. The judge wrote, “I find that the Agency did subject Complainant to unlawful discrimination based upon holding her, as an African-American wearing her natural hair, to a different aesthetic standard that was not equally applied to other non-African American candidates”.

**IV.**

**Religious and National Origin Harassment**

Complainant, a Muslim of Greek and Arab nationalities, was a Supervisory Biomedical Engineer at a VA healthcare facility. One of his co-workers used derogatory language to disparage him based on his national origin and religion. For example, he told complainant that he killed people like him in Iraq and that he should be home fighting with his brothers. The co-worker also refused to work with complainant because of his national origin and religion.

Other employees at the facility also harassed the complainant by subjecting him to slurs based on his national origin. Finally, complainant received an anonymous cartoon depicting an Arab with a sword stating “American jobs for Americans”.

Although complainant reported these events to management officials several times, no effective action was taken to stop the harassment. First, the complainant was directed to the EEO office. A mediation was scheduled between the complainant and his co-worker harasser, but never held due to the harasser’s deployment to active military duty. After the complainant reported that he was subjected to slurs by other employees, an investigation was conducted. However, the alleged harasser could not be identified and thus, cultural sensitivity training was provided to all employees in complainant’s work unit.

Finally, complainant submitted his resignation stating that he could not continue working at the VA due to the “intentional roadblocks and discriminatory actions perpetrated against him”. He also stated that no longer felt safe working at the facility. Management officials attempted to persuade him not to resign telling the complainant that the harassment would be stopped. However, complainant went forward with his resignation. He stated that he did not have confidence that the harassment would end given that he had reported it several times to his supervisors and the EEO office, but no action was taken.

OEDCA determined that the complainant was subjected to unlawful discrimination based on his national origin and religion and that the actions taken by management officials to stop the harassment were not effective. OEDCA further found that complainant’s working conditions were so intolerable that he was forced to resign, i.e. constructively discharged.

**V.**

**Boarding Process Discriminatory**

Complainant, a male, was hired as a Licensed Practical Nurse (LPN). The responsible management official (RMO) submitted complainant’s boarding package to the Professional Standards Board (PSB), but failed to provide all of the complainant’s supporting documentation including his prior work experience and education. However, she did submit all of the documentation provided by two female LPN selectees. Based on the documentation submitted for consideration, the PSB boarded the complainant at the GS-4 level and the female selectees at the GS-6 level.

An Equal Employment Opportunity Commission (EEOC) judge found that the Complainant was discriminated against based on sex by the RMO’s actions. The record established that he had two years of experience as a medic, which based on the VA’s staffing standards, was equivalent to the duties of a GS-6 practical nurse. The complainant also had worked as an EMT, had a bachelor’s degree in business that including nursing courses, and an associate degree in allied health sciences.

The judge determined that the RMO when preparing the complainant’s boarding package failed to give him credit for performing equivalent LPN duties when he served as a medic, did not show his work as an EMT, and did not include his resume. When the complainant asked the RMO for a review of his boarding package, she responded “No, we are not doing nothing about that”.

At the hearing, the RMO testified that she could not recall the documents she put in the complainant’s boarding package. She did agree, however, that she failed to maximize the complainant’s military experience and failed to consider it to his benefit.

Complainant was awarded 36 months of back pay, compensatory damages, and attorney fees.

**VI.**

**Hostile Work Environment Based on Sex**

Complainant, a female, alleged that a co-worker engaged in a pattern of harassment based on her sexuality. Specifically, the co-worker made a series of inappropriate comments about the complainant including that she wanted “to tie her up, put her in the trunk and throw her in the Bayou”. She also referred to the complainant as “Junkie” and referred to other co-workers by various nicknames including “Pizza Face” and “Tar Baby”. The co-worker also stated the complainant was sleeping with patients for money, and engaging in a homosexual relationship with a female co-worker.

On May 7, 2012, Complainant met with her first level supervisor and the co-worker and informed them how disturbed she was by the comments. The co-worker did not respond except to cry throughout the meeting. After the meeting, the co-worker contacted one of the management officials and denied all of the complainant’s allegations. No action was taken in response to complainant’s allegations.

The following week, the co-worker alleged to another management official that the complainant was bullying and creating a hostile work environment for her. In response to the co-worker’s allegations, a fact finding investigation was initiated relating to a “possible hostile work environment” created by the complainant. The fact finding was halted after the complainant’s union representative informed management officials that it was the complainant who was being harassed and not the co-worker.

Complainant filed an EEO complaint in July 2012 alleging that she was harassed by the co-worker and that management officials failed to take prompt and appropriate action once they became aware of the harassment. An administrative investigation was begun in September 2012 which confirmed complainant’s allegations. The co-worker was temporarily reassigned in September 2012 to another VA facility and her reassignment became permanent after the administrative investigation was concluded in November 2012.

OEDCA found that the co-worker’s comments about complainant’s sexuality were degrading and pervasive and created a hostile work environment. The VA could not avoid liability for the co-worker’s actions because it did not promptly investigate and take effective remedial action to stop the harassment. The evidence established that it took over four months for an investigation to be initiated and for management officials to transfer the co-worker to another facility.

**VII.**

**Vacancy Cancellation Discriminatory**

The Age Discrimination in Employment Act (ADEA) makes it unlawful for an employer to fail or refuse to hire an individual because of her age. Complainant, who was 57 years old, had worked as a Veterans Service Representative for 10 years at a VA Regional Office. In August 2010, she applied for the position of Rating Veterans Service Representative. Two vacancies were posted.

In September 2010, management officials informed the complainant that the selections were on hold due to a remodeling project. In February 2011, complainant was informed by a co-worker that the positions would not be filled. The vacancy announcement was subsequently cancelled. One of the positions was then converted to a Human Resources Liaison position. The other position was later filled by a Rating Veterans Service Representative from another VA Regional Office who had requested a hardship transfer.

An Equal Employment Opportunity Commission (EEOC) judge concluded that management officials’ articulated reason for cancelling the vacancy announcement were pretext to mask age discrimination. Evidence established that the complainant was the best qualified candidate for the position and should have been selected.

**VIII.**

**Probationary Employee Sexually Harassed**

Complainant was hired as a Medical Instrument Technician at a VA hospital. She had a one year probationary period. Shortly after she began her position, her supervisor began making comments to her such as “you are attractive” and “you have a lot of junk in the trunk”. He also constantly came to her work area to check on her when she worked nights even though he did not work on the night shift. A month later the supervisor changed complainant’s work schedule to the day shift and required her to report to him every day before she went home.

Three months into her employment, the complainant met with the supervisor to discuss her performance. The supervisor told her “I’m your bread and butter, remember I selected you. I scratch your back, you scratch mine”. He then began massaging the complainant’s shoulders. Several days later the complainant was the subject of a racist remark and reported it to her supervisor. He told her if she reported the remark to the EEO office he would fire her. Three days later, the complainant was given an unfavorable 90-day evaluation by her supervisor.

The complainant also alleged that her supervisor continued to make unwelcome remarks about her buttocks by saying “you got a lot of junk in your trunk”, “when was the last time you had some”, and “you are uptight and need to relax”. When she refused to have lunch with him, he reminded her again that he had hired her and that she was still on probation; she then agreed to have lunch with him.

The supervisor continued to sexually harass the complainant and to allow her male co-workers to do the same. For example, one evening when she was working the night shift her three male co-workers viewed a sexually graphic movie. Complainant felt threatened and left the room. When she reported it to her supervisor, he responded “guys are guys” and told her she would be written up and disciplined for leaving her work area for three hours. She was later issued a written counseling. A month later she was terminated during her probationary period.

An Equal Employment Opportunity Commission judge found that the complainant’s supervisor sexually harassed her throughout her probationary period, then terminated her when she refused to acquiesce to his sexually harassing conduct.

Complainant was reinstated to her position, awarded back pay, and compensatory damages.

**IX.**

**Harassment Based on Race and Reprisal**

Complainant, who was African-American, had engaged in prior EEO activity. She alleged that her supervisor harassed her based on her race and in reprisal for her prior EEO activity. The harassment included the supervisor threatening to fire the complainant, denying her the opportunity to apply for a higher graded position, initiating an unnecessary investigation against her, and engaging in a pattern of assisting White employees to advance professionally, but not offering the same assistance to Black employees.

An Equal Employment Opportunity Commission administrative judge determined that the complainant was harassed as alleged. Hearing testimony established that the supervisor treated Black employees considerably worse than White employees. For example, when the supervisor counseled the complainant he literally got into her face, a behavior he did not exhibit toward White employees. Also, the supervisor only told the complainant and another Black employee not to apply for a promotional opportunity and then he hired a White employee for the position. There was also considerable evidence that the supervisor regularly threatened the job security of Black employees. In regard to complainant’s reprisal claim, the judge found that most of the supervisor’s discriminatory actions occurred during the period when the complainant was litigating another complaint she had filed against him.

The judge concluded that the supervisor’s actions and conduct created a work environment permeated by ridicule, intimidation and insult that was based on complainant’s race and prior EEO activity. The judge further found that the conduct was so pervasive that it altered complainant’s working conditions and created an abusive work environment. The VA was liable for the supervisor’s conduct, the judge wrote, because the agency took no effective action to stop the harassment after the complainant reported it.

**X.**

**Reprisal When EEO Activity Disclosed**

Title VII protects employees from retaliatory actions that would deter a reasonable person from participating in the EEO process. Disclosure of an employee’s EEO activity to others, without her consent, has a chilling effect because it may intimidate the employee from using the EEO process. The supervisor’s motivation for disclosing the information is not relevant to the legal analysis.

The complainant, a Registered Nurse, alleged that his supervisor disclosed his EEO activity to one of his co-workers. The complainant and the co-worker shared an office space. Complainant had filed an EEO complaint and had an upcoming appointment to speak to an investigator about his complaint. The complainant sent an email to his supervisor stating that he needed a private office for the appointment. In her response to the email, the supervisor copied the co-worker and stated “coordinate office use with Rodney (the coworker)”.

OEDCA found that the complainant was reprised against because his supervisor disclosed his EEO activity, without his consent, by including the co-worker on the email. Even though it appeared that the supervisor was trying to be responsive to the complainant’s request, her actions had a chilling effect on the complainant and the exercise of his EEO rights.

**XI.**

**Posting Requirements**

When a finding of discrimination is made, the VA must post a notice to all employees at the responsible facility that discrimination has occurred, explaining their rights to be free of unlawful discrimination and also to assure employees that the discrimination will not happen again.

In a finding rendered by an Equal Employment Opportunity administrative judge, the VA was ordered to also post the finding notice on its website. OEDCA appealed that portion of the decision arguing that the posting requirement was overly broad. The Equal Employment Opportunity Commission’s Office of Federal Operations (OFO) agreed with OEDCA’s determination.

OFO found that the judge erred by ordering the notice to be also posted on the VA’s main website. It determined that that the website posting requirement was overly broad and that there was no justification or explanation for ordering notification of the discrimination finding on a wider basis outside the affected facility.

This case is part of a trend where EEOC judges are ordering expansive relief involving postings and training and requiring greater accountability from VA officials when findings of discrimination are made.

**XII.**

**Discriminatory Termination**

The complainant, a Telecommunications Specialist, alleged he was reprised against based on prior EEO activity, his race (Black), and age when he was terminated in January 2010 for poor performance during his probationary period.

The record established that in June 2009, he receiv*ed* a “Fully Successful” interim rating and a $500 cash award. In July 2009, he contacted the facility’s EEO manager and alleged that a White co-worker was harassing him. The EEO manager promptly contacted the complainant’s supervisor to report the allegation.

An Equal Employment Opportunity Commission judge found that after learning of the complainant’s EEO activity his supervisor began retaliating against him by closely scrutinizing his work and documenting his performance deficiencies. The judge further found that the complainant’s termination during his probationary period due to “unacceptable performance” was not supported by the record and was a pretext for discrimination based on the complainant’s prior protected EEO activity.

**XIII.**

**Reasonable Accommodation Untimely**

Complainant suffered from migraine headaches and degenerative discs in her back which constituted disabilities under the Rehabilitation Act. In June 2011, she requested a reasonable accommodation of part time work, a new computer screen, and an ergonomic keyboard, but her supervisor ignored the request and recommended that complainant take a disability retirement.

In January 2012, complainant submitted an accommodation request to the facility’s human resources office. It took the facility over 8 months to process her request. OEDCA found the 8 month delay was unreasonable and violated the Rehabilitation Act.

OEDCA further found the complainant was harassed based on her disability. The evidence established that her supervisor discussed the complainant’s reasonable accommodation issues with her co-workers, expressed skepticism about her claimed disabilities and made comments about her need to work in dim light, (“Not all of us like to live in darkness”), after complainant asked her to turn off lights in a conference room.

**XIV.**

**Per Se Reprisal by Police Chief**

A medical center Police Chief was the subject of two EEO complaints based on comments he made during meetings. In the first complaint, the Police Chief made statements that he did not care about the EEO process, encouraged staff to bring EEO complaints directly to him rather than using the EEO process, stated that he would not settle EEO complaints, and would “fight EEO complaints to the nail”.

In the second complaint, another employee alleged that the same Police Chief made the following statements during a staff meeting: “I have yet to see a valid Equal Employment Opportunity complaint, and if I did I would act promptly, but I see many EEO complaints started because of a lack of character”; “I am a very transparent and would like to place every complaint on the board as well as every good comment”; and “There are too many rumors floating about EEO complaints….it would be good for everyone to see what complaints were being made by whom and what the outcome would be”.

OEDCA found in both complaints that the Police Chief had engaged in reprisal per se because his comments expressed hostility toward the EEO process and would likely deter protected activity from employees under his supervision. Moreover, his statements violated the letter and spirit of EEO law which requires agencies to promote and support the full realization of equal employment opportunity in the workplace.