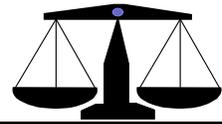




OEDCA DIGEST



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Department of Veterans Affairs
Office of Employment Discrimination
Complaint Adjudication

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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 age discrimination, management's burden of explaining its actions, nurse promotions, retaliation claims, education as a selection factor, disability discrimination, and dismissals for mootness.

Also included in this issue are data from EEOC's FY 1999 Federal Sector Report on EEO Complaints Processing and Appeals, as well as frequently asked questions and answers concerning disability-related inquiries and medical examinations of employees.

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

Charles R. Delobe



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AGE DISCRIMINATION MOTIVATED DECISION NOT TO HIRE DENTIST

The complainant, age 57 at the time, applied but was not hired for a Staff Dentist position. He had 29 years of clinical experience, including a private dental practice during the 13-year period immediately preceding his nonselection. He also had eight years of teaching and administrative experience at a dental school where he served as an Assistant Professor, Assistant Dean, Associate Dean, and Department Chair.

The person hired, age 26 at the time, had recently graduated from dental school and had less than one year of clinical experience.

A three-member panel, consisting of a Supervisory Dentist, the Chief of the Dental Service, and the Chief of Medicine, were involved in the interview and selection process.

The reasons cited by the panel members for the complainant's nonselection were vague and inconsistent. For example, one panel member stated that the selectee had the type of personality that would enable him to "blend in" better. Another stated that the selectee performed better during the interview, but was unable to provide specifics, such as interview notes, rating sheets, or any other information that would explain why the selectee performed better than the complainant.

Both of these officials also claimed that they were not the decision makers, and that it was the Chief of Medicine who made the final decision. The Chief of Medicine, however, testified that, while he signed the formal personnel action, he did not know why the selectee was chosen, and that the decision rested mainly with the Chief of the Dental Service. Moreover, he testified that he initially voted for the complainant, but later changed his vote so that the panel's decision would be unanimous.

Given the vague and unsupported reasons advanced by two panel members, the reluctance of any of the panel members to accept responsibility for the final decision, and the wide disparity in qualifications between the complainant and the selectee, OEDCA concluded that management had failed to articulate legitimate, nondiscriminatory reasons for its decision, and that the reasons cited for the decision were a pretext for age discrimination.

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 or promotion. Employers are free to exercise their own business judgment, as long as that judgment is not based on discriminatory criteria. However, as we noted in the Summer 2001 edition of the *OEDCA Digest*, 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, by any reasonable standard, observably and plainly superior to those of the selectee. The disparity in qualifications was so great, and management’s explanation so vague, that age discrimination was more likely than not the real reason for their decision not to hire the complainant.

II

NURSE NONPROMOTION NOT DUE TO DISCRIMINATION

The complainant was serving as a Nurse II when a Nurse Professional Standards Board (NPSB or “Board”) examined his qualifications for promotion to the grade of Nurse III. When the Board found him unqualified for promotion to the Nurse III grade, he unsuccessfully sought reconsideration of the Board’s decision at the facility level. Several months later, a different Nurse Professional Standards Board in VA Central Office in Washington, D.C. reviewed the complainant’s qualifications and reached the same conclusion as the local Board. The complainant thereafter filed a discrimination complaint alleging that his gender and national origin (Hispanic) influenced the decision not to promote him.

The criteria and procedures for promoting registered nurses in the VA are unlike those utilized in typical competitive or career-ladder (*i.e.*, non-competitive) promotion actions in the Federal personnel system. Unlike competitive promotion actions, nurses may be pro-

moted to certain grades without the need for a vacancy, as the grade is linked, not to a position, but rather, to the individual’s qualifications, performance, and scope of responsibilities. Moreover, unlike career-ladder promotions, nurses are not automatically entitled to promotion merely because of satisfactory or better-than-satisfactory performance. Instead, nurses must satisfy specific professional, performance, and educational criteria for the next higher grade, as stated in the *VA Nurse Qualification Standards*, in order to be promoted.

Evidence that the nurse has met the criteria is found in the nurse’s annual proficiency report. The proficiency report summarizes the nurse’s scope of responsibility, performance, and achievements for the previous year. If the Board concludes, based on a review of the proficiency report, that the nurse has not met the criteria, it will recommend that the nurse not be promoted. If a nurse is not promoted, and the scope of his or her responsibility does not change, further promotion review will take place at intervals of 1 to 3 years, at the discretion of the Board.

The investigative file in this case clearly showed that the complainant was a competent and highly respected nurse who was well liked by his coworkers and superiors. He was articulate and had excellent leadership skills. There is no dispute that the complainant had the talent, education, and ability to serve at the Nurse III grade level. Nevertheless, the Board concluded that the complainant had failed to satisfy two of the promotion criteria specified in the qualification standards, *i.e.*, membership in pro



professional health associations and initiating a sustained health program.

The complainant did not challenge this conclusion. Rather, he argued simply that he was entitled to promotion because of his admirable performance at the Nurse II grade. Unfortunately for him, admirable performance, in itself, is not sufficient to satisfy the VA's nurse promotion criteria. Moreover, he failed to present any evidence that other similarly situated nurses were promoted despite a failure to satisfy the promotion criteria. OEDCA accordingly concluded that the complainant's national origin and gender were not factors influencing the Board's recommendation not to promote him.

III

FAILURE TO RECALL REASONS FOR PROMOTION DECISION COMPELS A FINDING OF RACE DISCRIMINATION

The complainant, an African-American female, applied for a Personnel Management Specialist position, but was passed over in favor of an Asian-American female. Both the complainant and the selectee were qualified for the position. The complainant claimed that her nonselection was due to her race.

The selecting official, who was no longer working for the Department when deposed, had little recollection of the matter, as more than three years had elapsed since the promotion action. She had only a vague memory of the selectee and was unable to recall any specifics regarding the interview process, the criteria used to evaluate qualifi-

cations, or the reasons for her selection decision.

OEDCA issued a technical finding of discrimination in view of the Department's failure to articulate a legitimate, nondiscriminatory reason for its decision. Normally, management officials have little difficulty satisfying their legal burden of articulation. They need not prove that they did not discriminate. Rather, the law only requires that they articulate (*i.e.*, explain) the reason(s) for their actions. However, that articulation must be clear and specific enough to provide a complainant with the opportunity to challenge it, or else the complainant will automatically prevail.

Merely stating that the "best applicant" was chosen is not a sufficient articulation -- the reason(s) for that conclusion must be clearly and specifically explained. Likewise, merely claiming that discrimination did not occur is not a sufficient articulation. In this case, of course, the selecting official was unable to offer any explanation at all. Because the complainant had satisfied her initial burden of proving a *prima facie* case of discrimination, and because the selecting official failed to satisfy her burden of articulating a legitimate, nondiscriminatory reason for her decision, the complainant was automatically entitled to a finding in her favor.

This case illustrates an important lesson for supervisors and management officials. Because of turnover due to retirements, resignations, *etc.*, and/or the length of time it sometimes takes an agency, or the EEOC, or the courts to investigate a complaint or conduct hearings or trials, it is absolutely im-



perative that the responsible official ensure that there is a documented record available that clearly explains the rationale for employment decisions or actions.

Some VA facility directors require officials who make significant personnel decisions (*i.e.*, hiring, firing, promoting, *etc.*), to prepare a contemporaneous, summary description of the process involved and the specific reason(s) for the decision. Any documents that might help explain or support the decision are attached to this written summary. Facilities that follow this practice are far less likely to experience technical findings of discrimination. Had the selecting official in this case documented her actions, the outcome may have been different.

IV

EEOC JUDGE REJECTS RETALIATORY HARASSMENT CLAIM BECAUSE PRIOR EEO COMPLAINT ACTIVITY OCCURRED SEVERAL YEARS EARLIER

The complainant filed a reprisal claim, alleging that management officials retaliated against her because of her prior EEO complaint activity in connection with a five-day suspension, lack of training, room rotation schedules, and overtime assignments. She alleged that these matters resulted a hostile work environment.

According to the undisputed evidence in the record, the complainant had filed three EEO complaints in 1992 and 1993, all of which were settled in 1994.

The events complained of in this complaint occurred in 1998.

An EEOC administrative judge, after reviewing the agency's investigative report, issued a decision without a hearing wherein she concluded that the complainant had failed to prove retaliatory harassment and, in fact, had failed to establish even a *prima facie* case of retaliation.

To prevail on a retaliation claim a complainant must first establish a *prima facie* case. Then, if management articulates a legitimate, nondiscriminatory reason for its actions, the burden falls on the complainant to prove by a preponderance of the evidence that management's explanation is not the true reason, but rather a pretext for a retaliatory motive.

To establish a *prima facie* case of retaliation, a complainant must generally show that: (1) he or she engaged in prior EEO activity, (2) the management official alleged to have retaliated was aware of that prior EEO activity, (3) the official subsequently took some action unfavorable to the complainant, and (4) there is some evidence linking the unfavorable action to the prior complaint activity. The most common way of proving that link is to show 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 must present other convincing evidence that retaliation was, in fact, a motivating factor. In other words, the mere fact that an unfavorable action takes place within a relatively short period of time after an employee engages in EEO protected activity of which management is aware does not, by itself, prove that management took the action because of the prior EEO activity.

In this case, the EEOC judge correctly concluded that the complainant was not even able to establish a *prima facie* case of retaliation because the prior EEO complaint activity occurred four years earlier -- far too long an interval to create an inference that the prior complaints influenced the subsequent events of which she was complaining. Moreover, the judge noted that most of the supervisors responsible for the actions complained of had no knowledge of her prior EEO complaints; and the one supervisor who was aware of them knew none of the details, as she was not a supervisor at the time, and the complaints were not against her.

V

COMPLAINANT'S SUPERIOR EDUCATION NOT NECESSARILY INDICATIVE OF SUPERIOR QUALIFICATIONS

The complainant, a Food Service Worker, applied but was not selected for promotion to the position of Administrative Officer in the Physical Medicine and

Rehabilitation Service. He later filed a race discrimination complaint, alleging that he was better qualified than the selectee.

As evidence of his alleged superior qualifications, he pointed primarily to his Master's Degree in Business Administration, noting that the selectee did not have a Master's Degree.

The selecting official testified that a three-member panel interviewed the applicants, rated them, and recommended the selectee. The complainant received the lowest overall point score from the panel, while the selectee received the highest score.

All of the panel members thought the selectee had far more experience directly related to the job in question than the complainant. The selectee had over 14 years of VA administrative experience in the Psychiatry Service. Thus, she had administrative experience with policies and procedures relating to VA medical operations that were similar to the types of experience needed in the Physical Medicine and Rehabilitation Service, such as budget, control points, cost distribution, ADPAC, etc. Moreover, she had previously served as a secretary in the Physical Medicine and Rehabilitation Service, and was thus familiar with the physicians and administrative personnel.

The complainant, on the other hand, had no related experience. His application indicated that he had been an "entrepreneur" and had previously served as a medical clerk in the VA. He also mentioned prior employment with a university and his military service, but that work experience was not current and he



offered no details as to the nature of that experience.

OEDCA concluded that management's explanation for choosing the selectee was not a pretext for discrimination. The selectee had plainly superior qualifications. Although the complainant had a Master's Degree, such a degree was not a requirement and, more importantly, the degree did not enhance his qualifications, as it was not related to the tasks associated with the job.

This case clearly illustrates that superior education, by itself, does not necessarily result in superior qualifications. The appropriate weight, if any, to accord to educational qualifications will vary from case to case, depending on the nature of the job in question, the level of education needed for the job, whether and to what extent the applicant's education relates to the duties of the job, and other factors.¹

VI

DISQUALIFICATION BASED ON COMPLAINANT'S PHYSICAL CONDITION DID NOT VIOLATE "REHABILITATION ACT"

The complainant applied for the position of Medical Clerk, was found qualified, and was called in for an interview. A week later she received notice that she had been hired, contingent upon passing a physical examination.

¹ See case VII (page 8) where an applicant's superior education was found to be a significant factor contributing to her superior qualifications.

The facility's Office of Human Resources provided the examining physician with a form, CA-17, which lists all of the functional requirements of the position for which the complainant had tentatively been selected. The form described the job as primarily sedentary, but requiring simple grasping on a continuous basis for 8 hours per day.

During the physical exam, the complainant noted, among other things, that she had been diagnosed as having carpal tunnel syndrome (CTS). She maintained, however, that she could perform the duties of a medical clerk in the VA, provided she did not have to engage in prolonged pulling, pushing, or grasping. She also noted that her application for disability retirement at a prior job where she was a file clerk was rejected because it was determined that she was capable of performing other types of clerical jobs.

The examining physician consulted with the deciding physician, who determined that the complainant was physically unqualified for the medical clerk position at that facility because of the job requirement involving continuous grasping.

An EEOC administrative judge found, and OEDCA agreed, that the complainant was not discriminated against because of a disability. The complainant, through her attorney, stipulated that, although diagnosed with carpal tunnel syndrome, she does not have an actual disability as defined by the *Rehabilitation Act*. In other words, she argued that she does not have a physical impairment that substantially limits any of her major life activities, including working.



Under the *Rehabilitation Act*, an individual has a disability if he or she (1) has an actual physical or mental impairment that substantially limits a major life activity, or (2) is perceived as having such an impairment, or (3) has a record of such impairment. Although the complainant admitted that she does not have an actual disability, she argued that she was nevertheless entitled to the protections of the *Rehabilitation Act* because the VA regarded her as disabled; that is, the VA perceived her as having a physical impairment that substantially limited one of her major life activities; namely, her ability to work.

To succeed in establishing that such a perception existed, the complainant would have to demonstrate that VA physicians perceived her as being significantly restricted in the ability to perform a class of jobs, or a broad range of jobs in various classes.

The VA argued, and the EEOC judge agreed, that the VA physicians who examined her and found her physically unqualified did not regard her as disabled, *i.e.*, they did not perceive her as having an impairment that prevented her from doing all types of clerical jobs. Instead, they simply found her physically unqualified to perform the duties of that particular medical clerk position at that particular VA facility based on the statement of functional (*i.e.*, physical) requirements specific to that job. Accordingly, the judge found that the complainant was not disabled.

Moreover, the judge rejected the complainant's claim that she should have been hired notwithstanding her impair-

ment because management could have accommodated her by not requiring her to perform duties that conflicted with her medical restrictions. The judge correctly noted that the legal duty to accommodate arises only in cases where the individual has an actual disability. If an individual does not have an actual disability, as the complainant asserted in this case, there is nothing to accommodate.

VII

EEOC UPHOLDS OEDCA'S PARTIAL REJECTION OF AN EEOC ADMINISTRATIVE JUDGE'S RELIEF AWARD

The complainant, a registered nurse (Nurse II grade level), alleged that she was discriminated against because of her race (African-American), color (Black), and gender when she was not selected for the position of Community Health Nurse. She claimed that management selected an Hispanic male because the Nursing Service at that facility had very few Hispanic males in managerial or specialty nursing positions.

An EEOC administrative judge found, and OEDCA agreed, that the complainant's nonselection was influenced by her race, color and gender. The judge's conclusion was based primarily on the finding that the complainant's qualifications were plainly superior to those of the selectee. Specifically, the judge noted that the complainant had a Master's Degree in Public Health, with a specialty in community health nursing, whereas the selectee had only a Bachelor's Degree.

Moreover, the complainant had over nine years of experience as a community health nurse, including two years as



a chief community health nurse, while the selectee had no community health experience whatsoever. The judge also pointed to the complainant's performance appraisals and her military experience, where she was responsible for setting up a field hospital in a combat zone during Operation Desert Storm, and served as head nurse in the surgical unit in that hospital.

OEDCA and the EEOC judge disagreed, however, as to the appropriate relief the complainant should be awarded as a result of the discrimination. Although the judge correctly awarded compensatory damages and attorney's fees, OEDCA was of the opinion that the judge had incorrectly ordered the Department to convene a Nurse Professional Standards Board (NPSB) to review the complainant's qualifications and promote her to the Nurse III grade level, and to place her in a Community Health Nurse or other comparable Nurse III position. OEDCA rejected and appealed this aspect of the judge's relief award, arguing that it was inconsistent with the facts in the case and amounted to an inappropriate windfall for the complainant.

After reviewing the case on appeal, the EEOC's Office of Federal Operations (OFO) issued a final decision affirming OEDCA's partial rejection of the judge's relief award. The OFO correctly found in its appellate decision that the sole claim at issue was the complainant's nonselection for the Community Health Nurse position, which according to the undisputed evidence, was graded at the Nurse II level. Hence, as the complainant was already a Nurse II, her placement into the position required only a reassignment, not a promotion. There

was, therefore, no need to convene the NPSB to review the complainant's qualifications, and no need to promote her to Nurse III.

The NPSB review process for VA nurses differs significantly from the promotion processes typically used throughout the Federal government. The review process required for nurse promotions is not triggered by selection for a vacant nursing position, as the judge seemed to think. Instead, it is the anniversary date of the nurse's most recent promotion that determines when the nurse goes before the NPSB.²

VIII

COMPLAINANT'S DISCHARGE DUE TO HER FELONY CONVICTION NOT DISCRIMINATORY

The complainant was arrested and convicted for welfare fraud and sentenced to five years probation. Five days before her arrest she applied for a position as a supply technician. Three months after her conviction, she received notification that she had been hired.

During the new employee orientation process, she answered "yes" to a question asking her if she had ever been convicted of a felony. After reviewing and verifying a written statement the complainant had prepared explaining her conviction, management officials discharged her during the probationary period. The discharge notice cited as grounds for her removal "unsuitable

² See case II (page 3) for an in-depth discussion of the nurse promotion process in the VA.



traits of character as evidenced by her felony conviction.”

The complainant thereafter filed an EEO complaint alleging that her discharge was due to her gender. At the hearing stage, she claimed that the facility also discriminated against her because of her “background.”

An EEOC administrative judge found, and OEDCA agreed, that the complainant’s discharge did not violate federal civil rights laws. First, the judge noted that it was undeniable that the complainant’s conviction, and not her gender, prompted her discharge. Second, the judge found that discrimination due to “background” is not a permissible basis for filing a discrimination complaint involving Federal employment. In order to state a valid claim, a complainant must limit his or her claim to one or more of the bases of discrimination prohibited by civil rights laws and regulations applicable to Federal employment; namely, race, color, religion, gender, national origin, reprisal (*i.e.*, retaliation for prior EEO activity), age (40 or over), or disability.

This case illustrates a fatal flaw found in some Federal sector EEO complaints; to wit, citing an impermissible ground, or “basis”, for the complaint. Complaints, or claims within a complaint, are frequently dismissed at the outset because complainants allege something other than the eight bases of discrimination noted above. Thus, claims of discrimination will fail when, instead of alleging one or more of the above listed bases, they allege bias because of veteran’s status or preference (or lack thereof), social or educational disadvantage,

criminal record (unless it relates to a claim of race discrimination), age (where the complainant is under 40 years of age at the time of the alleged discrimination), lack of a disability, reprisal for non EEO-related activity (*e.g.*, whistle blowing in a contract fraud case), and other grounds that fall outside the purview of the Federal sector EEO complaint process.

IX

AGE CLAIM DISMISSED AS MOOT DESPITE COMPLAINANT’S REQUEST FOR COMPENSATORY DAMAGES

The complainant, a former Personnel Assistant who is no longer employed by the VA, alleged that her former VA supervisor discriminated against her because of her age. She claimed that the supervisor criticized and humiliated her on an ongoing basis for errors and discrepancies in her work. The complainant claimed that other workers were responsible for the discrepancies and errors.

The complainant later left the VA to accept a position with the Department of the Army. She did not claim that she was forced to leave the VA because of the harassment; *i.e.*, she did not claim constructive discharge. Moreover, she did not request reinstatement with the VA. The only relief she requested was \$300,000 in compensatory damages.

An EEOC judge dismissed her claim as moot. OEDCA subsequently notified the complainant that the Department was accepting the judge’s procedural dismissal decision and that she was entitled to no relief.



Under EEOC's governing regulations, an agency, or an EEOC judge, must dismiss a claim that is moot. Mootness, in the legal sense, means that a claim no longer presents a live controversy because of an intervening circumstance or event. In other words, something has happened since the complainant initially raised the matter, which has reversed the harm suffered by the complainant to the point that the complainant is no longer aggrieved. If that "something" has occurred, and remedial relief is no longer available, there is no longer a need to determine if discrimination occurred. It is a moot issue.

The Supreme Court has held that a claim is moot, and therefore no longer presents a live controversy, when the following two-prong test is met: (1) interim events or relief have completely eradicated the effects of the alleged violation, and (2) it can be said with assurance that there is no reasonable expectation that the violation will recur.

The EEOC judge correctly found that both prongs of this test were satisfied. The complainant no longer worked for the VA, was now working for the Army, and did not wish to return to her former position at the VA. Thus, an interim event, *i.e.*, the complainant's voluntary resignation from her employment with the VA, completely eradicated the effects of the alleged violation; and it can be said with assurance that there is no reasonable expectation that the alleged violation will recur.

The complainant had asserted that her claim was not moot. She argued that there was still some relief to which she

would be entitled if she were able to prove her claim of discriminatory harassment; namely, compensatory damages for the harm to her emotional well being. The judge, however, rejected her argument, noting that such damages are not authorized for claims brought under the *Age Discrimination in Employment Act*.

In this case, the complainant's claim was limited to age discrimination. Had she alleged a different basis (*e.g.*, race), alone or in conjunction with her age claim, the judge might not have dismissed it as moot. The reason is that, if she were to prevail on a basis other than age, damages might have been available as a remedy.

X

EEOC'S FY 1999 FEDERAL SECTOR REPORT ON EEO COMPLAINTS PROCESSING AND APPEALS

In its most recent annual report on EEO complaints and appeals processing in the Federal sector, the Equal Employment Opportunity Commission (EEOC) paints a rather bleak picture with respect to the ability of Federal agencies to cope with the increasing number of EEO complaints, hearing requests, and appeals being filed. Ironically, EEOC, the architect of the Federal sector complaint system, has more problems in this regard than most of the agencies that are subject to its regulations. The VA, on the other hand, ranks relatively high among all Federal agencies with respect to its overall processing times. What follows are some of the data reported by the EEOC in its FY 1999 annual report



and by the Government Accounting Office (GAO) in several recent reports on the Federal sector EEO complaint process.

Inventories. In the 1990s, the number of EEO complaints filed with Federal agencies increased by more than 50%. This, in turn, resulted in the doubling of the agencies' case inventories during this period. Also during this period the hearing request backlog at EEOC grew by over 300%, and the appeals backlog at EEOC grew by almost 700%.³ What makes these numbers even more discouraging is that the size of the Federal workforce declined by approximately 11% during the same period. There was some good news, however. Government-wide EEO inventories in FY 1999 decreased by 4.5%, and the number of complaints filed government-wide in FY 1999 decreased by 5.3%.

Timeliness: Case processing time also increased during the 1990s. In FY 1991, Federal agencies took an average of 341 days to process a complaint (includes complaints that were dismissed, settled, and withdrawn); and it took EEOC 173 days to process a hearing request. In FY 1999, agencies took an average of 423 days to process a complaint (EEOC's average was 616 days, and VA's average was 260 days). EEOC took 350 days to process a hearing request, even though its own regulations require it to do so in 180 days. At the appeal stage, EEOC took 461 days to issue an appellate decision, even though the regulations contem-

plate a 180-day period for appellate dispositions.

According to the General Accounting Office, an EEO complaint that travels through the entire process (*i.e.*, acceptability review, investigation, hearing, final action by the agency, and appeal to the EEOC) will take, on average, about 1200 days to complete the journey.⁴

Actions Complained Of. Complaints about intangible losses dominate agencies' caseloads. Complaints about harassment (nonsexual), account for approximately 19% of all claims. Such claims typically allege that the employee has been subjected to harassing behavior or a hostile work environment because of a prohibited factor, resulting in nonmonetary losses such as unfair treatment or loss of dignity. The second most frequently raised issue involved disciplinary actions, including terminations, which accounted for 15.6% of all claims. The third was nonpromotions or nonselections, which accounted for almost 14% of all claims. Sexual harassment allegations accounted for only 1.5% of all claims filed.

Bases of Discrimination Alleged. Of the eight protected bases of discrimination covered by EEOC's Federal sector regulations (race, color, gender, religion, national origin, age, disability and reprisal), reprisal was the most frequently raised – cited in approximately 23% of all complaints. Gender discrimination was a close second at 22%. Race discrimination was the third most frequent

³ *Discrimination Complaint Caseloads and Underlying Causes Require EEOC's Sustained Attention*, March 29, 2000, GAO/T-GGD-00-104.

⁴ *EEO Complaint Caseloads Rising, with Effects of New Regulations on Future Trends Unclear*, August 16, 1999, GAO-GGD-99-128.



basis, cited in 21.4% of all claims. These include claims based on African-American membership (14.4%), Caucasian membership (5.2%), and 1.8% involving claims filed by members of other races.

Dispositions. EEOC reports that Federal agencies found discrimination in approximately 2.4% of cases adjudicated on the merits. At the hearing stage, EEOC administrative judges found discrimination in approximately 7.5% of the cases they heard, down from a high of almost 15% in FY 1991.

One very interesting and significant statistic recently noted by the GAO in this regard is that the finding rate by EEOC's judges at the hearing stage declined dramatically during the 1990s, even though the number of complaints filed and hearings requested during that period increased dramatically. Both the GAO and the EEOC have acknowledged that one reason for this anomaly is that many employees use the Federal sector EEO complaint process to complain about matters that do not involve discrimination. GAO noted that "some employees file frivolous complaints to harass supervisors or 'game' the system."⁵ Another often-cited explanation is that the availability since 1991 of compensatory damages in the Federal sector complaint process has prompted many employees to use the EEO process rather than other more appropriate avenues of relief to resolve basic workplace disputes. Thus, the GAO has noted that the number of discrimination complaints is not a reliable indicator of

⁵ See footnote 3.

the level of discrimination occurring in the Federal workplace.⁶

XI

FREQUENTLY ASKED QUESTIONS AND ANSWERS RELATING TO DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES

(Claims alleging disability discrimination account for a significant number of EEO complaints filed against private and Federal sector employers. Unfortunately, this is one of the most difficult and least understood areas of civil rights law. The following article, based on guidance provided by the Equal Employment Opportunity Commission, presents frequently asked questions and answers relating to when employers may and may not obtain medical information about their employees. Although the guidance is aimed primarily at employers, employees can benefit from being aware of the rules set forth in the guidance.)

Q. 1. What does EEOC's Guidance address?

A.1. The Guidance explains the rules under *The Americans with Disabilities Act* (ADA) concerning when employers may and may not obtain medical information about their employees.

⁶ *Rising Trends in EEO Complaint Caseloads in the Federal Sector*, July 24, 1998, GAO-GGD-98-157BR



Q.2. Why did the EEOC issue this Guidance?

A.2. In October 1995, the EEOC issued enforcement guidance explaining the ADA's rules concerning when an employer may and may not make disability-related inquiries and require medical examinations of applicants. Since that time, we have had many inquiries from EEOC investigators and attorneys in the field, employers, and employees about how the law applies with respect to people who are already working. This Guidance is intended to answer some of the most frequently asked questions we have received.

Q.3. To whom does the Guidance apply?

A.3. The Guidance applies to private and to state and local government employers with fifteen or more employees. Federal sector employers are also covered by the Guidance, as the result of the 1992 amendments to the Rehabilitation Act.

The ADA's requirements regarding disability-related inquiries and medical examinations apply to all of the employees of a covered employer, whether or not they have disabilities.

Q.4. Are the rules about when an employer may make disability-related inquiries and require medical examinations the same for employees and applicants?

A.4. No. The ADA limits an employer's ability to make disability-related inquiries or require medical examinations at three stages: pre-offer, post-offer, and during employment. The rules concerning disability-related inquiries and medical examinations are different at each stage.

At the first stage (prior to an offer of employment), an employer may not ask any disability-related questions or require any medical examinations, even if they are related to the job.

At the second stage (after an applicant is given a conditional job offer, but before he or she starts work), an employer may ask disability-related questions and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.

At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

Q.5. What is a "disability-related inquiry"?

A.5. A "disability-related inquiry" is a question that is likely to elicit information about a disability, such as asking employees about: whether they have or ever had a disability; the kinds of prescription medications they are taking; and, the results of any genetic tests they have had.

Disability-related inquiries also include asking an employee's co-worker, family member, or doctor about the employee's



disability.

Questions that are not likely to elicit information about a disability are always permitted, and they include asking employees about their general well-being; whether they can perform job functions; and about their current illegal use of drugs.

Q.6. What is a "medical examination"?

A.6. A "medical examination" is a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health. Medical examinations include vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs.

Q.7. Are there any procedures or tests employers may require that would not be considered medical examinations?

A.7. Yes. There are a number of procedures and tests that employers may require that are not considered medical examinations, including: blood and urine tests to determine the current illegal use of drugs; physical agility and physical fitness tests; and polygraph examinations.

Q.8. When may an employer ask an employee a disability-related question or require an employee to submit to a medical examination?

A.8. Generally, an employer only may seek information about an employee's medical condition when it is job related and consistent with business necessity. This means that the employer must have a reasonable belief based on objective evidence that:

- an employee will be unable to perform the essential functions of his or her job because of a medical condition; or,
- the employee will pose a direct threat because of a medical condition.

Employers also may obtain medical information about an employee when the employee has requested a reasonable accommodation and his or her disability or need for accommodation is not obvious.

In addition, employers can obtain medical information about employees when they:

- are required to do so by another federal law or regulation (e.g., DOT medical certification requirements for interstate truck drivers);
- offer voluntary programs aimed at identifying and treating common health problems, such as high blood pressure and cholesterol;
- are undertaking affirmative action because of a federal, state, or local law that requires affirmative action for individuals with disabilities or voluntarily using the infor



mation they obtain to benefit individuals with disabilities.

Q.9. What should an employer do if it learns about an employee's medical condition from someone else?

A.9. First, the employer should determine whether the information learned is reliable. The employer should consider how well the person providing the information knows the individual, the seriousness of the medical condition, and how the person learned the information.

The employer should then determine whether the information gives rise to a reasonable belief that the employee in question will be unable to perform the essential functions of his or her job because of the medical condition or will pose a direct threat because of the condition.

If the information does give rise to such a reasonable belief, then the employer may make disability-related inquiries or require a medical examination as permitted by the Guidance.

Q.10. May an employer ask all employees what prescription medications they are taking?

A.10. Generally, no. In limited circumstances, however, employers may be able to ask employees in positions affecting public safety about their use of medications that may affect their ability to perform essential functions and thereby result in a direct threat.

For example, an airline could require

pilots to report when they are taking medications that may affect their ability to fly. A fire department, however, could not require employees in administrative positions to report their use of medication because it is unlikely that these employees would pose a direct threat as a result of an inability, or impaired ability, to do their jobs.

Q.11. What may an employer do if it believes that an employee is having performance problems because of a medical condition, but the employee won't answer any questions or go to the doctor?

A.11. The employer may discipline the employee for his or her performance problems just as it would any other employee having similar performance problems.

Q.12. May an employer have an employee who is requesting a reasonable accommodation examined by its own health care provider?

A.12. In some instances, yes. If the employer has explained what type of documentation is needed, and the employee fails to provide it or provides insufficient documentation, the employer may require the employee to see a health care professional of the employer's choice.

Even where an employee initially provides insufficient documentation, however, the employer should consider asking the employee's health care provider for additional information before requiring an examination by the employer's health care professional. This is



because an employee's health care provider frequently is in the best position to provide information about the employee's limitations.

Q.13. May an employer have an employee who it reasonably believes will pose a direct threat examined by its own health care provider?

A.13. Yes. This is because the employer is responsible for assessing whether an employee poses a direct threat based on a reasonable medical judgment that relies on the most current medical knowledge and/or best objective evidence.

The health care professional the employer chooses should have expertise in the employee's specific medical condition and be able to provide medical information that allows the employer to determine the effects of the condition on the employee's ability to perform his or her job.

If the employer's health care professional believes that the employee poses a direct threat, but the employee's own doctor disagrees, the employer should evaluate the conflicting medical information by considering, for example, the area of expertise of each medical professional; the kind of information each provided; and, whether the information provided is consistent with the employer's own observations of or knowledge about the employee.

Q.14. May an employer request that an employee provide a doctor's note or other explanation when the employee has used sick leave?

A.14. Yes. An employer is entitled to know why an employee is requesting sick leave. An employer, therefore, may ask an employee to provide a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees to do so.

Q.15. May an employer ask disability-related questions or require a medical examination when an employee who has been on leave for a medical condition wants to return to work?

A.15. Yes, if an employer has a reasonable belief that an employee's present ability to perform essential functions will be impaired by a medical condition or that he or she will pose a direct threat because of a medical condition. Any inquiries or examination, however, must be limited in scope to what is needed to determine whether the employee is able to work.

Q.16. May employers require employees to have periodic medical examinations?

A.16. No, with very limited exceptions for employees who work in positions affecting public safety, such as police officers, firefighters, or airline pilots. Even in these limited situations, the examinations must address specific job-related concerns. For example, a police department could periodically conduct vision tests or electrocardiograms because of concerns about conditions that could affect the ability to perform essential job functions and thereby result in a direct threat. A police department could



not, however, periodically test its officers to determine whether they are HIV-positive, because a diagnosis of this condition alone would not result in a direct threat.

Q.17. May employers subject employees to periodic alcohol testing?

A.17. Generally, no. Employers, however, may subject employees who have been in alcohol rehabilitation programs to periodic alcohol testing where the employer has a reasonable belief that the employee will pose a direct threat in absence of such testing.

In determining whether to subject such an employee to periodic alcohol testing, the employer should consider the safety risks associated with the position the employee holds, the consequences of the employee's inability or impaired ability to do his or her job, and the reason(s) why the employer believes that the employee will pose a direct threat.

Of course, an employer may maintain and enforce rules prohibiting employees from being under the influence of alcohol in the workplace and may conduct alcohol testing for this purpose if it has a reasonable belief that an employee has been drinking during work hours.

