



OEDCA DIGEST



Vol. III, No. 4

Department of Veterans Affairs
Office of Employment Discrimination
Complaint Adjudication

Fall 2000

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final decision or order on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include reprisal and *per se* reprisal claims, "pre-selection", same-sex sexual harassment, disability discrimination, and cultural diversity training.

Also included in this issue is the fourth in a series of articles concerning frequently asked questions and answers pertaining to the rights and responsibilities of employees and employers with regard to requests for reasonable accommodation of a disability.

The *OEDCA Digest* is available on the World Wide Web at: www.va.gov/orm.

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I

OEDCA FINDS REPRISAL WHERE SUPERVISOR ENGAGED IN CONDUCT AIMED AT INTERFERING WITH THE PROCESSING OF A SEXUAL HARASSMENT COMPLAINT

OEDCA recently issued a final agency decision finding that a supervisor had engaged in *per se* retaliation” in connection with a subordinate’s sexual harassment complaint against that supervisor.¹

Shortly after the complainant had contacted an EEO counselor to complain about sexual harassment, her supervisor approached one of her co-workers, who was also a potential witness, and accused her of “going over to the other side.” The co-worker understood the comment to mean that the supervisor was accusing her of supporting the complainant in her sexual harassment complaint.

Later, the supervisor also had discussions with some of the complainant’s witnesses regarding meetings they were scheduled to have with the EEO counselor assigned to the complainant’s sexual harassment complaint. Although he initially denied having any such discussions, he later admitted meeting with them and advising them “to make sure you tell the truth.” The supervisor also approached the EEO manager at the facility to voice his displeasure at the

¹ The complainant did not allege a claim of reprisal in her sexual harassment complaint. However, OEDCA ordered a supplemental investigation because evidence bearing on such a claim appeared in the report of investigation on her underlying complaint of sexual harassment.

questions being posed to the complainant’s witnesses by the EEO counselor. The EEO manager thereafter approached the counselor regarding the supervisor’s concerns.²

Finally, the EEO counselor testified that several employees were unwilling to speak with her on the record concerning the supervisor’s behavior because they feared that he would retaliate against them. Moreover, the counselor noted that many employees at the facility regarded the supervisor as an intimidating figure.

By engaging in the conduct described above, the supervisor violated the anti-retaliation provisions of EEOC’s regulations. It is a *per se* (i.e., automatic) violation of those regulations to take any action intended to or that might restrain or interfere with, or might otherwise have a chilling effect on potential utilization or participation in the EEO process by complainants or witnesses. Intent to retaliate is not a necessary element in a *per se* violation case. Moreover, a *per*

² The EEO manager should not have approached the counselor concerning the matter, as doing so gave the appearance that the EEO process at the facility was subject to the control of individuals accused of discrimination. This and other similar problems, however, were rectified when the Department of Veterans Affairs subsequently reorganized its internal EEO complaint process. Among other things, the reorganization removed EEO counselors from the chain of command at the facility where the discrimination allegedly occurred and created a professional corps of full-time counselors who now report directly to an EEO field manager employed by the Office of Resolution Management. The managers in turn report directly to the Deputy Assistant Secretary for Resolution Management in VA Central Office, Washington, D.C.



se violation is possible even if the wrongdoer takes no adverse action against the complainant or other participants in the EEO process. Finally, it is not necessary to show that the wrongdoer actually succeeded in restraining or interfering with the process – only that he or she took actions designed to or that could have resulted in such restraint or interference.

The lesson here for supervisors and managers is obvious – avoid any actions, statements or discussions with complainants, witnesses, potential witnesses, or officials with EEO complaint processing responsibilities that could reasonably be interpreted as an attempt to restrain or otherwise influence the processing or outcome of an EEO complaint.

II

SUPERVISOR'S LACK OF KNOWLEDGE OF COMPLAINANTS PRIOR EEO ACTIVITY AND LENGTH OF TIME SINCE THAT ACTIVITY DEFEATS COMPLAINANTS' REPRISAL CLAIM

OEDCA recently accepted an EEOC administrative judge's decision finding that management officials did not retaliate against the complainant when they announced a "buy-out" shortly after her voluntary retirement.

The complainant, a former Food Service Worker in the Dietetic Service, retired just a few days prior to an official announcement by upper level management in VA Central Office that buy-outs (*i.e.*, a financial incentive to retire) had

been approved and the subsequent announcement by the Chief, Dietetics Service at the complainant's facility that some employees in that service might be eligible.

The complainant was aware, prior to her retirement, of rumors that such buyouts might be approved, but she was unwilling to delay her retirement. When she later learned that buy-outs had been approved, she filed an EEO complaint alleging that management officials retaliated against her because of her prior EEO activity by not informing her prior to her retirement that she might be eligible for a buy-out.

The complainant's reprisal claim is premised on the fact that she had visited the EEO office four years earlier to inquire whether she could receive an upgrade from WG-3 to WG-4. She never spoke to an EEO counselor about that matter and never filed a complaint about it.

OEDCA agreed with the EEOC administrative judge's conclusion that the complainant had failed to establish even a *prima facie* case of reprisal. The reason for this conclusion was two-fold. First, there was no evidence in the record that the service chief -- her third level supervisor -- was even aware of her prior visit to the EEO office some four years earlier. Absent such knowledge, the complainant's visit to the EEO office could not possibly have had any bearing on the timing of the buy-out announcement.

Furthermore, even if the service chief had such knowledge, the four-year period between the visit and the buy-out



announcement was far too long to raise an inference that retaliation may have been a motive. To establish a *prima facie* case of retaliation, a complainant must generally show that he or she engaged in prior EEO activity, that the management official alleged to have retaliated was aware of that prior EEO activity, that the official subsequently took some action unfavorable to the complainant, and that the period of time between the prior EEO activity and the matter complained of was short enough to create an inference that retaliation may have been a motive. The EEOC and the courts have generally held, depending on the circumstances, that a period of 12 months or less will create such an inference.

Of course, even if a complainant is able to establish a *prima facie* case, such evidence, in itself, is never sufficient to prove that retaliation actually occurred. The complainant will have to offer other convincing evidence, direct or indirect, that retaliation was, in fact, a motivation. In other words, the mere fact that an unfavorable action takes place after an employee engages in EEO protected activity that management is aware of does not, by itself, prove that management took the action because of the prior EEO activity.

III

TWO INSTANCES OF NON-INTIMATE TOUCHING OF AN EMPLOYEE BY A SUPERVISOR NOT SUFFICIENT TO ESTABLISH SEXUAL HARASSMENT

OEDCA recently accepted an EEOC administrative judge's finding that an

employee had failed to prove that she had been subjected to a hostile environment due to sexual harassment. The complainant alleged, and the record showed, that her supervisor touched her on her side sometime in 1994. The complainant reacted in such a way as to convey to the supervisor her disapproval of the non-intimate touching. The complainant did not report the incident to another supervisor.

Some 4 years later, the same supervisor placed his hand on the complainant's shoulder on one occasion. She responded by filing an EEO complaint alleging sexual harassment. In her complaint she cited the two non-intimate touching incidents, and further claimed to have witnessed the supervisor inappropriately touching her coworkers.

In response to her complaint, management officials undertook an immediate investigation and instructed the supervisor to refrain from touching employees. None of the complainant's coworkers corroborated her claim that the supervisor had inappropriately touched them.

One of the elements of proof in a sexual harassment claim is that the conduct complained of, when viewed from both an objective and subjective standpoint, was severe or pervasive enough to affect a term or condition of employment; or interfere with work performance; or create a hostile, intimidating, or offensive work environment. Although the harassing conduct must be severe or pervasive, one isolated instance of an intimate touching, by itself, has generally been held to be sufficient to meet this test. In this case, however, the two isolated incidents, which occurred some



four years apart, and neither of which involved the touching of an intimate area of the complainant's body, were not so severe or pervasive as to constitute sexual harassment.

IV

EEOC UPHOLDS OEDCA'S FINAL ACTION REJECTING AN EEOC JUDGE'S FINDING OF NO DISCRIMINATION

In a previous edition of the *OEDCA Digest* (Winter 2000, Vol. III, No. 1), we reported that OEDCA had disagreed with and rejected an EEOC administrative judge's decision, wherein the judge had found in favor of the VA. This was one of the first cases decided by OEDCA under EEOC's new regulations giving EEOC's judges "decision" authority. Strangely enough, although OEDCA took final action favoring the complainant, the new regulations nevertheless required the VA to "appeal" the judge's decision to the Commission.

After reviewing the case on appeal, the Commission agreed fully with OEDCA's conclusion that the EEOC judge's decision favoring the agency was erroneous both as a matter of law and as to the facts, and further agreed with the relief that OEDCA had granted to the complainant.

This case highlights a significant flaw in EEOC's new regulation – namely – that an agency is not allowed to issue its own separate decision in cases where a judge has issued an erroneous decision against a complainant. Instead of being allowed to issue a decision finding dis-

crimination, agencies are required to "appeal" the judge's decision to EEOC's Office of Federal Operations -- a lengthy and clearly unnecessary exercise that accomplishes nothing other than delaying final resolution of the complaint.

This case also demonstrates the fact that OEDCA -- an independent EEO adjudication body within the Department of Veterans Affairs -- does not simply "rubber-stamp" decisions from EEOC administrative judges, even when such decisions favor the Department. The decision and record in each such case are carefully reviewed to ensure that the EEOC judge's findings and conclusions are factually and legally correct.

V

DEPARTMENT'S FAILURE TO PROVIDE CLEAR, SPECIFIC REASON(S) FOR NOT SELECTING COMPLAINANT RESULTS IN AUTOMATIC FINDING OF DISCRIMINATION

In last quarter's edition of the *OEDCA Digest*, we discussed the consequences that may ensue -- *i.e.*, a finding of discrimination -- when management officials fail to carefully document the specific reasons for their actions. The following case provides yet another example of this common -- yet easily avoidable -- problem.

The complainant applied, along with numerous other applicants, for one of several claims examiner vacancies. Although very highly qualified, both in terms of education (law degree) and experience, he was not one of the 15 indi-



viduals ultimately selected to fill the vacancies. He later filed a complaint alleging that his nonselection was due, in part, to his age.

The complainant had no difficulty proving a *prima facie* case, as he was over 40 years old, was qualified and applied for a vacant position that the Department was seeking to fill, and was passed over in favor of other applicants, all of whom were younger than the complainant. While these facts, by themselves, are not sufficient to prove discrimination, they do suffice to shift the burden to management to articulate legitimate, nondiscriminatory reasons for not selecting the complainant.

Unfortunately for management, it was unable to do so in this case. According to the record, the selecting official had retired and was unavailable to provide an affidavit to the agency EEO investigator. Moreover, he failed to document in writing the rationale for his selection decisions at the time he made them.

The only evidence in the record concerning a possible reason for the nonselection was a vague reference in the EEO counselor's report concerning "professional misconduct" by the complainant. The counselor, however, was unable to recall, due to the passage of time, the individual who had mentioned the alleged misconduct.

Management's burden of articulation is not onerous – management does not have to prove that it did not discriminate. Instead, it need only articulate – *i.e.*, explain -- the reason(s) for its actions. However, that articulation must be clear and specific enough to provide a com-

plainant with the opportunity to challenge it, or else the complainant will automatically prevail.

In this case, management was unable to provide a clear and specific explanation for its decision not to select the complainant for one of the 15 vacancies. Hence, the complainant was automatically entitled to a decision in his favor.

This case illustrates two important lessons for supervisors and management officials. First, be sure to offer clear and specific reasons for personnel decisions and other actions, otherwise a finding of discrimination is likely. While there is no legal burden on management to prove that it made the right decision -- it need only articulate a reason -- it certainly behooves management to ensure that such evidence is available and offered if the Department is later called upon to respond to a complaint.

Second, because of turnover due to retirements, resignations, *etc.*, and/or the length of time it sometimes takes an agency or the EEOC to process a complaint or hold a hearing, it is absolutely imperative that management officials ensure that there is a documented record available that clearly explains the rationale for employment decisions or actions. Failure by management to require such a record may, and frequently does, result in a finding of discrimination, notwithstanding the fact that discrimination may not have been a motive.

VI

MULTITUDE OF AILMENTS DOES NOT NECESSARILY RESULT IN A



DISABILITY

An employee, who was terminated from employment during her probationary (trial) period for excessive absenteeism, filed a discrimination complaint alleging that her termination was due to her disabilities. When asked to identify the disabilities, she presented a lengthy list of ailments such as frequent colds, the flu, stomach bugs, workstation stress, hives, and continual menstrual bleeding.

OEDCA accepted an EEOC administrative judge's conclusion that the complainant did not prove that she had a disability, as such term is defined in the *Americans with Disabilities Act* and EEOC's implementing regulations and guidance.

To demonstrate the existence of a disability, an individual must show that he or she has a physical or mental impairment that substantially limits one or more major life activities, or has a record of such an impairment, or is regarded as having such an impairment. "Major life activities" include – but are not limited to – functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. In addition to the above requirements, the impairment must generally be permanent, not temporary in nature. In some circumstances, two or more impairments that are not substantially limiting by themselves may together substantially limit the major life activity of an individual.

Despite the multitude of ailments recited by the complainant, most of them were not of a permanent nature, and hence

not disabilities. Moreover, she failed to present any evidence that these ailments substantially limited any of her major life activities, including working. Although she attributed most of her frequent absences from work to one or more of these problems, she presented no evidence that any of her ailments were serious enough, by themselves or in combination with others, to prevent her from working.

This case illustrates the point that the legal standard for determining whether an impairment amounts to a "disability" is a stringent one. It is a common but erroneous belief that the *Rehabilitation Act* and the *Americans with Disabilities Act* cover any and all medical conditions or ailments. This is not the case. Many employees have medical conditions -- some even have multiple medical problems. However, as this case clearly illustrates, not all medical problems meet the legal definition of a disability, and even multiple medical problems do not necessarily amount to a disability.

VII

EVIDENCE OF "PRE-SELECTION" NOT NECESSARILY PROOF OF A DISCRIMINATORY MOTIVE

In an effort to revitalize a Community Based Outpatient Clinic (CBOC), the VA decided to transfer responsibility for its management to a different VA medical center. In conjunction with this transition in ownership, officials at the facility assuming ownership of the CBOC appointed one of their highly respected managers to serve as the liaison for the transfer. Eventually, this facility an-



nounced a vacancy for the position of Operations Manager at the CBOC, and the individual who earlier had been appointed as the liaison for the transfer was selected.

One of the unsuccessful applicants filed a complaint alleging that his nonselection was due to his gender and was an act of reprisal because of his prior EEO complaint activity. Management officials denied the allegation and articulated convincing reasons for their decision to choose the selectee and for not choosing the complainant. As for the selectee, they cited her prior demonstrated effectiveness as a manager. As for the complainant, they noted that he had, on more than one occasion, displayed inappropriate anger.

The complainant offered no direct or indirect evidence of a discriminatory motive. Instead, he simply claimed that the selecting officials, by having initially appointed the selectee to be the liaison transfer manager, had essentially “pre-selected” her by giving her an unfair advantage.

It was clear from the record that the liaison appointment gave the selectee a competitive advantage over other applicants. It is even possible, and perhaps probable, that the selecting officials already had the selectee in mind for the CBOC position when they appointed her to be the transition liaison. Such facts, however, do not necessarily prove discriminatory intent. “Pre-selection”, by itself, does not violate Title VII of the *Civil Rights Act*. Such a violation requires proof of discriminatory intent.

Indeed, in many cases, evidence of pre-

selection can actually prove the absence of a discriminatory intent. It is not uncommon for selecting officials to know in advance whom they will select or hire for a particular job, even before they announce a vacancy and, hence, before they even know the identity and race, gender, age, etc. of other individuals who might apply. Such a situation does not suggest a discriminatory motive.

Often, “pre-selection” legitimately occurs simply because the selecting official has previously recognized the high-level performance and ability of an individual and has already made up his or her mind to select the individual for a vacancy before the vacancy is even announced. In some cases, the pre-selection might not be legitimate and could constitute a prohibited personnel practice under certain Federal laws and regulations (e.g., civil service law prohibiting nepotism). In both of these situations, however, a factor other than discrimination is the motive for the action or decision.

While pre-selection might, and usually does, seem unfair to a disappointed applicant, it does not violate civil rights laws unless there is convincing evidence that the pre-selection occurred because of discrimination.

VIII

MALE EMPLOYEE SEXUALLY HARASSED BY MALE COWORKER

The following case, in which OEDCA issued a decision finding sexual harassment, illustrates the fact that sexual harassment does not always involve



conduct by a male against a female, or by a female against a male. In some cases, sexual harassment can occur when the victim and the perpetrator are the same gender.

The complainant alleged that a male coworker repeatedly subjected him to unwelcome physical and verbal conduct of a sexual nature between 1994 and 1998. The alleged conduct included touching the complainant's crotch, thighs, buttocks, and chest; kissing, hugging, and approaching the complainant from behind and simulating a sexual act. The alleged conduct also included numerous verbal comments referring to oral sex, soliciting oral sex from the complainant, frequent references to long objects being the size of a penis, and using pastry to illustrate an orgasm.

The complainant further alleged that he reported these incidents to his supervisor on several occasions; beginning as early as a few months after the first incident in 1994, but the supervisor did nothing other than question his credibility by suggesting that he may have misinterpreted the coworker's comments and actions, and that he may not have been wearing his hearing aid. At one point the complainant had approached an EEO counselor about the matter, but did not follow through with a formal complaint. Eventually, some four years after the first incident occurred, and after repeated attempts to obtain assistance from his supervisor, he reported the matter to the Chief of Human Resources Management Service (HRMS). That official promptly investigated the matter and took appropriate corrective action.

When examining a sexual harassment claim, fact-finders such as OEDCA, the EEOC, or a U.S. district court must address three questions: (1) did the alleged conduct occur? (2) if so, did the conduct constitute sexual harassment? and (3) if sexual harassment did occur, is management liable (*i.e.*, legally responsible) for the sexual harassment?

As for the first question, the preponderance of the evidence supported the complainant's claim that the conduct occurred as alleged. Although the harasser denied engaging in the alleged conduct, his testimony was unpersuasive and inconsistent during the agency investigation. The complainant's testimony, on the other hand, was consistent, credible, and supported in some instances by eyewitnesses. In addition, another male employee testified that he had complained of similar conduct by the harasser during the same time frame. Moreover, a medical center patient had complained that the harasser had propositioned his son, who was visiting him in the hospital.

As for the second question – whether the conduct constituted sexual harassment -- a complainant must prove that the conduct was (1) sexual in nature, (2) unwelcome, (3) based on sex, and (4) when viewed from both an objective and subjective standpoint, severe or pervasive enough to affect a term or condition of employment; or interfere with work performance; or create a hostile, intimidating, or offensive work environment.

The complaint presented persuasive evidence on all four of these elements. First, the conduct in question was clearly sexual in nature. Second, there



was eyewitness testimony that the complainant was visibly angered by the harasser's conduct and had pushed the harasser away. Witnesses also testified that the complainant had told them at the time that the harasser's conduct was unwelcome. Third, the conduct occurred because of the complainant's sex, as there was evidence that the harasser had displayed similar conduct toward other males in the workplace; and there was no evidence to suggest that the harasser had ever displayed such conduct toward female employees. Fourth, from a subjective standpoint, the complainant demonstrated, through his complaints and comments to his supervisor and other employees, that he considered his work environment to be hostile and intimidating. In addition, from an objective standpoint, the conduct in question was clearly severe and sufficiently frequent – occurring over the course of several years – that a reasonable person would have considered the work environment to be intimidating and offensive.

As for the third question – whether management is liable – the record shows that, almost from the very beginning, the complainant's supervisor was aware of the harassment, but took no corrective action. Although the supervisor denied any knowledge of the harassment, several witnesses recalled the complainant telling them that he had notified his supervisor about the harassment, but that nothing had been done. One witness specifically recalled the complainant telling her of the supervisor's doubts as to whether the complainant had correctly perceived the situation.

Management in this case knew of the sexually harassing behavior for approximately four years, yet did nothing to correct and prevent the problem until the complainant eventually brought it to the attention of higher-level management in HRMS. Accordingly, OEDCA found that management failed to exercise reasonable care to promptly prevent and correct the sexually harassing behavior and, hence, was liable for the hostile environment resulting from the harassment. OEDCA ordered the facility to provide the complainant with appropriate, make-whole relief.

IX

EMPLOYEE NOT DISCRIMINATED AGAINST BECAUSE OF HIS RELIGIOUS BELIEFS WHEN REQUIRED TO ATTEND CULTURAL DIVERSITY TRAINING

The VA recently accepted an EEOC administrative judge's decision finding that the Department did not discriminate against an employee because of his religious beliefs.

The VA, like other Federal agencies, mandates periodic training for its employees regarding cultural diversity. In this case, a VA employee refused a directive to attend a four-hour training program on managing and recognizing cultural diversity. The employee claimed that certain aspects of the training violated his religious beliefs. Although management took no action against the employee because of his refusal to attend, he filed an EEO complaint alleging that the training requirement itself discriminated against him



because of his religious beliefs.

According to the employee, the course workbook made reference to “women’s issues” and “sexual orientation.” He interpreted the term “women’s issues” to mean abortion, and stated that his religion views both abortion and homosexuality as “abominations.” Thus, he argued that requiring his attendance at such training was tantamount to requiring him to “accept” matters that violated his religious beliefs.

According to the course workbook, the stated purpose of the training program is “to provide information and sensitivity training needed to assist all VA employees in recognizing, valuing, and managing diversity, and in reducing prejudice. This program will expand each participant’s vision and understanding about the culture of others and provide a foundation for resolving conflicts among employees.”

Management officials testified that the training workbook does not mention the word “abortion,” and the topic was never discussed during the training. Moreover, they testified that the message of the training is simple -- respect other people, their cultures and their beliefs. They noted that there is no attempt in the training to compromise religious beliefs or to control thought or speech. Moreover, employees are not being asked to “accept” anything in the sense of having to modify their own personal beliefs -- religious or otherwise. Rather, they are merely being asked to foster an atmosphere of cooperative, sensitive, and respectful behavior in a diverse workforce so as to achieve a work environment conducive to efficient opera-

tion.

In this case, because management took no punitive action against the employee for his refusal to attend the training, the employee was unable to establish even a *prima facie* case of religious discrimination. However, even if management had taken such action, the EEOC decision noted that there was no evidence of a violation of the employee’s religious beliefs. The employee was unable to offer any evidence that the actual purpose of the training program, -- *i.e.*, fostering respect and cooperation in the workplace -- conflicts with any actual religious belief held by the employee.

Moreover, the EEOC decision agreed with the Department’s position that the accommodation requested by the complainant, -- *i.e.*, requiring the Department to excuse any employee who does not wish to attend such training -- would seriously compromise the goals of the training program and, hence, constitute an undue hardship on the Department’s operation.

X

FREQUENTLY ASKED QUESTIONS AND ANSWERS CONCERNING THE DUTY TO ACCOMMODATE AN EMPLOYEE’S DISABILITY

(Complaints concerning an employer’s failure to accommodate an employee’s disability account for a significant number of discrimination complaints filed against private and Federal sector employers. Unfortunately, this is one of the most difficult and least understood areas of civil rights law. This is the fourth in a



series of articles addressing some frequently asked questions and answers concerning the reasonable accommodation requirement. The Q&As below cover accommodation issues relating to the types of reasonable accommodations related to job performance.

The following discussion illustrates several common types of reasonable accommodations related to job performance.

Job Restructuring

Job restructuring includes modifications such as:

- reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and
- altering when and/or how a function, essential or marginal, is performed.

An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.

Q. 1. If, as a reasonable accommodation, an employer restructures an employee's job to eliminate some marginal functions, **may the employer require the employee to take on other marginal functions** that s/he can perform?

A. 1. Yes. An employer may switch the marginal functions of two (or more) employees in order to restructure a job as a reasonable accommodation.

Example: A cleaning crew works in an office building. One member of the crew wears a prosthetic leg which enables him to walk very well, but climbing steps is painful and difficult. Although he can perform his essential functions without problems, he cannot perform the marginal function of sweeping the steps located throughout the building. The marginal functions of a second crew member include cleaning the small kitchen in the employee's lounge, which is something the first crew member can perform. The employer can switch the marginal functions performed by these two employees.

Leave

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. **An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees.** Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

An employee with a disability may need leave for a number of reasons



related to the disability, including, but not limited to:

- obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
- recuperating from an illness or an episodic manifestation of the disability;
- obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
- training a service animal (e.g., a guide dog); or
- receiving training in the use of braille or to learn sign language.

Q. 2. May an employer apply a “**no-fault**” leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?

A. 2. No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer

must modify its “no-fault” leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.

Q. 3. Does an employer have to **hold open an employee's job** as a reasonable accommodation?

A. 3. Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.

If an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

Example: An employee needs eight months of leave for treatment and recuperation related to a disability. The employer grants the request, but after four months the employer determines that it can no longer hold open the position for the remaining four



months without incurring undue hardship. The employer must consider whether it has a vacant, equivalent position to which the employee can be reassigned for the remaining four months of leave, at the end of which time the employee would return to work in that new position. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.

Q. 4. Can an employer **penalize an employee for work missed during leave** taken as a reasonable accommodation?

A. 4. No. To do so would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law. Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.

Example A: A salesperson took five months of leave as a reasonable accommodation. The company compares the sales records of all salespeople over a one-year period, and any employee whose sales fall more than 25% below the median sales performance of all employees is automatically terminated. The employer terminates the salesperson

because she had fallen below the required performance standard. The company did not consider that the reason for her lower sales performance was her five-month leave of absence; nor did it assess her productivity during the period she did work (i.e., prorate her productivity).

Penalizing the salesperson in this manner constitutes retaliation and a denial of reasonable accommodation.

Example B: Company X is having a reduction-in-force. The company decides that any employee who has missed more than four weeks in the past year will be terminated. An employee took five weeks of leave for treatment of his disability. The company cannot count those five weeks in determining whether to terminate this employee.

Q. 5. When an employee requests leave as a reasonable accommodation, may an employer provide an accommodation that **requires him/her to remain on the job** instead?

A. 5. Yes, if the employer's reasonable accommodation would be effective and eliminate the need for leave. An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation. Accordingly, in lieu of providing leave, an employer may provide a



reasonable accommodation that requires an employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his/her medical needs. The employer is obligated, however, to restore the employee's full duties or to return the employee to his/her original position once s/he no longer needs the reasonable accommodation.

Example A: An employee with emphysema requests ten weeks of leave for surgery and recuperation related to his disability. In discussing this request with the employer, the employee states that he could return to work after seven weeks if, during his first three weeks back, he could work part-time and eliminate two marginal functions that require lots of walking. If the employer provides these accommodations, then it can require the employee to return to work after seven weeks.

Example B: An employee's disability is getting more severe and her doctor recommends surgery to counteract some of the effects. After receiving the employee's request for leave for the surgery, the employer proposes that it provide certain equipment which it believes will mitigate the effects of the disability and delay the need for leave to get surgery. The

employer's proposed accommodation is not effective because it interferes with the employee's ability to get medical treatment.

Q. 6. How should an employer handle leave for an employee covered by both the **ADA and the Family and Medical Leave Act (FMLA)**?

A. 6. An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in a similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no



undue hardship in holding it open) if the employee is still qualified (*i.e.*, the employee can perform the essential functions of the position with or without reasonable accommodation).

If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which s/he is qualified.

Under the FMLA, an eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period. The FMLA guarantees the right of the employee to return to the same position or to an equivalent one. An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. The FMLA requires an employer to continue the employee's health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.

Example A: An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a

reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.

Example B: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

Example C: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent



position. Under the FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

Modified or Part-Time Schedules

Q. 7. Must an employer allow an **employee with a disability to work a modified or part-time schedule** as a reasonable accommodation, absent undue hardship?

A. 7. Yes. A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.

Example A: An employee with HIV infection must take medication on a strict schedule. The medication causes extreme nausea about one

hour after ingestion, and generally lasts about 45 minutes. The employee asks that he be allowed to take a daily 45-minute break when the nausea occurs. The employer must grant this request absent undue hardship.

For certain positions, **the time during which an essential function is performed may be critical**. This could affect whether an employer can grant a request to modify an employee's schedule. Employers should carefully assess whether modifying the hours could **significantly disrupt** their operations -- that is, cause undue hardship -- or whether the essential functions may be performed at different times with **little or no impact** on the operations or the ability of other employees to perform their jobs.

If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

Example B: A day care worker requests that she be allowed to change her hours from 7:00 a.m. - 3:00 p.m. to 10:00 a.m. - 6:00 p.m. because of her disability. The day care center is open from 7:00 a.m. - 7:00 p.m. and it will still have sufficient coverage at the beginning of the morning if it grants the change in hours. In this situation, the employer must provide the reasonable accommodation.

Example C: An employee works



for a morning newspaper, operating the printing presses which run between 10 p.m. and 3 a.m. Due to her disability, she needs to work in the daytime. The essential function of her position, operating the printing presses, requires that she work at night because the newspaper cannot be printed during the daytime hours. Since the employer cannot modify her hours, it must consider whether it can reassign her to a different position.

Q. 8. How should an employer handle requests for modified or part-time schedules for an **employee covered by both the ADA and the Family and Medical Leave Act (FMLA)**?

A. 8. An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship. If there is undue hardship, the employer must reassign the employee if there is a vacant position for which s/he is qualified and which would allow the employer to grant the modified or part-time schedule (absent undue hardship). An employee receiving a part-time schedule as a reasonable

accommodation is entitled only to the benefits, including health insurance, that other part-time employees receive. Thus, if non-disabled part-time workers are not provided with health insurance, then the employer does not have to provide such coverage to an employee with a disability who is given a part-time schedule as a reasonable accommodation.

Under the FMLA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12-month period. When such leave is foreseeable based on planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position, with equivalent pay and benefits, for which the employee is qualified and which better suits his/her reduced hours. An employer always must maintain the employee's existing level of coverage under a group health plan during the period of FMLA leave, provided the employee pays his/her share of the premium.

Example: An employee with an ADA disability requests that she be excused from work one day a week for the next six months because of her disability. If this employee is eligible for a modified schedule under the FMLA, the employer must provide the requested leave under that statute if it is medically necessary, even if the leave would be an undue



hardship under the ADA.

taken during working hours.

Modified Workplace Policies

Q. 9. Is it a reasonable accommodation to **modify a workplace policy**?

A. 9. Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, absent undue hardship. But, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees.

Example: An employer has a policy prohibiting employees from eating or drinking at their workstations. An employee with insulin-dependent diabetes explains to her employer that she may occasionally take too much insulin and, in order to avoid going into insulin shock, she must immediately eat a candy bar or drink fruit juice. The employee requests permission to keep such food at her workstation and to eat or drink when her insulin level necessitates. The employer must modify its policy to grant this request, absent undue hardship. Similarly, an employer might have to modify a policy to allow an employee with a disability to bring in a small refrigerator, or to use the employer's refrigerator, to store medication that must be

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. For example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship. Furthermore, an employer may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship.

In some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation. For example, an employer may have a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If an employer would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a disability.

Reassignment

Although the *Americans with Disabilities*



Act specifically lists “reassignment” as a form of reasonable accommodation, it is one that is frequently overlooked by employers. Because of the complex rules regarding management’s duty to consider reassignment during the accommodation process, the next issue of the *OEDCA Digest* will discuss this topic in considerable detail.

acquiescing in the discrimination by sending a message to the others in attendance that the offensive conduct was okay. The agency felt that the manager's hesitation was inconsistent with its policy of zero tolerance of discrimination. We therefore recommend that supervisors and managers immediately address derogatory or discriminatory statements or conduct by their subordinates.

XI

MANAGER’S FAILURE TO CORRECT IMMEDIATELY A DISCRIMINATORY REMARK MADE DURING A MEETING RESULTS IN DISCIPLINE



(The following article is reproduced with permission of “Fedmanager”. The incident discussed occurred at another Federal agency. For other articles of interest to Federal managers, supervisors, and employees, visit the “Fedmanager” website located at www.fedmanager.com.)

Managers should remember that when they witness an employee make a possibly discriminatory remark, they should act immediately to correct it. In a recent case, a manager was presiding over an informal meeting of his subordinates when one of the subordinates made an derogatory slur about another employee, who was known to be homosexual. The employee who was the subject of the offensive epithet was not in the room. The manager did not say or do anything to the offending employee until several hours after the meeting. The manager was disciplined for his delayed reaction. The agency's position was that by not addressing the employee on the spot, the manager was effectively