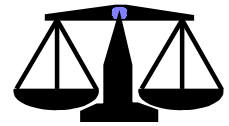


# OEDCA DIGEST



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Vol. XIII

Department of Veterans Affairs  
Office of Employment  
Discrimination  
Complaint Adjudication

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*Summaries of Findings of Discrimination  
Issued in Fiscal Year 2010*

**This issue of OEDCA's Digest contains summaries of the final agency decisions issued by OEDCA in fiscal year 2010 that found discrimination. Many of the decisions were based on reprisal (31%). Twenty four percent involved disability and reasonable accommodation. There were also several findings of non-sexual and sexual harassment (21%). Twenty one percent of the findings involved non-selections and six percent involved disciplinary actions (suspension and termination).**



## I

### **Supervisory Comments that are likely to Deter an Employee from Engaging in Protected EEO Activity Constitute *Per Se* Reprisal and are a Violation of Title VII**

The most common type of reprisal or retaliation involves taking an adverse personnel action against someone because that person participated in protected EEO activity. The prohibition against reprisal or retaliation is not limited to adverse employment actions that affect the terms and conditions of employment. It also covers any action or statement by management officials that might dissuade a complainant or others from engaging in protected activity. Statements or actions that have this effect are called *per se* reprisal. In other words *per se* reprisal is an automatic violation of the law against reprisal that does not require evidence of an “adverse action.” *Per se* violations occur when management officials make negative comments or take some action concerning an individual who participates in the EEO process or concerning the EEO complaint process itself. Because such statements or actions might dissuade a reasonable person from engaging in protected activity, they violate the anti-retaliation provisions of Title VII of the Civil Rights Act.

In FY 2010 OEDCA issued two final decisions that illustrate how management officials engaged in *per se* reprisal.

A complainant filed a claim of discriminatory harassment against her supervisor. She cited 59 separate incidents in support of the claim. Although complainant did not prevail in her discriminatory harassment claims, OEDCA found *per se* reprisal because complainant’s supervisor disclosed and distribut-

ed to complainant’s co-workers complainant’s statement of harassment addressed to the EEO manager. In several cases the Equal Employment Opportunity Commission (EEOC) has found that disclosure of a person’s EEO activity to others without complainant’s consent has a potentially chilling effect, intimidating employees from utilizing the EEO complaint process or proceeding with an EEO complaint.

In the second final decision complainant notified the EEO manager that the Associate Director sexually harassed him. After the EEO manager notified him of the sexual harassment claim, the Medical Center Director met with the union president to discuss using mediation to resolve complainant’s sexual harassment complaint. The Medical Center Director acknowledged that he told the union president “if the complainant was not telling the truth, that it could result in disciplinary action.” The union president confirmed that the Director told him that if the complainant lied about anything in the EEO investigation, he could be subject to disciplinary action. Complainant learned of the Director’s remark through the union president. Although the Director testified that the remark was not meant to be a threat or intended to get back to the complainant, OEDCA found that complainant perceived his remarks as intimidation and a threat and concluded that *per se* reprisal occurred. Despite the Director’s actual intent, his cautionary advice falls within the type of conduct prohibited by EEO law. It was not necessary to show that the Director actually succeeded in restraining or interfering with the process. It is only necessary that he took actions that could have resulted in such restraint or interference.

The lesson for supervisors and managers to take away from these cases is to avoid any actions, statements or discussions with com-

plainants, witnesses, potential witnesses, representatives, or officials with EEO complaint processing responsibilities that could reasonably be interpreted as an attempt to restrain or otherwise influence the processing of an EEO complaint.

## II

### **Rescission of Complainant's Voluntary Reassignment Found to be Reprisal**

In October 2006 the complainant, a Program Specialist, requested a reassignment. Management agreed to reassign her to a Staff Assistant position in February 2007. Before the paperwork for the reassignment was processed, complainant was suspended in March 2007 and contacted an EEO Counselor a few days later. In an initial contact and interview sheet, the EEO counselor identified reassignment as one of several preliminary claims. Complainant raised the reassignment with the EEO Counselor because she was concerned about the delay in implementation. The Director of the national program testified that she was informed of the EEO complaint and asked if she still wanted complainant as a Staff Assistant. Although the Director still wanted complainant as a Staff Assistant, the Chief of Employee Relations told her that complainant could not be reassigned because it would be viewed as retaliation. Complainant's second line supervisor sent complainant an e-mail notifying her that her voluntary reassignment was postponed because "it could be misconstrued as a negative action."

Management officials testified that complainant's reassignment was not cancelled, but was put on hold to determine why it was mentioned in her EEO complaint. OEDCA found this explanation lacking in credibility because complainant was not consulted before the reassignment was cancelled and

there was no genuine doubt complainant wanted the reassignment.

OEDCA found that complainant established unlawful reprisal in violation of Title VII through direct evidence that she was not reassigned because she engaged in protected activity. Management's assertions that the reassignment was placed on hold in order to avoid the "appearance of retaliation" were disingenuous.

This case illustrates the point that supervisors may not take actions that negatively impact an employee simply because the employee has engaged in EEO activity. It is possible that management may not have intended to violate the anti-retaliation provisions of Title VII of the Civil Rights Act. Management may have considered its actions prudent under the circumstances. Even if this were the case, however, complainant was not reassigned because of her EEO activity. Such a motivation constitutes prohibited retaliation in violation of Title VII of the Civil Rights Act.

## III

### **Selecting Official's Reasons For Not Choosing Complainant Pretext for Retaliation**

The complainant was hired as a Motor Vehicle Operator at a VA Medical Center in 2003. In December 2006 the complainant filed a prior EEO complaint regarding a removal action based on reprisal. Complainant also filed a removal claim with the Merit Systems Protection Board in February 2007. In early 2007, the complainant retired on disability. In late 2007 he applied, qualified, and interviewed for the position of Motor Vehicle Operator, GS-7 at the same VA Medical Center, but in February 2008 he was not selected.

After complainant applied for the Motor Vehicle Operator position, members of the se-

lection panel and the selecting official attended meetings with Human Resource officials where complainant's prior EEO activity was discussed. The selecting official conceded that he was aware of complainant's prior EEO activity, but the other panel members denied being aware of any prior EEO activity on the part of the complainant. The selecting official stated that he did not select the complainant because the panel ranked him lower than the selected applicant. One of the panel members stated that he was aware of complainant's prior employment as a Motor Vehicle Operator, but he did not consider that in making a selection because he believed that it would not be impartial to do so. The other panel member believed that the selected applicant was more qualified because he had experience as a RTA bus driver and because he was better dressed.

The EEOC judge found that the reasons articulated by the selecting panel were pretextual because the evidence established that complainant's qualifications were observably superior to those of the selectee. Specifically, the EEOC judge noted that the selectee had no experience as a Motor Vehicle Operator with the VA. In contrast, the EEOC judge noted that the complainant had one year and nine months experience as a Motor Vehicle Operator at the GS-7 level. Additionally, the EEOC judge found that the panel's other reasons for not selecting the complainant did not withstand scrutiny. Panel members indicated that the selectee's experience as an RTA bus driver made him more qualified than the complainant, but the EEOC judge found this reason to be inadequate because they did not explain why. One of the panel members recanted his testimony that the selectee was better qualified and stated instead that he and the complainant were equally qualified. He then stated that he selected the selectee because he was better dressed for the interview than the complainant. The EEOC judge noted

that during complainant's employment there was never a problem with complainant abiding by the dress code. The EEOC judge also noted that one of the panel members stated that he did not consider complainant's prior experience in the position of Motor Vehicle Operator because to do so would not be impartial. The EEOC judge concluded that this statement was "absurd and reflects either a fundamental lack of understanding regarding how to evaluate candidates for a position or, more likely, it is merely the panel members attempt to justify not selecting the most qualified candidate for the subject position when he has no justification."

This case is another example of a case where the complainant appeared, at least on paper, to be better qualified than the selectee. Passing over such an applicant always raises a red flag. Trying to justify such a selection decision by simply stating the selectee was "better qualified" will, absent a clear and specific explanation, result in a finding of discrimination.

#### IV

##### **Failure to Follow Agency's Procedure Results in a Finding of Discrimination**

In October 2006, the complainant, a Food Service Leader, participated in EEO activity when he mentioned to his supervisor that there was a difference in assignments given to male and female employees. In June 2007 he contacted an EEO Counselor and alleged that the Food Service Supervisor assigned him less desirable work more often than his co-workers in retaliation for his prior EEO activity in October 2006. Management stated that complainant's assignments were made for business related purposes. The EEOC judge concluded that management's reason was pretextual because complainant's assignments violated agency policy.

This case illustrates how important it is for management officials not to deviate from agency policy when carrying out personnel actions. Additionally, in this case it did not help that the agency's reason for the assignments was not specific. It is possible that if management had provided a detailed reason explaining why they deviated from their usual policy with regard to assignments the result may have been different. In any event, the case highlights the fact that managers need to be careful not to depart from normal procedure because it will raise red flags if an EEO complaint is filed.

## V

### **External EEO Complaint Constitutes Prior EEO Activity**

Complainant held a dual appointment as a faculty member at a local college of medicine and as a staff physician at a VAMC. In July 2005 the college of medicine failed to renew his contract, and complainant filed an EEO complaint against the college. In December 2005, at the request of the college of medicine officials, VAMC officials changed the complainant's tour of duty and instructed complainant to have no contact with medical residents from the college in any supervisory, training, or instruction capacity. In March 2006 VAMC officials placed the complainant on a performance improvement plan with unrealistic "time frames. In January 2007 VAMC officials gave the complainant an unsatisfactory proficiency evaluation and removed him from his VAMC position.

VAMC officials were aware of the complainant's EEO activity when they took adverse actions with respect to his tour of duty, his relations with residents, the PIP, the proficiency evaluation, and the removal from his position.

The EEOC administrative judge found that the adverse actions against the complainant

did not begin until after he filed an EEO complaint against the college of medicine. Additionally, the EEOC judge found that although there was substantial testimony that the college of medicine had no authority or influence over the VAMC, that was contradicted by more credible testimony and evidence. Thus, the EEOC judge found that college of medicine officials and VAMC officials were so intricately intertwined that they could not be separated for liability purposes.

## VI

Complainant, a supervisory physician, alleged that the Chief of Staff subjected her to hostile work environment harassment on the basis of reprisal. The Chief of Staff counseled complainant regarding her time and attendance and prohibited her from contacting Human Resources about performance problems. Pending the completion of an investigation of an employee complaint of abuse, the Chief of Staff removed complainant's supervisory duties. The EEOC judge found that complainant was treated differently than other chiefs with respect to time and attendance and exercise of supervisory authority. He also found that management's explanation for removing complainant's supervisory duties to be pretextual because they were inconsistent and the policy or practice that management relied upon to conduct its investigation was vague. The EEOC judge also found that there was no credible reason to continue to suspend complainant's supervisory duties for six months after the completion of the investigation.

## VII

### **Retaliation Found in the Absence of Objective Evidence**

Complainant alleged that in 2001 she was discriminated against on the basis of reprisal

when she was non-referred for the position of Voucher Examiner, GS-6. In 2003 she applied and was found qualified for the Voucher Examiner position at the GS-5 level, but declined the position. Her prior protected EEO activity involved an EEO complaint against her supervisor for harassment.

After she applied for the Voucher Examiner position, complainant spoke with a Human Resource Specialist who informed her that she qualified for the position. Several days later, however, complainant received a letter from Human Resources which stated that she did not qualify for the position. The Human Resource Specialist testified that she made a mistake and had to find complainant not qualified because she did not have one year of specialized experience. When she was asked what constituted specialized experience, the Human Resource Specialist provided contradictory answers. She also admitted that she did not check with complainant's supervisor to ascertain whether complainant performed the duties required to qualify for the position. The EEOC judge found that the evidence of record supported the conclusion that complainant did perform most, if not all, of the duties that constituted specialized experience.

The EEOC judge also found that the Human Resources Specialist did not make the decision to disqualify the complainant. Instead, a Labor Relations Specialist who participated on behalf of the Agency in the proceedings for complainant's prior EEO activity actually disqualified complainant even though he admitted that qualifying individuals was not his job. Furthermore, the Labor Relations Specialist provided no objective evidence upon which to base his belief that complainant was not qualified.

## VIII

### **Request by Victim of Sexual Harassment that Management not Confront the Ha-**

### **rrasser Does not Excuse Management from Investigating the Matter**

In 2006 complainant advised her supervisor that a male employee made sexual advances toward her. Because complainant asked her to keep her claim confidential, the supervisor believed that she was obligated to honor complainant's request and took no action. Throughout 2006 and into early 2007 complainant's supervisor was the only official in complainant's supervisory chain who knew about complainant's sexual harassment allegations.

In February 2007 complainant brought additional sexual harassment claims to her supervisor's attention. The supervisor referred complainant to a labor relations specialist in Human Resources. As a result, the harasser's first line supervisor was contacted and the harasser was counseled. Management also conducted a fact-finding investigation, ordered the harasser to stay away from the complainant, and sent the harasser to mandatory training on the prevention of sexual harassment. Additionally, whenever complainant raised concerns about the harasser's conduct management officials viewed her claim seriously, conducted appropriate inquiries, and took actions to resolve complainant's concerns.

OEDCA's final decision found that management officials took prompt, appropriate, and effective action following the complainant's claims that she brought to her supervisor's attention after February 2007. This was because whenever complainant raised concerns about the harassing conduct, management took prompt and effective action to resolve her concerns.

OEDCA found that management was liable for the failure to take action when complainant reported harassment in 2006 notwithstanding complainant's request to keep her 2006 claims confidential. Federal EEO law and VA directives obligate man-

agement officials to take appropriate action upon learning about allegations of harassment. Complainant's desire for confidentiality does not override that obligation. Under EEOC guidelines management is obligated to protect an employee's confidentiality to the extent possible. Management cannot guarantee complete confidentiality and is obligated to prevent and correct harassment. In the interest of maintaining a degree of confidentiality, there were steps management could have taken to address complainant's claims. Some examples include talking to the harasser's supervisors, questioning other employees about the harasser's behavior and reaffirming to all employees that sexual harassment is illegal and will not be tolerated.

## IX

### **Management's Failure to Take Prompt Corrective Action Results in a Finding of Sexual Harassment**

Complainant alleged that her second level supervisor made comments to her such as, "I would sure love to have some of that (meaning sex)." She also testified that her supervisor told another employee that "her ass was getting small." According to the complainant, her supervisor also physically harassed her. Among other things, she claimed that the supervisor grabbed her legs, put his hand up her pant leg, pulled her pants leg up and asked her what color panties she was wearing. Shortly after she was hired, complainant stated that the supervisor told her she must go out with him because he hired her. Consequently, complainant felt she owed her supervisor something. Ultimately, complainant learned that her supervisor was not responsible for hiring her.

Despite the supervisor's denials, OEDCA found that the incidents did occur. Addi-

tionally, there was evidence in the record that the supervisor told a female patient that the only way she could get a job at the medical center was "on her knees" (meaning sex).

Complainant reported the sexual harassment to her immediate supervisor prior to June 2008 and to union representatives in September 2008 and January 2009. Two of complainant's co-workers also reported to complainant's immediate supervisor that they had witnessed the second level supervisor harassing the complainant.

Management did not take any action to stop the harassment in June 2008 and September 2008 respectively until February 2009.

Complainant's immediate supervisor even admitted that he did not notify his supervisor of the complainant's sexual harassment allegation. Higher level management learned of complainant's sexual harassment claim after union officials contacted the EEO manager. In February 2009 complainant's second level supervisor was reassigned to another VA campus to remove him from complainant's work area.

OEDCA's final decision found that management failed to exercise "reasonable" care or to act promptly to prevent and correct the sexual harassment. Management did not take any action to stop the sexual harassment until about nine months after it became aware of complainant's allegations.

## X

### **Management Found Liable Where It Failed to Exercise Reasonable Care to Prevent and Promptly Correct a co-worker's Harassing Behavior**

During a conversation, one of complainant's Caucasian co-workers cracked a racially derogatory joke about complainant's sons in the presence of his supervisor. The supervisor laughed at the joke, told the complainant that the co-worker made racist jokes, and ad-

vised the complainant not to complain when a co-worker makes a racist joke. He also told the complainant to leave the co-worker alone. Both the complainant and another co-worker spoke to an EEO Counselor about the offensive jokes.

Complainant felt that he could not complain because as a temporary worker he would lose his job. When the EEO Counselor spoke with the supervisor about the jokes, the supervisor stated that all employees make offensive comments. The EEO Counselor instructed the supervisor to counsel the co-worker on his conduct and to schedule training regarding harassment. The supervisor showed a video on cultural diversity, engaged employees in a group discussion, and reviewed the Medical Center Memorandum entitled "Prevention of Workplace Harassment" with the staff.

The evidence of record also established that the supervisor called African-American male employees boys. On several occasions, before and after the training regarding harassment, complainant's supervisor called him boy. For example, during a meeting to discuss verbal counseling, the supervisor told complainant, "sit down boy." OEDCA agreed with an EEO judge's decision that complainant established harassment based on race and reprisal. The co-worker's racial comments, the supervisor's reference to complainant as boy, and the favorable treatment accorded Caucasian employees established racial harassment. Complainant established retaliatory harassment because his supervisor began calling him boy and stated that the employee who complained to the union would not get a posted job. The supervisor made this comment shortly after complainant objected to his co-worker's racially offensive comments. Ultimately, the administrative judge held the Department liable for harassment because management failed to exercise reasonable care to correct and prevent the racial and re-

taliatory harassment. The supervisor who presented the training on preventing harassment continued to call complainant boy after presenting the training.

## XI

### **Two Racially Offensive Comments are Sufficient to Establish Severe and Pervasive Harassment**

During a period of racial tension in April 2008, complainant's immediate supervisor, an Assistant Police Chief sat in the facility's parking lot to spy on day shift employees who were mostly Black and Hispanic. In May 2008, one of complainant's white co-workers asked the complainant if he knew the difference between "a nigger and Black". In September 2008 another white co-worker told another co-worker the following joke. "How can you tell when a Black woman is pregnant...you pull her tampon out...if the black baby picked the cotton, then she is pregnant." The co-worker reported the joke to complainant. On September 2, 2008, complainant informed the second level supervisor that he and other minority employees felt that the Police Service treated white police officers more favorably. Among other things, complainant noted that the shifts were racially segregated. During a meeting held in September 2008, complainant informed the second level supervisor that racial jokes were being told in the workplace, that minority police officers were not being mentored, and that white police officers were being treated more favorably.

After the September 2008 meeting, one of complainant's white co-workers subjected complainant to loud, targeted whistling. The same co-worker also threatened the complainant in a physically intimidating manner and told him that he better not make an accusation about him that he could not prove.



Additionally, he tampered with the complainant's radio.

There was also evidence that the white co-worker was involved in prior incidents of discriminatory conduct in the Police Service. For example, he admitted that he left a noose on another co-worker's desk in 2003, but management officials took no action against him. Another co-worker reported that the same co-worker made a racially derogatory remark.

In its final agency decision OEDCA found that all of the conduct that occurred was severe enough to create a hostile work environment. Notably, a co-worker made two historically offensive comments about the complainant's race. Even though there were only two such comments made within a four month period, EEOC has found that the use of unambiguous racial epithets, even when isolated, falls on the more severe end of the spectrum with regard to harassing conduct. However, there was ample evidence of a pre-existing climate for racial intolerance in the Police Service.

OEDCA also found that management officials failed to take effective action to prevent harassment from recurring in the Police Service. After the September 23, 2008, meeting management scheduled sensitivity and diversity training. The training was held on January 23, 2009, but one of the harassers did not attend. There was also no evidence that management initiated an investigation into claims of derogatory racial comments or that it took any action against the employee who left a noose on a co-workers desk.

This case illustrates the importance of effectively addressing incidents of harassment shortly after they arise.

## XII

### **Supervisor Failed to Use Reasonable Care to Prevent or Correct Harassing Behavior**

In this case, a male charge nurse often followed the complainant, a certified nursing assistant, into rooms where he would be alone with the complainant; often stood too close to the complainant; often stared at the complainant and touched her arms and shoulders; brushed his penis against complainant's buttocks; and once leaned in, put his hands over complainant's shoulders and touched his head to complainant's forehead. These events occurred through April and May 2009.

In early May 2009, complainant sent her immediate supervisor an email indicating that she had a complaint against the charge nurse and that she would call to discuss the details. Complainant did not receive a response to her email from the supervisor. The supervisor testified that she did not respond to complainant's email because complainant indicated in her email that she would call her at a later time with more detail, but never did. In late May 2009, complainant reported to the union steward that she had contacted her supervisor about the charge nurse, but received no response from the supervisor. Both the union steward and the complainant then emailed the supervisor about the charge nurse's sexual harassment. Complainant requested that she and the charge nurse no longer work on the same shift. In June 2009, the supervisor conducted an investigation, but concluded that there was "no preponderance of evidence for sexual harassment, there is however a preponderance of evidence toward unwanted personal space invasion." The supervisor ordered the charge nurse to return to his unit where he would resume working with the complainant. Additionally, the supervisor directed the charge nurse to stay an arm's length away from the complainant, not to touch the complainant, and to limit conversation with the complainant to professional issues. She instructed complainant to tell the charge nurse to stop if he offended her again or to report the incident to the supervi-

sor. Complainant did not report any further sexual harassment to the supervisor. Instead, she requested and received a reassignment to a different unit.

Among other things, this case illustrates the consequences of management's failure to take prompt, effective, and appropriate remedial action as soon as it became aware of harassment. The supervisor should have responded to complainant's May 6, 2009, email and taken some action immediately despite complainant's statement that she would call her later, but failed to do so. Management is under an obligation to do whatever is necessary to end sexual harassment and prevent misconduct from recurring. The supervisor's duty to act on complainant's email was heightened by her awareness that another employee had reported sexual harassment by the charge nurse in the recent past. Had she acted immediately after receiving complainant's May 6, 2009 email, chances are complainant would have been spared from additional harassment, a reprimand for retreating to the break room to avoid the charge nurse, and a request to be reassigned to another unit.

### XIII

#### **Offensive Sexual Jokes Amounted to Harassment**

Typically, sexual harassment is ascribed to an incident in which an individual directs inappropriate comments or gestures toward another. This case however, demonstrates that sexual harassment can also include instances in which a supervisor repeatedly makes inappropriate remarks about employees to another employee who finds the remarks offensive. Such conduct is deemed inappropriate and may create a hostile environment.

An overwhelming number of witnesses in this case testified that the supervisor con-

stantly turned normal workplace conversations into sexual jokes. Jokes of this nature were told to the complainant on a daily basis, even after the complainant indicated that he found the jokes to be offensive. In addition to making offensive comments to the complainant about others, management was accused of explicitly referring to the complainant as "old man" and openly threatened to take the complainant's job away. The supervisor's sexual comments in conjunction with the disrespectful comments regarding the complainant's age put the complainant under a significant amount of stress. As a result, the complainant was hospitalized and even considered retirement.

The comments which were made by management in this particular case were so frequent and pervasive that they prompted the complainant to retire. Although the sexual comments made by the management official were not necessarily about the complainant, the mere fact that the comments were made in his presence on a consistent bases, raised an inference of sexual harassment.

Although the complainant did not directly report this issue to management, the intensity of the harassment demonstrates an implicit reasonable expectation of fear. Because the complainant did not want to lose his job, he was reluctant to report the incidents of harassment. Management officials should be clear that a complainant's failure to directly report an incident of harassment does not exempt management from the responsibility of addressing the issue. Management was well aware of the conduct that the complainant was facing and instead of providing a remedy, they simply dismissed the conduct as humorous. Instead of addressing the issue when it first became a problem, management decided to wait until the complainant was hospitalized to take corrective measures. Acting too late is the equivalent of not acting at all.

Continuous offensive comments about an employee in the presence of other employees can be considered harassment. Management's failure to take corrective measures in a timely fashion can result in a finding of discrimination.

#### XIV

#### **Management's Failure to Engage in an Interactive Process Following a Disabled Employee's Request for Reasonable Accommodation Results in a Finding of Discrimination**

OEDCA issued a final agency decision in a case that illustrates an error that managers often make when they receive a request for reasonable accommodation from an employee. The error is failing to engage in an "interactive process" with an employee who has made a request.

The complainant in this case suffered from bone degeneration and osteoporosis. She requested 10 to 12 weeks of leave without pay (LWOP) in order to undergo and recuperate from right hip replacement surgery. Her second line supervisor, recommended denial of that request on the basis that the complainant had exhausted all accumulated leave and all benefits available to her under the Family Medical Leave Act. Although complainant's prior requests for leave had always been granted and she had never been counseled about any leave issues, the supervisor maintained that the right hip surgery was elective and that the complainant had abused her leave in the past. In addition, the complainant's first line supervisor maintained that complainant's absence from her position of Program Support Assistant for the 10 to 12 weeks requested would cause the Agency undue hardship.

The complainant alleged that her second line supervisor gave her three options when he advised her that he had recommended denial of her request for the LWOP. According to

the complainant, he told her that she could continue to work and earn enough leave to take off the 10 to 12 weeks required for the right hip replacement surgery, she could choose to proceed with the surgery, be considered absent without leave (AWOL), and possibly face termination, or she could retire from her position with the Agency and have the surgery. The supervisor denied he presented the options alleged by the complainant but, OEDCA did not find his testimony to be credible.

The complainant, who suffered from constant pain, retired instead of choosing either of the other options presented to her. OEDCA found that the complainant's request for LWOP was a request for reasonable accommodation that was denied by the Agency. The Agency violated the provisions of the Rehabilitation Act when it failed to engage the complainant in an interactive process to determine her entitlement to an accommodation.

In this case, management should have immediately engaged the complainant in a dialogue in order to determine whether she was entitled to accommodation. Rather than seek further information as to the extent of complainant's disability and whether granting her request for LWOP would be an appropriate and effective accommodation, management summarily denied the request. Additionally, there was no evidence that granting complainant's request would create an undue hardship.

As a result of the Agency's denial of the complainant's request for reasonable accommodation, the Agency gave the complainant no choice but to retire. Her involuntary retirement was found to be a constructive discharge based on her disability.

### **Single Attempt at Reasonable Accommodation was Inadequate**

On December 11, 2006, the complainant began work as a GS-9 Social Worker in the facility's Substance Abuse Residential Rehabilitation Treatment Program (SARRTP). According to the position description, the position was a developmental entry level position requiring management to closely monitor the employee's work and to conduct regularly scheduled conferences to provide the employee with guidance and advice and to evaluate the employee's performance. As the employee mastered tasks and assignments, the amount and extent of supervision was to be reduced. The complainant informed the program director that he was concerned about being placed in SARRTP because he did not have a substance abuse background.

Complainant was legally blind and had retinitis pigmentosa which diminishes both his peripheral and night vision. As a retired disabled military veteran, the VA purchased a closed circuit television to assist complainant with his disability. The closed circuit television (CC-TV) is a magnification system that scans written material, magnifies it, then projects it onto a monitor in a larger format. Complainant brought the CC-TV with him to work to help him perform his duties. Additionally, he requested a ZoomText program that enlarges and reads text on dual computer monitors. The Agency purchased and installed the ZoomText program on complainant's computer, but after four weeks the program failed. Ultimately, attempts to fix the problem failed. Among other things, complainant's duties included documenting a veteran's visit into a computer program. The Agency was advised that the software was incompatible with the system and that they needed to purchase new software, but they did not. The complainant's

t's duties required a significant amount of work on the computer.

In April 2007, the complainant, a probationary employee, was issued a letter of warning for poor performance. The complainant was issued a letter of termination on June 5, 2007 for failing to "satisfactorily perform the duties and responsibilities of a social worker." His termination was effective June 22, 2007.

The EEOC administrative judge found that the Agency failed to provide the complainant with an effective accommodation for his disability and failed to, in good faith, engage him in an interactive process. The judge found it significant that the complainant's supervisors, appeared indifferent to the complainant's visual impairment and how it affected every aspect of his duties and performance. The Program Director was unaware of the expected standards for an entry-level Social Worker, and she failed to consider that the complainant was a disabled employee who had not been provided an effective accommodation for his disability. The Agency's conduct violated the Rehabilitation Act,

This case illustrates the principal that an agency's single attempt at accommodation is inadequate. Agency's are required to continue to engage in the interactive process to ensure that an employee is provided with an effective accommodation. In this case, the EEOC administrative judge found that although the agency's initial efforts to accommodate complainant were reasonable, and comported with law, once complainant informed his immediate supervisor that the accommodation was ineffective, more action was required by the agency.

### **XVI**

### **Disability Discrimination Found when Agency Acted Upon Unsubstantiated Per-**

## **ception of complainant's Physical Disability**

Complainant, a Registered Nurse, occupied a light duty position due to an on the job injury. In July 2006 and September 2006 the agency posted two separate vacancy announcements for the position of Surgical Care Coordinator. The announcements did not contain any information regarding physical requirements for the position. The agency conducted performance based interviews, but complainant was not among the applicants interviewed. Complainant's immediate supervisor did not forward complainant's application for consideration because complainant was on light duty. Because complainant was on light duty her supervisor believed she would be unable to physically perform all of the essential duties of the positions. The supervisor was not familiar with the details of complainant's injury.

The EEOC judge found that the agency discriminated against the complainant on the basis of disability when it acted on an "unsubstantiated perception" of complainant's disability at the pre-job offer stage. Under EEOC guidelines, agencies are advised not to consider a person's disability prior to evaluating a person's non-medical qualifications for the position. Furthermore, EEOC advises agencies to refrain from making any disability inquiries until a job offer has been made to an applicant.

The EEOC judge found that the agency discriminated against the complainant "when it acted upon a unsubstantiated perception of an identified physical disability, made at the pre-job offer stage which resulted in the agency's failure to administratively process" or consider complainant's application.

## **XVII**

## **Nursing Service's Policy Regarding Reasonable Accommodation Violated Rehabilitation Act**

The complainant worked as a Certified Nursing Assistant (CNA) at VA Medical Center 1 (VAMC1). In May 2007 complainant fell and injured her back. She underwent surgery in July 2007, completed a strenuous rehabilitation regiment, and returned to work with restrictions in December 2007. In February 2008, the complainant's personal physician authorized her return to duty without restrictions. In February 2008 the complainant accepted an offer to work as a CNA in Nursing Service at VAMC2, subject to passing a physical examination without limitations. VAMC 1 cleared the complainant for unrestricted duty after conducting a courtesy examination of the complainant on behalf of VAMC2.

The Director, Occupational Health and Environmental Medicine (OH&EM) at VAMC2 reviewed the complainant's medical records, erroneously concluded that the complainant was disabled, and in March 2008 recommended limiting complainant to light lifting. The complainant maintained that she could work without restriction and successfully completed a private functional capacity examination at her own expense, whereupon the Director, OH&EM changed the limitation to moderate lifting. At the time, Nursing Service operated under a policy from the Nurse Executive not to provide reasonable accommodation to Nursing Assistants with lifting restrictions and not to hire Nursing Assistants with physical limitations.

The EEOC judge found that by instituting such a policy without even considering whether the agency could provide a reasonable accommodation to an otherwise qualified applicant with disabilities, the agency was engaging in an ongoing violation of the Rehabilitation Act.

## XVIII

### **Agency Discriminated Against Complainant Because He Had PTSD**

The complainant was selected for a position as a Readjustment Counseling Therapist at VAMC1 pending a pre-employment examination to determine if he met the medical requirements of the position. At the time he applied for the position, complainant worked at VAMC2. An Occupational Health Physician at VAMC2 conducted the complainant's pre-employment examination and found that the complainant was fit to perform the position. The Occupational Health Physician accessed complainant's medical documentation without the complainant's consent and discovered that the complainant had been on medication for depression and anxiety. The Occupational Health Physician included this information in his notes that accompanied the pre-employment physical. The complainant informed the Occupational Health Physician that he had stopped taking his medication and that he was not on medication when he was examined.

The Occupational Health Physician informed the Employee Health Physician at VAMC1 that the complainant was fit to perform the Readjustment Counseling Therapy position. Subsequently, a Human Resources official informed the complainant that he did not pass the pre-employment physical and that he should contact the Employee Health Physician at VAMC1. The complainant contacted the Employee Health Physician. The Employee Health Physician informed the complainant that he was not selected because of his post traumatic stress disorder (PTSD).

The Employee Health Physician testified that she was concerned that the complainant's medical examination revealed that the complainant electively took himself off of medication for his mental condition and she

did not know which medication he was taking. The Employee Health Physician also testified that she wanted follow-up information about whether the complainant needed to be on medication and that she contacted the Occupational Health Physician to request a psychiatrist consult for the complainant. The Occupational Health Physician denied that this contact occurred. He testified that he did not have any further contact with the Employee Health Physician after he cleared the complainant for employment and forwarded his findings to the Employee Health Physician.

The EEOC judge found that the Employee Health Physician's testimony was not credible as the preponderance of the evidence revealed that the Employee Health Physician did not inform the Human Resources officials involved in the pre-employment process that she was waiting to receive additional medical information from the complainant. The complainant testified that he was never asked to provide additional medical information and there was no documentary evidence to the contrary. The Human Resources officials testified that the Employee Health Physician informed them that the complainant did not pass his pre-employment physical, resulting in the rescission of his employment offer. The EEOC judge found that the Employee Health Physician discriminated against the complainant based on a perceived disability when she determined that the complainant did not pass the pre-employment physical, which led to rescission of his employment offer as a Readjustment Counseling Therapist.

## XIX

### **The Agency Violated the Rehabilitation Act When Agency Officials Improperly Accessed Complainant's Medical Files**

Complainant, a Nursing Assistant, suffered a work-related injury to both hands and was diagnosed with tendonitis and carpal tunnel syndrome. Since 2000 complainant has been on light duty. In 2007 complainant's supervisor asked her to provide medical documentation from her physician clarifying her physical work restrictions due to carpal tunnel. Complainant claimed that she could not obtain the documentation. It was undisputed that complainant's supervisor pulled complainant's personnel and medical file in order to obtain the name of the physician who treated complainant for carpal tunnel syndrome.

The EEOC judge found that the Agency discriminated against complainant when her supervisor improperly accessed her medical files. Although the supervisor explained that she accessed the file in order to obtain the name of complainant's physician, the EEOC judge noted that the supervisor's intentions were irrelevant. EEOC regulations provide that, unless specifically designated to oversee and/or access confidential medical information, any unauthorized person's accessing an employee's confidential medical record is a per se violation of the Rehabilitation Act. Since complainant's supervisor was not designated as the medical records custodian, she improperly accessed confidential medical information when she pulled complainant's medical file.

## XX

### **Permanent Reassignment to a Position Outside of a Disabled Complainant's Medical Limitations Fails to Reasonably Accommodate Complainant and Results in a Finding of Discrimination**

The following case highlights the obligatory duty of management to accommodate a complainant in instances where management has knowledge of a complainant's disability. When made aware of an employee's medical

condition, management must make a good faith effort to provide an accommodation that would effectively address the complainant's illness/injury to the extent that addressing the matter would not result in an undue burden. Providing a reasonable accommodation requires that management do more than just place the employee in a different position. If reassignment is being used as the method of accommodation, management is responsible for seeking out various types of positions that would allow the complainant to perform the essential duties of the job.

In 2008 the complainant in this case was demoted and reassigned to a vacant position within the department. The new position required the complainant to perform direct patient care and contact duties. Prior to the complainant's reassignment, the supervisor had specific knowledge of the complainant's disabilities and inability to have direct contact with patients, but nonetheless decided to assign the complainant to a job that required him to perform these duties. Despite management's awareness of the complainant's medical limitations, no efforts were made to find a more suitable position for the complainant. The complainant had no choice, but to take leave without pay (LWOP) and was eventually terminated because he was unable to perform the essential job functions that the reassignment required.

The evidence provided by management for making the reassignment does not demonstrate that management thoroughly sought a non-supervisory position that would have accommodated the complainant. Management did not take the initiative to seek other types of work which in their nature would have been less invasive to the complainant. Furthermore, management showed no indication that they explored other forms of work, such as an administrative position as a potential option. Management failed to produce evidence that they considered putting

the complainant into another nursing position or into a non-nursing position that would have allowed the complainant to physically fulfill the duties of his job.

Management cannot simply ignore a complainant's request for an accommodation. After receiving evidence of a disabled employees' disability, management has an "affirmative duty" to provide a reasonable accommodation. In the event that management makes a reassignment decision that adversely affects a disabled complainant's continued employment without first exhausting all possible options for a reasonable accommodation, management's motives to reassign the complainant may be construed as discriminatory.

## XXI

### **Selecting Officials' Reasons For Not Choosing Complainant Were A Pretext for Racial Discrimination**

The following case illustrates some typical examples of the evidence that EEOC judges and OEDCA may rely on when finding that a selecting official's reasons for not choosing an applicant are not credible and, therefore, pretextual.

In May 2008, the Agency posted a vacancy announcement for the position of Engineering Equipment Operator Leader. Complainant was one of two applicants whose names appeared on the Merit Promotion Certificate that was forwarded to the selecting official. The selecting official returned the Certificate with an endorsement that he had selected the other applicant, a Caucasian employee. On the Certificate, the selecting official indicated that he evaluated the applicants by reviewing their applications and related material and by reviewing their responses to in-person interviews. According to management, complainant was not selected because he did not do well in the inter-

view, resulting in a lower interview score than the selectee. The EEOC judge found that management's reason for not selecting complainant was pretextual and that it was based on race.

The evidence indicated that the Complainant was significantly better qualified than the selectee. Overall, the complainant was already performing the job in his position of Engineer Equipment Operator. Additionally, based upon complainant's overall performance rating he performed the essential functions of his job in an exceptional manner. Complainant also excelled at promoting a harmonious working environment and demonstrated leadership ability. In contrast, the selectee was the Wage Leader for the Headstone Crew and did not work with the heavy equipment used in the Engineering Operator Leader position. Additionally, the selectee did not have the same level of experience that the complainant had in training employees on the use of the heavy equipment.

The EEOC judge also found the Agency's reasons pretextual because of the "inconsistent and implausible" positions taken by the interview team and the selecting official. The selecting official claimed that he based his selection on interview scores without considering the KSA responses or his personal knowledge of the applicants' work duties and performance. On the other hand, he indicated on the Recruitment Action Transmittal Sheet and the Best Qualified Certification that he evaluated the applicants by reviewing their applications and related material and by reviewing their responses to in-person interviews.

Finally, the EEOC judge found evidence of pretext because of general work place disparities. For example, the EEOC judge noted that at the time of the hearing, the Agency did not have any African American employees in leadership or managerial posi-



tions. He also noted evidence that complainant was treated disparately in daily work activities.

Passing over an applicant who on paper appears to be better qualified than the selectee usually raises a red flag. Justifying such a selection decision by posing inconsistent reasons results in a finding of discrimination.

## XXII

### **Evidence Showed that Age Discrimination Motivated Decision Not To Promote Loan Specialist to Supervisory Position**

The complainant, age 57 at the time, applied but was not selected for the position of Supervisory Loan Specialist, GS-13 at a VA Regional Office in May 2008. He was a GS-12 Loan Specialist (Team Leader) at the Regional Office and had been a team leader since 2002. Complainant also received positive feedback from employees on his performance as a Team Leader and had many years of private sector experience in the mortgage industry.

The person selected, 27 years old at the time, lacked experience in the mortgage industry and lacked leadership experience. His only employment in the industry consisted of a few years with the VA after college.

Management testified that complainant was not promoted because of his difficulty with accomplishing tasks and meeting deadlines, receipt of various employee complaints about his performance, and his placement on a pre-performance improvement plan shortly before his promotion to Team Leader in 2002. The EEOC judge found that management's reasons lacked credibility and cited evidence that contradicted their reasons for not promoting the complainant.

The EEOC judge also found a history of discrimination against older employees as evidenced by a pattern of promoting, advancing, and providing greater opportunities to younger employees who participated in the Federal Career Intern Program. This was at the expense of older, more experienced employees.

Normally, courts and administrative fact-finding bodies such as EEOC and OEDCA will not disturb an employer's business judgment regarding the relative qualifications of applicants for employment promotion. Employers are free to exercise their own business judgment, as long as that judgment is not based on discriminatory criteria. However, evidence of discriminatory motive may be established if a complainant can show that his or her qualifications are "plainly superior" to those of the selectee. In this case, the complainant's qualifications were observably and plainly superior to those of the selectee. The disparity in qualifications was so great, and management's reason so lacking in credibility, that age discrimination was more likely than not the real reason for their decision not to promote the complainant.

## XXIII

### **Management's Failure to Provide a Clear and Specific Explanation for their Selection Results in a Finding of Age Discrimination**

The complainant, a WG-7 Area Maintenance Worker serving a term appointment, alleged that management officials discriminated against him based on age when they did not select him for a position as a permanent WG-7 Area Maintenance Worker. The recommending official testified that the applicants' interview scores were significant factors in the decision-making process. Two applicants with the highest interview scores were selected. Although the recommending

official was able to articulate specific and detailed reasons for selecting one of the applicants, he was unable to do so with respect to the other applicant. In addition, the facility failed to produce a copy of the recommending official's interview scoring sheets with accompanying handwritten notes. The selecting official testified that he simply followed the recommending official's recommendation. The EEOC judge found that management's "vague articulations" were not legally sufficient to allow complainant an opportunity to show pretext, and therefore failed to rebut complainant's prima facie case of discrimination.

This case illustrates the importance of providing a clear, specific and detailed explanation for a selection action. In this case, the recommending official stated that the selected applicant answered questions in more detail than the complainant, but was unable to provide specific examples to support this position. It also highlights the importance of saving records related to the selection. This includes rating and ranking sheets, interview notes, and any other materials that management relied upon during the selection process. The reason to keep the records is that the Department's representative will need to produce them if an applicant files an EEO complaint. Simply stating that a selectee was better, particularly in the absence of any documentary support, has more often than not lead to a finding of discrimination.

#### XXIV

#### **Failure to Maintain Complainant's Application Package Results In An Adverse Inference and a Finding of Age Discrimination**

In December 2007, the complainant applied for the position of Human Resources Management Intern. At the time of his application, the complainant was 72 years old. The Human Resources (HR) Staffing and Re-

cruitment Specialist did not refer the complainant's application to the selecting official for consideration because it did not include a Declaration of Federal Employment Form (OF-306) as required by the vacancy announcement. Complainant acknowledged that he did not submit the OF-306, but asserted that the vacancy announcement did not require it. The EEOC judge found that the vacancy announcement required all applicants to submit an OF-306 to complete their application package.

Notwithstanding complainant's failure to submit the required OF-306, the EEOC judge found that the Staffing Specialist treated the selectee's application more favorably. The EEOC judge found that the selectee, age 55, submitted a partially completed OF-306 with his application, but was referred to the selecting official despite the requirement to submit a complete application package. The EEOC judge found that the Staffing Specialist ignored the requirement, as well as his own described policy not to refer applicants who did not submit all the required information, when he referred the selectee's incomplete application to the selecting official.

Additionally, complainant claimed that the EEOC judge should draw an adverse inference because the Department could not produce the full application package that he submitted when he applied for the position. The EEOC judge agreed with the complainant, and noted that the Department failed to keep pertinent information regarding the nonselection in violation of 29 C.F.R. Section 1627.3. Citing 29 C.F.R. Section 1614.109(f)(3) the EEOC judge drew an adverse inference against the Department due to the failure to keep complainant's complete application package for the timeframe required by the regulation. Specifically, he found that complainant's application package would have reflected favorably upon him and established that he was qualified for the position and would

have been referred to the selecting official for consideration. Furthermore, the EEOC judge found that the complainant's qualifications were plainly superior to the selectee's qualifications and that this supported a finding of pretext.

This case highlights how critical it is for HR officials to ensure that documents pertaining to personnel actions that are the subject of a pending EEO complaint are not destroyed. In the ordinary course of business, and in accordance with the General Services Administration's records disposal regulations, agencies regularly destroy records that are no longer needed. Those regulations require, however, that all records relevant to an EEO complaint must be preserved until after final resolution of the complaint.

## XXV

### **Employee's Superior Qualifications Coupled With Contradictions and Inconsistencies In The RMO's Testimony Results in a Finding of Discrimination**

The complainant was an Electrician, WG-10 at a VA Medical Center from May 1994 until September 2003. As an accommodation for an on the job injury that he sustained in 2002, the complainant was reassigned to the position of Laundry and Textile Clerk in 2003, which is the position he held at the time of the complaint. His on the job injury led to his physical disability of degenerative disc disease and lumbar radiculopathy. In May 2007, the complainant applied for the position of Engineering Technician, GS-9, but was found not qualified for the position. The Human Resource Management Specialist who made the determination regarding the complainant's qualifications determined that the complainant lacked specialized experience for the position. The EEOC judge who heard the case concluded that there were numerous inconsistencies and contradictions in the Human Resource Management Specialists testimony.

The Human Resource Management Specialist testified that he looked at two criteria to determine whether applicants were minimally qualified for the position. They were 1) whether the applicant had one year working at the GS-8 level, and 2) whether the applicant had one year working in a trade or craft that provided knowledge of engineering at the GS-8 level (specialized experience). On cross examination the Specialist admitted that the complainant had experience in a position that showed specialized experience, but he indicated that he was unable to determine how long the complainant performed any of the duties identified in his application. The EEOC judge noted that it defied logic to believe that the Specialist was unable to determine how long complainant performed the duties identified in his application given the fact that his application provided detailed information and dates regarding his work experience. The EEOC judge also noted that complainant's application contained statements from his supervisors that indicated complainant had the requisite specialized experience. The Specialist indicated that he did not consider the supervisory statements.

There was also evidence that the Specialist treated complainant less favorably than the selectee. For example, the Specialist admitted that he did not give the complainant credit for work that he described in his KSA because he did not provide any documentary evidence that he performed the work. In contrast, the Specialist gave the selectee credit for the same work based solely upon the selectee's statement in his resume that he performed the work. Additionally, the Specialist indicated that if the complainant performed the duties he described in the KSA he would have been found minimally qualified.

Ultimately, the EEOC judge concluded that the complainant's qualifications were plain-

ly superior to those of the complainant. Notably, the Specialist testified that the selectee did not have the one year working at the GS-8 level, but was able to satisfy this time-in-grade requirement through his VRA status. According to the Specialist, the selectee had never worked above the GS-7 grade level for more than four months. In contrast, complainant's application reflected 28 years of relevant experience.

## XXVI

### **Disparities in Disciplinary Treatment Lead to a Finding of Discrimination Based on Race**

Complainant, an African-American female, was employed as a Podiatrist at a VA Medical Center where she was the only African American doctor who managed a clinic. On May 11, 2007, complainant was suspended and placed in a paid, non-duty status pending an investigation. Complainant sought the assistance of the union and disputed the charges regarding the incidents. After the completion of the investigation complainant received a notice of proposed suspension charging her with five deficiencies. Ultimately, complainant was suspended without pay for three days.

An EEOC judge agreed with complainant's claim that she was singled out for harsher treatment than her white, male counterparts based upon patient complaints. She claimed that when white, male physicians received more severe patient complaints they were not disciplined as harshly as the complainant. For example, a white male physician who was previously disciplined for jeopardizing patient care was not suspended when he was charged a second time with failing to exercise appropriate patient care and jeopardizing a patient's safety. In contrast, the evidence showed that complainant never jeopardized the patient's safety or failed to exercise diligence regarding the pa-

tient's care, yet she was placed off duty and suspended.

The EEOC judge also found the agency's additional reasons for placing complainant off duty to be lacking. One additional reason was complainant's failure to interact with a patient in an appropriate manner when she rescheduled his appointment. The facility Director believed that the complainant scolded the patient for being late, but the complainant denied this and stated that she rescheduled the appointment for medically sound reasons. The EEOC judge found that the Director lacked credibility because he provided no objective basis for his belief and because he never discussed any of the incidents with the complainant.

The Director also recommended placing complainant off duty because she was rude and abrasive with staff and patients. The EEOC judge found disparate treatment, however, because there was evidence that two white males were also rude and abrasive but were not investigated or suspended. Although the Director took issue with complainant's lack of enthusiasm with his instructions, he admitted that other physicians were less than enthusiastic with his instructions. The Director could not, however, identify other physicians who were disciplined for similar conduct.

## XXVII

### **Agency May Not Cancel a Vacancy Announcement in Order to Avoid Selecting an Applicant in a Particular Protected Group**

Complainant alleged that he was discriminated against on the bases of race/national origin (Asian/Chinese) when he was not selected for a GS-12 Program Analyst position. He was found qualified and was interviewed for the position but members of the interview panel had reservations about his communication and compliance skills. They

were also concerned that neither the complainant nor the other applicant who the panel interviewed could hit the “ground running” and establish a compliance program. The interview panel recommended that the vacancy announcement be cancelled and that it be re-posted. In order to broaden the pool of applicants, a member of the selection panel attempted to have the position reclassified as a GS-13, but was unsuccessful. The position was re-announced about a year later at the GS-11/12 level.

The EEOC judge found the Agency’s reasons for not selecting the complainant to be pretextual. Agency officials stated that they needed someone who could hit the ground running and complainant would need extensive training. At the same time Agency officials acknowledged that anyone who was hired for the position would need extensive training because of the changing regulatory requirements of the VA. Additionally, although the facility was under a mandate to fill the position right away the Agency waited a year before re-posting the position which belies the purported urgency to select someone who could “hit the ground running.”

The members of the interview panel also recommended that complainant not be selected because he lacked compliance experience. Complainant’s application, however, clearly set out his compliance experience. The EEOC judge also noted that although panel members claimed that complainant did not have compliance officer experience, the vacancy announcement did not list it as a qualification.

Lastly, the interview panel cited complainant’s lack of critical communication skills as another reason for his nonselection. The EEOC judge found this reason to be pretextual because complainant’s application was replete with examples of his oral presentation skills. The EEOC judge sug-

gested that the panel’s belief that complainant lacked communication skills was synonymous with having a Chinese accent.

Ultimately, the EEOC judge concluded that the Agency’s reason for re-posting the vacancy announcement was suspect. One of the panel members wanted to re-post the vacancy announcement at a higher grade level to attract a broader pool of applicants. Quoting the Director of the facility the judge pointed out that normally to widen the area of consideration a position would be posted at a lower grade level.

The EEOC judge found, and OEDCA agreed, that the Agency’s reasons for complainant’s nonselection were pretextual. Accordingly, the decision found discrimination based upon race/national origin.

## XXVIII

### **EEOC Judge Sanctions Agency for Failing to Secure the Attendance of a Witness at the Hearing**

On September 3, 2008, the complainant, a WG-4 Cook, had a verbal confrontation with a co-worker. The complainant initiated the incident, but it escalated when the co-worker threatened to beat up the complainant and set him on fire. Complainant told his supervisor that he was going to report the incident to the police, but his supervisor tried to dissuade him. His supervisor told him to drop the matter because the supervisor did not believe complainant’s witnesses heard anything. Complainant reported the incident to the VA police and the police conducted an investigation.

According to the complainant, one of the witnesses who the police interviewed provided a lengthy written statement describing the co-worker’s threat in detail. This statement disappeared and did not become part of the police report released to the com-

plainant. Complainant requested that this witness be allowed to testify at the EEO hearing about what he heard and about his missing statement. The EEOC judge ordered the VA to arrange to have the witness present at the hearing.

The Operations Director used the police report to conduct his own investigation. Complainant told the Operations Director that he did not feel safe with the co-worker who threatened him, but the Operations Director did not believe that the co-worker threatened complainant. He recommended a reprimand for the co-worker and a 10-day suspension for the complainant. Complainant believes that if the statement that disappeared from the police report had been present, the Operation Director's recommendation would have been different.



Complainant alleged that he was discriminated against on the basis of his race (white) because he was suspended but his black co-worker received only a reprimand. The VA articulated a legitimate, nondiscriminatory reason for the disparity in discipline. That reason was that the complainant provoked the altercation with a snide comment. Additionally, the complainant had a history of discipline for similar disrespectful comments unlike his co-worker who did not. Complainant submitted that the agency's articulated reason was pretext. His theory for pretext was that one of the witnesses to the altercation would have given testimony that demonstrated how serious complainant's co-worker's threats were, but the VA failed to produce this witness when ordered to do so by the EEOC judge. The EEOC judge found that VA's failure to make the witness available for the hearing prevented complainant from putting on his case and presenting crucial evidence. Therefore, the EEOC judge drew an adverse inference that the witness's testimony would have supported a finding of pretext and found discrimination based upon race.