



# OEDCA DIGEST



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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 agency decision 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 nurse promotions, diagnosis *vs.* disability, definition of "EEO protected activity" in reprisal cases, and management's burden of "articulation." Also in this issue is an article on obtaining employee medical information for emergency purposes and an update on religious accommodation.

The *OEDCA Digest* now contains a comprehensive cumulative index.

The *OEDCA DIGEST* may be accessed both on the internet at: <http://www.va.gov/orm/oedca.asp> and on the Department of Veterans Affairs Intranet at <http://vaww.va.gov/orm/oedca.htm>.

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## I

### ***LENGTHY EXPERIENCE AND PH.D DEGREE NOT ENOUGH TO QUALIFY NURSE FOR PROMOTION***

The complainant was serving as a Nurse II when a Nurse Professional Standards Board (NPSB or “Board”) examined her qualifications for promotion to the grade of Nurse III. When the Board found her unqualified for promotion to the Nurse III grade, she filed a discrimination complaint alleging, among other things, that her color (African-American with a light complexion) was a motivating factor in the decision not to promote her. All of the nurses named by the complainant or otherwise involved in the nonpromotion decision had darker complexions.

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 promoted to certain grades without the need for a vacancy, as the grades are linked, not to a specific 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 educa-

tional criteria for the next higher grade, as stated in the VA *Nurse Qualification Standards*, in order to be promoted. Thus, nurses are occasionally passed-over for promotion, despite a record of above-average or even outstanding performance.

Evidence that the nurse has met the criteria is found in the nurse’s annual proficiency report --*i.e.*, the performance appraisal prepared by the nurse’s supervisor – and other documents contained in his or her official personnel folder (OPF).<sup>1</sup> 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 and other documents, 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. In the interim, however, the nurse, may request the Board to reconsider its initial decision if important information was not included in the materials presented to the Board.

The complainant in this case met and significantly exceeded the educational and length of experience requirements

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<sup>1</sup> The nurse does not actually appear before the Board. The Board’s decision is based solely on documents pertaining to the candidate’s qualifications, performance, achievements, and scope of responsibility.



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specified in the VA *Nurse Qualification Standards*, and she had an overall rating of “Satisfactory” in her most recent performance evaluation. The Board, however, notified her that she would not be promoted because she failed to satisfy the other promotion criteria. Specifically, the Board stated that her proficiency report contained no indication that she had met or satisfied all of the nine “dimension” requirements (Practice, Quality of Care, Performance, Education/Career Development, Collegiality, Ethics, Collaboration, Research, and Resource Utilization).

The complainant claimed that she was eminently qualified to function at the Nurse III level because she had over thirty years of nursing experience and a Ph.D. degree. However, such qualifications, though clearly significant and relevant, are not sufficient, by themselves, to qualify a nurse for Level III. The testimony of numerous nurses indicated that the complainant had not satisfied all of the nine dimension requirements. Several nurses also testified that the complainant was unhappy in her nursing role and routinely spoke negatively about other nurses. The complainant, though claiming she met all qualification requirements, failed to offer any evidence to rebut the testimony presented by management and Board nurses.

After reviewing the evidence of record, OEDCA concluded that the complainant’s nonpromotion was not due to her skin color. There was no evidence

anywhere in the record suggesting that the complainant’s nurse supervisor or the nurses serving on the Board intentionally discriminated against her.

## II

### ***REFUSAL TO WAIVE EDUCATIONAL REQUIREMENT FOR NURSE IN NONPROMOTION CASE NOT DISCRIMINATORY***

Another issue that sometimes arises in nurse promotion cases in the VA involves the waiving of the educational requirement, or more specifically, the refusal to waive that requirement. The following case is a good example.

The complainant had worked as a nurse at a VA medical facility for over twenty years, the last four of which were in a Substance Abuse Residential Program. She had for several years expressed an interest in promotion to the Nurse III level, but promotion to that level requires a Master’s Degree in Nursing, which the complainant did not have.

The regulation governing nurse promotions does provide, however, that the Chief Nurse may request the Nurse Professional Standards Board (hereinafter the “Board”) to waive the degree requirement when a nurse has made “numerous and complex contributions beyond the requirement of the nurse’s assigned program.” The complainant approached her Chief Nurse



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and asked that she request the Board to waive the degree requirement on her behalf when forwarding her file to the Board for promotion consideration. The Chief Nurse refused to request a waiver, and the Board passed her over for promotion. The complainant thereupon filed an EEO complaint alleging discrimination due to her national origin, age, and reprisal for her prior EEO complaint activity.

After reviewing the evidence of record, OEDCA concluded that the Chief Nurse's refusal to request a waiver was not discriminatory. In support of her claim, the complainant pointed to three other nurses, not of her protected class, who were promoted to Level III without a Master's Degree after having been granted a waiver of the educational requirement.

However, the credible testimony of the Chief Nurses involved in those promotion actions showed that the promoted nurses all demonstrated activities and responsibilities above and beyond the requirements of their assigned program. One had been serving as a Nurse Manager, one had been serving as a Quality Manager for two VA facilities, and the third had been responsible for all of the information management training for the Mental Health Care line.

The complainant, on the other hand, was responsible for only one group of patients in the Mental Health Clinic, and that such limited responsibilities were not sufficient to justify a waiver of the educational requirement.

## III

### ***DIAGNOSED DISEASE NOT THE SAME AS A DISABILITY***

Many disability discrimination claims fail because, as the following complainant found out, having a diagnosed medical condition is not the same as having a disability.

The complainant was employed as a Respiratory Therapist. In 2004, he requested permission to take unscheduled sick or annual leave whenever his medical condition, described by his dermatologist as "urticaria", prevented him from working. The Chief of Staff denied his request. The complainant then filed a discrimination complaint alleging a failure to accommodate his disability.

His dermatologist explained that the condition is a vascular reaction involving the upper dermis, resulting in localized edema and hives. It can flare-up due to stress, sun, cold, pressure, or chemicals. Flare-ups can cause feet and hands to hurt, and swelling of the tongue, lips, and eyes.

When asked to describe which major life activities his medical condition restricted, he stated that it can limit the amount of walking he is able to do when the condition is exacerbated. He did not, however, provide any specific testimony or other evidence as to how this condition actually affected his ability to walk. He also failed to specify the frequency or duration of the flare-ups.



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According to evidence in the record, the complainant had the condition for 20 years, and had always been able to perform all aspects of his job, which he admitted required “a lot of walking.” Moreover, he was able to do so without restrictions or limitations. He never had to leave work because of a “flare up.”

After reviewing the evidence, an EEOC administrative judge concluded that the complainant was not entitled to an accommodation, as he did not have a “disability” as defined by EEO law and regulations. An “individual with a disability” is one who has a physical or mental impairment that substantially limits one or more major life activities. Major life activities refer to functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, breathing, speaking, learning, and working. Also falling within the definition of “individual with a disability” is one who is perceived as having such an impairment, or one who has a record of such an impairment.

The only major life activity alleged by the complainant to be limited was his ability to walk. However, as the EEOC judge noted, he failed to provide any specific information regarding the extent of the alleged limitation, or how often his condition would cause him problems -- *i.e.*, the frequency and duration of the flare-ups. Moreover, he was always able to perform the duties of his job, which required a lot of walking, despite flare-ups and without restrictions or limita-

tions. Hence, his medical condition, although “diagnosed”, was not an impairment that substantially limited any of his major life activities. Therefore, he was not an individual with a disability.

## IV

### ***OSHA COMPLAINT AND UNION GRIEVANCES NOT “EEO PROTECTED ACTIVITY”***

Reprisal -- also referred to as retaliation -- is one of the most frequently raised bases of discrimination in the federal sector EEO complaint process. Many such complaints, however, fail on procedural grounds because the type of “retaliation” alleged by many complainants does not fall within the purview of applicable civil rights statutes and EEOC’s implementing regulations. Consider the following case.

A VA employee alleged that he was subjected to retaliatory harassment and constructively discharged because of his “protected activity.” His protected activity, according to his testimony, consisted of being a “whistleblower”, *i.e.*, he had previously filed complaints of unsafe and dangerous working conditions with the Department of Labor’s Occupational Safety and Health Administration (OSHA).

He also cited several union grievances, as well as a complaint he filed with the Federal Labor Relations Authority (FLRA). However, there was no evidence in the record that any of the



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complainant's union grievances or his complaint to the FLRA contained allegations of discrimination covered by applicable civil rights statutes (*e.g.*, allegations of discrimination based on race, color, religion, national origin, gender, age, disability, or retaliation for having filed complaints containing such allegations).

Following an agency investigation, the complainant requested a hearing before an EEOC administrative judge. After reviewing the complaint and investigation files, the judge issued a decision without a hearing (*i.e.*, a "summary judgment") wherein she ruled that the complainant had failed to establish his threshold burden of proving a *prima facie* cases of retaliation. Specifically, the judge noted that in the federal sector EEO complaint process a claim of discriminatory retaliation must be based on prior "protected activity" of the type described above; that is, a prior complaint or grievance alleging discrimination because of race, color, religion, gender, national origin, age, disability, or reprisal; or some other activity opposing such discrimination.

In this case, the complainant presented no evidence that he had engaged in the type of "protected activity" for which the federal sector EEO complaint process could provide a remedy. The Equal Employment Opportunity Commission (EEOC) has no jurisdiction over OSHA "whistle blower" complaints, or retaliation claims involving such complaints. Likewise, the EEOC has no jurisdic-

tion over reprisal claims arising out of union grievances or FLRA complaints that do not contain allegations of the type of discrimination described above. Because these types of complaints and grievances do not constitute EEO protected activity, the complainant in this case was unable to establish a *prima facie* case of reprisal.

This is not to say that the complainant had no claim whatsoever. Retaliation for protected "whistle blower" activities, for example, is a prohibited personnel practice for which certain federal statutes provide a remedy. The complainant's error in this case was in trying to use the EEO complaint process to obtain a remedy that could only be provided by other statutory processes.

## V

### ***DISCUSSION WITH SUPERVISOR ABOUT DISCRIMINATORY HARASSMENT BY COWORKER IS "EEO PROTECTED ACTIVITY" FOR PURPOSES OF RETALIATION CLAIM***

As noted in the preceding case, in the federal sector EEO complaint process a claim of discriminatory retaliation must be based on prior "protected activity". "Protected activity" means either (1) participation<sup>2</sup> in the EEO complaint process, or (2) some other

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<sup>2</sup> Participation could be as a complainant, a witness, an EEO official, or a representative, but does not include being named as a "responsible management official" (RMO).



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activity in opposition to discrimination, such as demonstrations, picketing, membership in civil rights organizations, complaints to superiors about discrimination, grievances in which discrimination is alleged, *etc.* The following case illustrates that an employee or applicant need not actually file a complaint of discrimination to show prior “protected activity.”

The employee in this case, an African-American female, was hired as a Nursing Assistant for a one-year temporary appointment. One year later, her temporary appointment was renewed for an additional year per the recommendation of her supervisor, the Nurse Manager.

Employees serving under temporary appointments are subject to termination at any time without benefit of adverse action or reduction-in-force procedures that are generally available to permanent employees.

Shortly before the expiration of the one-year extension of her appointment, management officials at the facility imposed a hiring freeze due to a budget shortfall. The facility therefore instructed the complainant’s supervisor to reduce the nursing assistant staff on her ward by three employees (FTEE). Shortly after the supervisor learned of the need to reduce staff, the complainant met with the supervisor to complain about harassment by a co-worker and to request information about how to file a complaint against the co-worker. A week later, the supervisor notified the complainant that

her temporary appointment, which was about to expire in a few weeks, would not be renewed.

The complainant thereafter filed a discrimination complaint alleging, among other things, that the decision not to renew her temporary appointment was an act of retaliation because of her prior EEO protected activity. In support of her claim, she cited the timing of the events (*i.e.*, notice of nonrenewal issued one week after the meeting with the supervisor).

After reviewing the investigative file an EEOC judge issued a decision without a hearing (*i.e.*, a summary judgment), concluding that the complainant, although able to establish a *prima facie* case of retaliation, was unable to prove retaliatory motivation by a preponderance of the evidence. The judge noted that the evidence in the record fully supported management’s reasons for the need to reduce staff, and that no temporary appointments involving nursing assistants were renewed during the time frame in question because of the budget shortfall. The complainant offered no evidence, aside from the timing of the events, that retaliation was a motive. While the timing of the events was sufficient to establish a *prima facie* case, it was not sufficient, by itself, to sustain the complainant’s overall burden of proving retaliation by a preponderance of the evidence.

Although finding against the complainant, the judge did find, contrary to management’s assertion, that the



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complainant had engaged in prior protected activity. While she did not participate in the Federal sector EEO complaint process prior to filing the instant complaint (*i.e.*, she did not previously file a formal or informal complaint), she did oppose discrimination by meeting with her supervisor to complain about discriminatory harassment by a co-worker and to inquire about how to file a complaint.

Opposing discriminatory treatment is protected activity, and employees who go to their supervisors to report discrimination against them or against others are engaging in protected EEO activity. Hence, action taken against an employee because of such opposition constitutes unlawful retaliation under Title VII of the Civil Rights Act and other similar civil rights statutes.

## VI

### ***MANAGEMENT'S EXPLANATION FOR TERMINATING COMPLAINANT DOES NOT MEET ITS BURDEN OF ARTICULATION***

The following case illustrates why management officials need to be clear and specific about the reasons for their actions.

The complainant filed a complaint alleging numerous incidents of discriminatory treatment due to her age and/or gender involving promotions, holiday pay, and the termination of her two-year temporary appointment. An EEOC judge held a hearing and

found for the VA on the pay and promotion issues but found for the complainant on her termination claim.

At the hearing, the management official responsible for the termination action testified that, although her two-year temporary appointment was not due to expire for another 12 months, her services were “no longer needed”. When asked why the temporary appointment of a similarly situated younger male employee was extended for an additional year less than two weeks after the complainant’s termination, he stated simply that the younger male was a “team player”. The official offered no other evidence or testimony to clarify or expand upon the reason for his action.

OEDCA agreed with and accepted the EEOC judge’s decision finding for the complainant on the termination claim. Specifically, the judge noted that management presented no legitimate, nondiscriminatory reason for the decision to terminate the complainant yet retain the younger male employee. Because it failed to present, or articulate, such a reason, judgment in the complainant’s favor was automatic.

It might be argued that management did articulate a legitimate, nondiscriminatory reason when it said it no longer needed her services and that the younger male was a “team player”. However, such an explanation is vague and unspecific. It fails to afford the complainant an adequate opportunity to address and rebut it. Why were her services no longer needed?



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Was it because of budgetary constraints? The termination of the project or program in which she was involved? Poor performance on her part? Some other reason? Absent something more clear and specific, the complainant was unable to address the reason given for her termination.

Management did provide a hint when it stated that the younger male was a “team player.” But did that mean that the complainant was not a team player? And if so, what specifically happened or what was the problem prompting the belief that she was not a team player? The complainant simply lacked adequate information to address the problem(s) perceived by management regarding her employment.

Management’s burden to “articulate a legitimate, nondiscriminatory reason” for its actions is not a heavy burden. It is almost always satisfied without much difficulty. The burden is not to prove the absence of discrimination. Instead, the burden is simply to provide a clear and specific reason for what happened – one that will allow a complainant a fair opportunity to offer evidence, if any, in rebuttal.

Because the responsible management official in this case offered reasons that were too vague, he failed to meet his burden, thereby resulting in an adverse judgment against the Department.

The lesson for management here is obvious. If there is a legitimate, non-

discriminatory reason for taking an action, be sure to explain it completely and thoroughly when asked by an EEO investigator or an EEOC judge.

## VII

### ***Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures***

*The following guidance was issued by the Equal Employment Opportunity Commission and is available on line at <http://www.eeoc.gov/facts/evacuation.html>*

#### **Introduction**

In light of the terrorism threat, many employers are developing or re-evaluating emergency procedures to ensure the safe evacuation of all employees. A comprehensive emergency evacuation plan should provide for prompt and effective assistance to individuals whose medical conditions may necessitate it. Many employers have asked how the *Americans with Disabilities Act* (ADA) and the *Rehabilitation Act* affect their ability to achieve this goal.<sup>(1)</sup> Specifically, employers have asked whether they may request information to help identify individuals who might need assistance because of a medical condition and whether they can share this information with others in the workplace. As the following questions and answers demonstrate, federal disability discrimination laws do not prevent employers from obtaining and appropriately using information necessary for



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a comprehensive emergency evacuation plan.<sup>(2)</sup>

*Q1. May an employer ask employees whether they will require assistance in the event of an evacuation because of a disability or medical condition?*

Yes. Some employees may need assistance because of medical conditions that are not visually apparent. Others may have obvious disabilities or medical conditions but may not need assistance. Employers, therefore, are allowed to ask employees to self-identify if they will require assistance because of a disability or medical condition.

*Q2. How may an employer identify individuals who may require assistance?*

There are three ways that an employer may obtain information:

- After making a job offer, but before employment begins, an employer may ask all individuals whether they will need assistance during an emergency.
- An employer also may periodically survey all of its current employees to determine whether they will require assistance in an emergency, as long as the employer makes it clear that self-identification is voluntary and explains the purpose for requesting the information.
- Finally, whether an employer periodically surveys all employ-

ees or not, it may ask employees with known disabilities if they will require assistance in the event of an emergency. An employer should not assume, however, that everyone with an obvious disability will need assistance during an evacuation. For example, many individuals who are blind may prefer to walk down stairs unassisted. People with disabilities are generally in the best position to assess their particular needs.

An employer should inform all individuals who are asked about their need for emergency assistance that the information they provide will be kept confidential and shared only with those who have responsibilities under the emergency evacuation plan. (See Question 4 below.)

*Q3. May an employer specifically ask what type of assistance will be needed?*

Yes. An employer may ask individuals who indicate a need for assistance because of a medical condition to describe the type of assistance they think will be needed. One way that this can be done is by giving all employees a memo with an attached form requesting information. The employer also may have a follow-up conversation with an individual when necessary to obtain more detailed information. For example, it would be important for an employer to know whether someone who uses a wheelchair because of mobility limitations is able to walk independently, with or without



the use of crutches or a cane, in an emergency situation. It also would be important for an employer to know if an individual will need any special medication, equipment, or device (e.g., an assisted wheelchair carrier strap or a mask because of a respiratory condition) in the event of an emergency. Of course, an employer is entitled only to the information necessary for it to be prepared to provide assistance. This means that, in most instances, it will be unnecessary for an employer to know the details of an individual's medical condition.

*Q4. Who is allowed to have information about employees needing assistance in an emergency?*

The ADA has provisions that require employers to keep medical information about applicants and employees confidential. These provisions, however, include an exception that allows an employer to share medical information with first aid and safety personnel. This exception would allow an employer to share information about the type of assistance an individual needs in the event of an evacuation with medical professionals, emergency coordinators, floor captains, colleagues who have volunteered to act as "buddies," building security officers who need to confirm that everyone has been evacuated, and other non-medical personnel who are responsible for ensuring safe evacuation. These individuals are entitled to the information necessary to fulfill their responsibilities under the employer's emergency evacuation plan.

1. The ADA applies to private employers with fifteen or more employees and to state and local government employers. The Rehabilitation Act applies to most federal employers, and its substantive requirements are the same as those that apply to employers covered by the ADA.

2. The Commission previously has issued more detailed guidance on related issues concerning disability-related inquiries and medical examinations of applicants and employees. See Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations under the Americans with Disabilities Act of 1990 (October 10, 1995) and Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA) (July 27, 2000). These and other guidance are available on this web site.

More information on emergency preparedness for employees with disabilities can be found on the President's New Freedom Initiative Disability Direct web site <http://www.disabilities.gov/> and on the Job Accommodation Network's web site at <http://www.jan.wvu.edu/>.

## VIII

### ***RELIGIOUS ACCOMMODATION – AN UPDATE***

*(The following article appeared in the Winter 2006 edition (Vol. XVII, No. 1) of the EEOC's Digest of Equal Employment Opportunity Law*

Title VII of the Civil Rights Act of 1964 requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless doing so would create an undue hardship.<sup>1</sup> The Commission defines the term "religious" to include moral or ethical beliefs as to right and wrong



that are sincerely held with the strength of traditional religious views.<sup>2</sup> After an employee or prospective employee notifies the employer of his or her need for an accommodation, the employer has an obligation to reasonably accommodate the individual's religious practices.<sup>3</sup> When there is more than one method of accommodation available which would not cause undue hardship to the employer, the Commission will examine the alternatives considered by the employer, and the alternatives, if any, offered by the requesting individual in order to determine whether the accommodation offered is reasonable.<sup>4</sup> In cases in which there is more than one means of accommodation which would not cause an undue hardship, the employer must offer the alternative which least disadvantages the requesting individual's employment opportunities.<sup>5</sup>

## LEGAL STANDARDS

The traditional framework for establishing a *prima facie* case of discrimination based on religious accommodation requires a complainant to demonstrate that: (1) she has a bona fide religious belief, the practice of which conflicted with her employment; (2) she informed the agency of this belief and conflict; and (3) the agency nevertheless enforced its requirement against the complainant such that she was penalized for failing to comply.<sup>6</sup> Once a *prima facie* case has been established, the burden shifts to the agency to demonstrate that it cannot reasonably accommodate the complainant without incurring an undue

hardship. The Supreme Court has found that an accommodation which creates more than *de minimis* (i.e., minimal) monetary or efficiency costs causes an undue hardship for an employer.<sup>7</sup> In addition, undue hardship can be shown where a variance from a bona fide seniority system is necessary in order to accommodate the complainant's religious practices, and doing so would deny another employee his or her job shift preference guaranteed by that system.<sup>8</sup> A showing of undue hardship, however, cannot be merely hypothetical, but must include evidence of an actual imposition on co-workers or disruption of work schedules or routines.<sup>9</sup>

## RECENT COMMISSION DECISIONS FINDING RELIGIOUS DISCRIMINATION

In *Bullock v. USPS* <sup>10</sup> the complainant, a Casual Mail Handler, alleged that he was subjected to religious discrimination when he was terminated from employment for failing to report to work on Saturdays. Complainant, a member of the African Methodist Episcopal Church, asserted that he became convinced, after praying and reading the Bible, that Saturday was the proper day on which to observe the Sabbath. After advising his supervisor of his belief in May 2000, complainant was not required to work on Saturday. In February 2002, however, complainant was transferred to another facility. He was subsequently told that he could not have off on Saturdays, despite complainant having informed his new supervisor of his be-



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lief. Complainant received a letter terminating him from employment after he failed to report to work on a Saturday.

The Commission found that complainant had a *bona fide* religious belief that Saturday is the Sabbath, and that he arrived at this belief after reading the Bible, praying, and talking to others with similar beliefs. Further, complainant informed the agency of his belief, and was denied the opportunity to take Saturdays off from work. The Commission also concluded that the agency failed to show that accommodating complainant's belief would pose an undue hardship. The record contained evidence that another Casual employee was off work on Saturdays. In addition, just days after complainant was terminated, two tours were combined so that Casuals could be given Saturdays off, and the agency failed to show that there had been any changes in operations between those times.

The complainant in *Cirami v. USPS* [11](#) worked as a Motor Vehicle Operator, and requested leave to observe Good Friday in 2001. The agency denied his request, stating that it was untimely submitted in violation of the local Memorandum of Understanding, and that 20-percent of the Motor Vehicle Operators were not scheduled for that day. The Commission found that the agency failed to show that it attempted to reasonably accommodate complainant's request. The Commission noted that there are several acceptable alternatives for accommodat-

ing conflicts between work schedules and religious practices, including, among other things, voluntary substitutes and swaps. Further, it is the agency's obligation to facilitate the securing of a voluntary substitute. In this case, the record was devoid of any evidence that the agency pursued the possibility that another employee might volunteer to substitute for complainant, or swap annual leave days, or that complainant might have used compensatory time to make up for the time lost in observance of his religious practices.

In *Rolfe v. USPS*,[12](#) the Commission found that the agency failed to accommodate complainant's religious practices. The complainant, a Catholic, alleged that the agency denied her request not to work on Christmas and New Years days, which she stated are Holy Days of Obligation in the church. The Commission initially found that complainant had a *bona fide* belief that she should not work on the days in question because of her religious beliefs. Specifically, complainant's testimony revealed that she was deeply troubled about working on these Holy Days of Obligation. Further, complainant clearly informed both her supervisor and the Postmaster that working on the two religious holidays conflicted with her religious beliefs, and the agency failed to show that providing complainant with an accommodation would result in an undue hardship. The Commission concluded that complainant's supervisor did not ask other employees to work on the days in question, and did not



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attempt to reschedule complainant. Finally, the record failed to show that other employees could not, in fact, work on either of the days at issue, and the agency offered no explanation why the supervisor scheduled complainant to work on both of the holidays rather than either of the other employees.

The complainant in *Manalo v. Department of the Navy* <sup>13</sup> alleged that she was denied a religious accommodation when she was not permitted to use annual leave on Good Friday. Complainant stated that her previous supervisor had allowed her to use annual leave on Good Friday, which was a very important day of the Holy Week “that [her] family observes solemnly.” The Commission found that the agency failed to show that it could not reasonably accommodate complainant without incurring an undue hardship. Complainant’s supervisor stated only that she had off on the last eight Good Fridays, and that he believed she was abusing her sick leave. The Commission concluded that this explanation did not indicate that granting complainant’s request for accommodation would impose more than a *de minimis* cost, and, instead, suggested that complainant was being punished for exercising her right to a reasonable accommodation for her religion in the past. Thus, the Commission found that complainant was subjected to religious discrimination.

In *Darland v. Department of Defense*<sup>14</sup> the complainant alleged that he was subjected to religious discrimination

when his work schedule was changed to require that he work on Sundays. Complainant, a Protestant, acknowledged that his supervisor allowed him to take two hours off on Sunday. Complainant asserted, however, that he could not perform any work on Sunday due to his religious belief that the entire Sabbath was holy. The agency contended that Sundays were particularly busy at the facility, and, as such, almost all employees were required to work on that day.

The Commission initially noted that there was no evidence that the agency attempted to find complainant an accommodation other than offering him two hours off on Sundays. The Commission stated that, although required to do so, the agency did not consider a voluntary shift swap, flexible scheduling, or a lateral transfer to other facilities on days other than Sunday. The agency, instead, summarily found that any accommodation other than providing two hours off would cause an undue hardship without providing any documentation to support its assertion. The Commission found no evidence in the record that the facility’s operations would have been adversely affected if complainant did not perform his assignment, which involved assembling shippers of merchandise, on Sundays. Thus, the Commission found that complainant was subjected to discrimination on the basis of his religion when the agency failed to reasonably accommodate his religious beliefs.



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## DECISIONS FINDING NO DISCRIMINATION

The complainant in *Owens v. USPS* <sup>15</sup> asserted that the agency discriminated against her on the basis of her religion when it denied her request to pray in her immediate supervisor's office. Complainant, a Muslim, informed the agency that she needed a place to pray, because her religious belief requires her to pray each morning before sunrise. Complainant asked to pray in one of two specified areas for approximately 15 minutes. While her supervisor denied her request to pray in the areas mentioned, he told complainant that she could pray in an area where other Muslim employees prayed. The supervisor also told complainant that she could pray for a total of 60 minutes each day. The Commission found that the supervisor's response was sufficient to meet the agency's obligation to provide complainant with religious accommodation. The Commission also noted that complainant had the option of praying during her lunch break, which she was allowed to take within a two-hour window during the pre-dawn hours.

The complainant in *Cosgrove v. Department of the Interior* <sup>16</sup> worked for the agency as Park Ranger. In response to complainant's request for Sunday mornings off in order to attend his Sabbath services, the agency granted complainant leave without pay from 1993 until 1999. According to complainant, his supervisor then informed him that a new union

agreement did not provide for religious accommodation, and he would have to taken annual leave. The record showed that, at times, complainant's request for leave was denied because it conflicted with a co-worker's request made months before complainant's request. On those days when complainant's request was denied, the agency advised him to contact the facility on Sunday morning to see if there was sufficient coverage so as to excuse him for the day.

The Commission found that, when staffing permitted, the agency allowed complainant to use leave without pay and annual leave to attend Sabbath services, and permitted complainant to accrue compensatory time in order to avoid using leave. Nevertheless, there were occasions when complainant was required to work Sunday mornings. According to the record, in order to accommodate complainant at times when others requested leave before he did, the agency would have been required to remove an employee who either was already on annual leave or violate the collective bargaining agreement by granting complainant a permanent preference which it is not required to do. Thus, the Commission concluded that the agency acted in good faith to accommodate complainant's religious practices.

## CONCLUSION

As stated, an agency is required to reasonably accommodate the religious practices of an employee or prospective employee, unless doing so would



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create an undue hardship. In order to constitute an undue hardship, the agency must show that accommodating complainant's religious practices creates more than hypothetical or *de minimis* monetary or efficiency costs.

## ***Footnotes***

- 1 42 U.S.C. § 2000e(j).
- 2 29 C.F.R. § 1605.1.
- 3 29 C.F.R. § 1605.2(c).
- 4 29 C.F.R. § 1605.2(c)(2).
- 5 29 C.F.R. § 1605.2(c)(2)(ii).
- 6 *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).
- 7 *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).
- 8 29 C.F.R. § 1605.2(e)(2) (citing *Hardison*, *supra*).
- 9 *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981).
- 10 EEOC Appeal No. 07A40101 (August 3, 2005).
- 11 EEOC Appeal No. 01A33035 (January 13, 2005).
- 12 EEOC Appeal No. 07A40011 (March 26, 2004).
- 13 EEOC Appeal No. 01A14800 (May 23, 2003), request for reconsideration denied, EEOC Request No. 05A30945 (August 8, 2003).
- 14 EEOC Appeal No. 01A22273 (November 6, 2003).
- 15 EEOC Appeal No. 01A40636 (July 7, 2005).
- 16 EEOC Appeal No. 01A34768 (August 25, 2004).





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“Any Factor Other Than Sex”: IV, 1, p. 2-3; V, 1, p. 3-4; VII, 3, p. 8-10; IX, 2, p. 8-10  
Equal Work: (*See: Equal Pay Act*)  
Evidence:  
“After-Acquired”: VIII, 4, p. 2-3  
Articulation (Burden of): III, 3, pp. 2-3 and 3-4; III, 4, p. 5-6; IV, 2, p. 3-4; X, 3, p. 3-4; **X, 4, p. 8-9**  
Belief vs. Evidence: II, 2, p. 6; II, 3, p. 3-4; III, 1, p. 13  
Bias Attitudes: III, 1, p. 7-8  
Circumstantial:  
Credibility: II, 4, pp. 8-9 and 9-11; III, 3, p. 2-3; IV, 1, p. 8-9; IV, 3, p. 5-6 and 6-7; V, 1, p. 5-6; V, 2, p. 8-10; V, 3, p. 8-10; V, 3, 13-16; VI, 4, p. 2-3; IX, 4, p. 7-9  
Derogatory Comments: VII, 4, p. 4-6  
Direct: III, 1, p. 9; III, 2, p. 4; VII, 4, p. 4-6  
Favoritism: VI, 3, p. 2  
Opinion vs. Evidence: (*See: Evidence: Belief vs. ...*)  
Preponderance (of the): II, 2, p. 6  
Proof (burden of): III, 3, pp. 2-3 and 3-4  
“Similarly Situated”: (*See: Employees; See also: Disciplinary/Negative Actions*)  
Statistical: V, 3, p. 13-16



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Substantial (appellate review standard): IX, 3, p. 7-8  
Suspicion vs. Evidence: (*See: Evidence: Belief vs. ...*)  
Pretext: (*See: Removal Actions: Pretext, and Promotions/Selections/Hiring: Pretext*)  
Unfairness: II, 2, p. 6; V, 3, p. 13-16

Experience (as evidence of qualifications): (*See: Promotions: Pretext: Evidence*)

## F

Failure to Cooperate: III, 1, p. 3-4; V, 4, p. 10-11  
Failure to Hire, Promote or Select: (*See: Promotions/Selections/Hiring*)  
Failure to State a Claim: III, 1, pp. 5 and 13; III, 3, p. 5-6; IV, 4, p. 9-10; V, 1, pp. 7 and 7-8; V, 4, p. 7-8;  
VI, 1, p. 15; VI, 2, pp. 2-3 and 4-5; VIII, 2, p. 7-8; VIII, 3, p. 9-10; VIII, 4, pp. 4-5 and 8-9; IX, 2, p. 2;  
IX, 3, p. 2-3; X, 2, p. 10  
False Statements: (consequences of making): VIII, 2, p. 11; (*But See Also: Harassment: Corrective Action: Discipline of Victim*)  
Favoritism (as evidence of discrimination): (*See: Evidence*)  
FOIA Requests (denial of): X, 2, p. 9-10 (failure to state a claim)  
Food Service Workers (applying *Americans With Disabilities Act* to): VIII, 3, p. 11-15  
Forced Retirement/Resignation (*See: Constructive Discharge*)  
Freedom of Information Act (denial of request): *See FOIA Requests*  
Forum (Choice of): (*See: Election of Remedies*)  
Friendship (as evidence of discrimination): (*See: Evidence: Favoritism*)  
Frivolous (complaints): VI, 2, p. 4-5; VII, 1, p. 7-9; IX, 3, p. 10-11 (article about)  
Future Harm or Injury (Risk of): (*See: Disability: Direct Threat*)

## G

Gender-Based Requirement or Policy: (*See "BFOQ"*)  
Gender Dysphoria: (*See: Disability: Type of; See Also: Trans-Gender Behavior*)  
Gender Stereotypes: VII, 1, p. 5-6  
General Counsel (*See: Office of the General Counsel*)  
Genetic Information (collection, use, and disclosure of): V, 1, p. 13-16  
Grievance Procedures: (*See: Election of Remedies*)  
Grievances (as protected EEO activity): (*See: Reprisal: Protected EEO Activity*)

## H

Handicap: (*See: Disability*)  
Harassment (includes sexual and non-sexual):  
Automatic (Strict) Liability: VI, 2, p. 9 (fn.3); VI, 4, p. 4-5; VII, 4, p. 6-8; VIII, 1, p. 3-4; IX, 4, p. 9-10  
Anti-Harassment Policy (requirement for): II, 4, p. 11-15  
Article about: III, 3, p. 11-12; VII, 3, p. 11-12  
Because of Association: (*See: Association with EEO Protected Individuals*)  
Because of Gender: I, 1, p. 6; VII, 1, p. 5-6 VII, 3, p. 2-4  
Because of Disability: VI, 2, p. 8-10; VIII, 1, p. 25-28; X, 2, p. 9  
Because of National Origin: V, 4, p. 13-14  
Because of Race: I, 1, p. 6; II, 3, p. 4-5; V, 1, p. 9-11; VII, 3, p. 6-7; VII, 4, p. 10-11; X, 2, p. 9  
Because of Sex (*i.e.*, sexual in nature): III, 4, p. 8-10; IV, 3, p. 11-12; VI, 1, p. 10-12; VI, 2, p. 8-10  
VIII, 3, p. 7-8 and 9-10  
Because of Sexual Orientation: IV, 3, p. 13-14  
Because of Trans-Gender or Trans-Sexual Behavior: (*See: Trans-Gender Behavior*)  
By Co-workers: (*See: Harassment: Liability of Employer: Harassment Committed by*)  
By Patients: (*See: Harassment: Liability of Employer: Harassment Committed by*)  
By Supervisors: (*See: Harassment: Liability of Employer: Harassment Committed by*)  
By Subordinates: (*See: Harassment: Liability: Harassment Committed by*)  
Comments about Appearance: III, 3, p. 11-12  
Coerced Sex: VI, 4, p. 4-5; VII, 4, p. 6-8  
Confidentiality (pledge of): II, 4, p. 3  
Consensual Sexual Relationships: II, 1, p. 5; VII, 3, p. 11-12  
Continuing Violation: VI, 4, p. 6-8  
Corrective Action (*In General*): I, 1 14; VI, 3, p. 3-4  
Discipline/Negative Action (against victim): (*See: Reprisal: Discipline/Negative Action*)  
Discipline of Supervisors/Managers: III, 3, p. 11-12; III, 4, p. 20  
Reassignment of Harasser: VIII, 4, p. 9  
Reassignment of Victim: (*See: Reprisal: Reassignment of Harassment Victim*)  
Failure to Act as Retaliation: II, 1, p. 5  
Definition of: III, 2, p. 4-5; VII, 4, p. 10-11; VIII, 3, p. 7-8; X, 2, p. 9  
Disability: (*See: Harassment: Because of*)



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- Discipline (of coworker-harasser): VI, 4, p. 3-4; VII, 1, p. 2  
Discipline (of victim): (*See: Reprisal: Discipline of Harassment Victim*)  
Elements of Proof: III, 4, p. 8-10  
"Equal Opportunity Harasser": I, 1, p. 6; IV, 3, p. 11-13  
False Claims: VIII, 2, p. 11 (*But See Also: Harassment: Corrective Action: Discipline of Victim*)  
Frequency of: (*See: Harassment: "Severe or Pervasive"*)  
Gender: (*See: Harassment: Because of*)  
Investigation of:  
    Duty to Conduct: II, 4, p. 3; III, 1, pp. 13 and 14-15; VI, 2, p. 8-10  
    Duty to Cooperate: VI, 3, p. 9-10  
    Alleged to be Discriminatory/Harassing: III, 1, p. 13; V, 2, p. 10; VIII, 4, p. 9  
Isolated Remarks/Incidents: (*See: Harassment: "Severe or Pervasive"*)  
Liability of Employer: (*See also: Harassment: Automatic Liability*)  
    Harassment Committed by:  
        Co-workers: I, 1, p. 3-4 and p. 14; II, 3, p. 2-3; III, 4, p. 8-10; IV, 3, pp. 3-4, 4-5, and 6-7; V, 1, p. 9-11; VI, 1, p. 2-3; VI, 4, p. 6-8; VII, 1, p. 2 IX, 4, p. 9-10  
        Patients: IX, 3, p. 2-3  
        Subordinates: III, 1, p. 14-15; VI, 1, p. 10-12  
        Volunteers: I, 1, p. 4  
    Harassment Committed by Supervisors (in general): I, 1, p. 10-11 and 14-15; II, 2, p. 8; III, 4, p. 4-5; VI, 2, p. 8-10; VI, 3, p. 3-4; VI, 4, p. 6-8; VII, 3, p. 6-7; VII, 4, p. 6-8; IX, 4, p. 9-10  
    Affirmative Defense (employer's): II, 4, p. 6-7; VI, 2, p. 8-10; VI, 3, p. 3-4; IX, 4, p. 9-10  
        Duty of Employer to Prevent and Correct: III, 4, p. 8-10; VII, 3, p. 6-7; VIII, 1, p. 3-4; IX, 4, p. 9-10  
        Duty of Victim to Timely Report: III, 4, p. 8-10; IX, 4, p. 9-10  
        Duty of Victim to Avoid Harm: VI, 3, p. 3-4  
Management's Response: (*See: Harassment: Liability of Employer*)  
National Origin: (*See: Harassment: Because of*)  
Race: (*See: Harassment: Because of*)  
Rejection (of sexual advances): (*See: Harassment: Coerced Sex*)  
Report (duty of victim to): (*See: Harassment: Liability: Harassment Committed by Supervisors: Affirmative Defense*)  
Retaliation (against victim of): (*See: Reprisal: Discipline*)  
Romance (workplace): VII, 3, p. 11-12 (article)  
Rudeness (of supervisor): VII, 4, p. 10-11; VIII, 2, p. 7-8  
Sex (harassment because of): (*See: Harassment: Because of*)  
Same Sex: I, 1, p. 10-11; III, 4, p. 8-10  
"Severe or Pervasive": I, 1, p. 10-11; II, 3, p. 4; III, 2, p. 4-5; III, 4, p. 4-5; IV, 2, p. 2-3 IV, 3, pp. 4-5 and 11-13; V, 1, pp. 7 and 7-8; VI, 2, pp. 2-3 and 5-6 and 8-10; VI, 4, p. 6-8; VII, 1, p. 5-6; VII, 4, p. 10-11; VIII, 1, p. 2-3; VIII, 3, p. 7-8; VIII, 4, p. 9; IX, 2, p. 2; X, 2, p. 9-10  
Sexual Conduct: IV, 3, p. 11-13  
Strict Liability: (*See: Harassment: Automatic Liability*)  
Sexual Orientation: (*See: Sexual Orientation; See also: Harassment: Because of*)  
Submission (to sexual advances): (*See: Harassment: Coerced Sex*)  
Subordinates (romancing of): VII, 3, p. 11-12 (article)  
Tangible Employment Action: (*See: Harassment: Automatic Liability; See also: Harassment: Coerced Sex*)  
Touching Employees: III, 3, p. 11-12; III, 4, p. 4-5; IV, 3, p. 3-4, 4-5, and 11-13; VI, 2, p. 8-10; VII, 4, p. 6-8; VIII, 1, p. 2-3; IX, 3, p. 2-3  
Trans-Gender (Trans-Sexual) Behavior: (*See: Trans-Gender Behavior*)  
Unwelcome: I, 1, p. 10-11; IV, 3, pp. 3-4 and 4-5; VI, 3, p. 3-4  
Harm (need to show): (*See: Aggrieved*)  
Health Records (*See: Disability: Medical Records*)  
Hearing Impairments: (*See: Disability: Type of*)  
Hearing Process (cooperation during): III, 1, p. 3-5  
Heart Conditions: (*See: Disability: Type of*)  
Hiring: (*See: Promotions/Selections/Hiring*)  
  
**I**  
Illegal Drug Use (*See: Disability: Type of: Drug Use*)  
Impairment: (*See: Disability: Type of*)  
"Individual with a Disability": (*See: Disability: Type of*)  
Information (medical): (*See: Disability: Medical Records*)



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Injuries: (*See: Disability: Accommodation*)  
Intellectual Disabilities: (*See: Disability: Type of*)  
Interact with Others: (*See: Disability: Type of*)  
Interim Earnings (offsetting): (*See: Back Pay*)  
Intimidation: (*See: Reprisal: "Per Se" Reprisal*)  
Interference (*See: Reprisal: "Per Se" Reprisal*)  
Investigation (duty to cooperate with): VI, 3, p. 9-10  
Interviews: (*See: Promotions/Selections/Hiring; See Also: Disability: Interviews*)  
Involuntary Retirement/Resignation (*See: Constructive Discharge*)

## **J**

Job Injuries: (*See: Disability: Accommodation*)  
Jurisdiction (lack of): (*See: Failure to State a Claim*)

## **K**

## **L**

Limited Relief/Remedies: (*See: Remedies: Limited*)  
Latex Allergies: (*See: Disability: Type of: Allergies*)  
Legal Advice: X, 3, p. 9-10  
Legal Representation: (*See: Representation*)  
Licensure (See also: Nurses: Licensure): I, 1, p. 2; VII, 2, p. 8-10; X, 3, p. 2-3

## **M**

Manipulation (of the promotion/selection/hiring process): (*See: Promotions/Selections/Hiring: Manipulation of the Process*)  
Mediation: (*See: ADR*)  
Medical Condition/Impairment: (*See: Disability*)  
Medical Examinations/Inquiries: (*See: Disability: Medical Examinations/Inquiries*)  
Medical Information: (*See: Disability: Medical Records*)  
Mental Impairment: (*See: Disability: Type of*)  
Merit Systems Protection Board (appeals to): (*See: Election of Remedies*)  
Mistake of Fact: (*See: Settlement Agreements*)  
Mixed Case Complaint (election to pursue): (*See: Election of Remedies*)  
Moot(ness): IV, 4, p. 10-11  
MSPB Appeals: (*See: Election of Remedies*)  
Multiple Ailments: (*See: Disability: Type of*)

## **N**

National Origin: V, 4, p. 12-15 ; VI, 2, p. 2-3  
Negative Employment Actions: (*See: Disciplinary/Negative Actions*)  
Negative Employment References: V, 3, p. 10-12  
Negotiated Grievance Procedure (election to pursue): (*See: Election of Remedies*)  
Non Job-Related Injuries: (*See: Disability: Accommodation*)  
Non-Sexual Harassment: (*See: Harassment*)  
Numerosity: (*See: Class Action Complaints*)  
Nurses:  
    Educational requirements: **X, 4, p. 3-4**  
    Waiver of: **X, 4, p. 3-4**  
    Examinations (Nursing Board): IX, 1, p. 6-7  
    GNT (Graduate Nurse Technician) Program: IX, 1, p. 6-7  
    Licensure: I, 1, p. 2; VII, 2, p. 8-10  
    Lifting Restrictions: (*See: Disability: Type of*)  
    Nurse Professional Standards Board: I, 1, p. 16  
    Performance: (*See: Nurses: Promotions (non-competitive): Performance*)  
    Promotions (non-competitive): I, 1, p. 16; IV, 4, p. 2-3; VI, 2, p. 6-8  
    Nurse Qualifications Standards: I, 1, p. 16; VI, 2, p. 6-8; **X, 4, p. 2-3**  
    Performance (as justification for): IV, 4, p. 2-3; VI, 2, p. 6-8  
    Proficiency Reports: I, 1, p. 16; VI, 2, p. 6-8

## **O**

Obesity: (*See: Disability: Type of*)  
"Observably Superior": (*See: "Plainly Superior"*)  
Offensive Remarks: (*See: Comments*)



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Office of the General Counsel: X, 3, p. 9-10  
Official Time (to prepare for/participate in EEO process): VIII, 2, pp. 4-5 and 9-10; IX, 2, p. 7-8  
Offsets (to back pay awards): (*See: Back Pay*)  
"Opposition" (activity opposing discrimination): (*See: Reprisal: Protected EEO Activity*)  
Oral Agreements: (*See: Settlement Agreements*)  
OWCP Claims (denied or controverted): III, 3, p. 5-6; V, 4, p. 7-8; VIII, 4, p. 4-5  
OWCP Clearances (to return to full duty): (*See: Disability: Accommodation*)

## P

Paranoid Schizophrenia: (*See: Disability: Type of*)  
Parking Spaces (*See: Disability: Accommodation*)  
Participation (in EEO complaint process): (*See: Reprisal: Protected EEO Activity*)  
Performance (removal/termination because of): (*See: Removal Actions*)  
Performance Appraisals:  
    Pretext:  
        Found:  
        Not Found:  
    Reason(s) articulated for --  
        Burden of articulation met (specific reason given for nonpromotion or nonselection)  
        Burden of articulation not met (no reason or nonspecific reason given)  
            I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 2, p. 3-4  
        Found not true (see Pretext Found)  
        Found True (see Pretext Not Found)  
    Use of (in promotion/selection actions): II, 3, p. 3  
Performance Problems (need to document): V, 3, pp. 8-10 and 10-12; VI, 4, pp. 2-3 and 5-6  
Physical Impairment: (*See: Disability: Type of*)  
Pregnancy (discrimination because of): VII, 4, p. 8; IX, 2, p. 6-7  
Pre-Selection: (*See: Promotions/Selections/Hiring: Pre-Selections*)  
Priority Consideration: (*See: Promotions/Selections/Hiring: Priority Consideration*)  
Privacy (right to): X, 1, p. 9-11 (urine screening)  
Problem Employees: V, 3, pp. 8-10 and 10-12; VI, 4, p. 5-6; VII, 1, p. 9-10 (article); VII, 2, p. 3-4  
    (*See also: Performance Problems*)  
Procedural Dismissals: (*See specific ground(s) for dismissal – e.g., failure to state a claim, untimeliness, etc.*)  
Promotions/Selections/Hiring:  
    Affirmative Action Plans (use of): II, 1, p. 7  
    Applications: II, 3, p. 3; V, 2, p. 2; VI, 2, p. 10-12; VIII, 4, p. 3-4.  
    Disqualification (by HR specialist): VI, 2, p. 10-12; X, 1, p. 8-9; X, 2, p. 7  
    Documentation (need to retain): III, 4, p. 5-6; IV, 4, p. 4-5; V, 3, p. 8-10; VI, 1, p. 5-6;  
        VI, 4, pp. 2-3 and 8-9; VIII, 4, p. 10-11; IX, 4, p. 4-5  
    Education: (*See: Qualifications: Education*)  
    Experience: (*See: Promotions/Selections/Hiring: Pretext: Evidence*)  
    Innocence of Decision Maker: V, 3, p. 2-3;  
    Knowledge (of applicant's race, gender, etc.): X, 2, p. 7  
    Manipulation of the Process: V, 1, pp. 4-5 and 5-6 and 12; VIII, 4, p. 10-11  
    Mistakes: (*See: Promotion/Selections/Hiring: Pretext: Evidence*)  
    Nurses (non-competitive promotions): (*See: Nurses: Promotions*)  
    Panels (interview and rating): V, 3, p. 8-10; VII, 3, p. 10-11; IX, 4, p. 4-5  
    Performance Appraisals (use of): II, 3, p. 3  
    Position Descriptions: V, 4, p. 8-9  
    Pre-Selections: III, 4, p. 7-8; V, 3, p. 13-16; V, 4, p. 4-5; VIII, 4, p. 10-11 (article)  
    Pretext:  
        Evidence or Not Evidence of:  
            Affirmative Employment Plans (use of): II, 1, p. 7-8  
            Derogatory Comments: II, 2, p. 3  
            Education: (*See: Qualifications: Education*)  
            Experience: II, 1, p. 7; III, 1, p. 13; VI, 3, p. 4-5  
            Interview Not Granted as: II, 1, p. 7-8  
            Opinion (of complainant as to his/her qualifications as): (*See: Qualifications: Opinion*)  
            Mistakes: V, 1, p. 5-6; X, 1, p. 8-9  
            Performance Appraisals: V, 1, p. 4-5; VI, 4, p. 2-3  
            Priority Consideration (use of as): (*See: Promotions/Selections/Hiring: Priority Consideration*)  
            Prior Nonselections as: II, 1, p. 7



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Seniority: IV, 3, p. 9-11; V, 3, p. 8-10  
Subjective Factors (use of by selecting official): IV, 3, P. 9-11  
Found: I, 1, p. 15; II, 2, p. 2-3; II, 4, p. 9-11; IV, 3, p. 9-11; IV, 4, pp. 2-3 and 8-9; V, 1, p. 4-5 and 5-6; V, 3, p. 8-10; IX, 4, p. 4-5  
Not Found: I, 1, p. 16; II, 1, p. 7; II, 2, p. 7; II, 3, p. 3; III, 3, p. 4-5; IV, 3, p. 9-11; IV, 4, p. 5-6; V, 3, 13-16; V, 4, p. 4-5; V, 4, p. 8-9; V, 3, p. 13-16; VI, 2, p. 10-12; IX, 1, p. 6-7; IX, 3, p. 6; X, 1, p. 8-9  
Priority Consideration: III, 3, p. 4-5  
Procedures/Policies (failure to follow): V, 3, p. 8-10; X, 1, p. 8-9  
Proficiency Reports (nurses):  
    If issue involves use in noncompetitive promotions: (*See: Nurses: Promotions*)  
    If issue relates solely to the rating: (*See: Performance Appraisals*)  
Rating Panels: V, 1, p. 5-6  
Reason(s) articulated --  
    Burden of Articulation Met (specific reason given for nonpromotion or nonselection)  
    Burden of Articulation not Met (no reason or nonspecific reason given)  
        I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 4, p. 2-3 and 4-5; X, 3, p. 3-4  
    Found not True (see Pretext Found)  
    Found True (see Pretext Not Found)  
    Inability to Accommodate: (*See: Disability: Accommodation or Religion: Accommodation*)  
    Risk of Harm or Injury (as reason cited): (*See: Disability: Direct Threat*)  
Proof: (*See: Evidence*)  
Proposed (vs. Completed) Actions (dismissal because of): VIII, 4, p. 5-7  
Protected Activity: (*See: Reprisal: Protected EEO Activity*)  
Punitive (damages): (*See: Compensatory Damages*)

## Q

### Qualifications

Applications (...not noted in): (*See: Promotions/Selections/Hiring*)  
Disqualification (by HR specialist): (*See: Promotions/Selections/Hiring*)  
Education (as evidence of): IV, 4, p. 6-7; V, 3, p. 13-16  
Experience (as evidence of): (*See: Promotions/Selections/Hiring: Pretext: Evidence*)  
Nurses (*See: Nurses: Promotions/:Qualifications*)  
"Observably Superior": (*See: Qualifications: Plainly Superior*)  
Opinion (of complainant as to his or her own): IV, 3, p. 9-11  
Position Descriptions: (evidence of): V, 4, p. 8-9  
"Plainly Superior": IV, 3, p. 9-11; IV, 4, pp. 2-3, 6-7, and 8-9; V, 3, p. 8-10; VI, 1, p. 5-6  
Seniority (use of): (*See: Promotions/Selections/Hiring: Pretext: Seniority*)  
Supplemental Qualification Statements: II, 2, p. 3

## R

Race (knowledge of applicant's): X, 2, p. 7  
Racial Harassment: (*See: Harassment: Racial*)  
Racial Profiling: V, 1, p. 8-9  
Reannouncing Position Vacancies (to manipulate the process): (*See: Promotions/Selections/Hiring: Manipulation of the Process*)  
Reasonable Accommodation (*See: Disability: Accommodation or Religion: Accommodation*)  
"Reasonable Suspicion" Standard (as relates to untimeliness of complaint): VII, 4, p. 11-12  
Reassignment (as a reasonable accommodation): (*See: Disability: Accommodation*)  
Reassignment (of harassment victim): (*See: Reprisal: Reassignment of Harassment Victim*)  
Recency (of experience): (*See: Promotions/Selections/Hiring: Pretext Evidence*)  
Records (medical): (*See: Disability: Medical Records*)  
Reductions in Force (involving Title 38 Employees): V, 2, p. 12-13  
Regulations (*See: EEOC Regulations*)  
Relief: (*See: Remedies*)  
Religion:  
    Accommodation: IV, 1, p. 4-5; V, 4, p. 5-7; **X, 4, p. 11-16 (Article)**  
    Beliefs (nature or sincerity of): III, 4, p. 10-11  
    Inquiries (about): IX, 1, p. 6-7  
    Seasonal Displays/Activities: III, 1, p. 5  
    Diversity Training (as allegedly violating beliefs): III, 4, p. 10-11  
    Undue Hardship: V, 4, p. 5-7  
Remarks (inappropriate or offensive): (*See: Comments*)



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## Remedies:

Inappropriate: IV, 4, p. 8-9

Limited: V, 2, p. 2-4

## Removal Actions:

Conduct (because of):

Pretext:

Evidence or Not Evidence of:

Found: IX, 1, p. 2-3

Not found: VI, 4, p. 3-4

Reason(s) Articulated --

Burden of articulation met (specific reason given for removal)

Burden of articulation not met (no reason or nonspecific reason given)

Found Not True (*See Pretext: Found*)

Found True (*See Pretext: Not Found*)

Job Performance (because of):

Pretext:

Evidence or Not Evidence of:

Found: I, 1, p. 18; VI, 4, p. 2-3; IX, 1, p. 2-3

Not found: VII, 4, p. 2-3; X, 3, p. 2-3

Reason(s) Articulated --

Burden of articulation met (specific reason given for removal)

Burden of articulation not met (no reason or nonspecific reason given)

Found Not True (*See Pretext: Found*)

Found True (*See Pretext: Not Found*)

Other Reasons (because of):

Pretext:

Evidence or Not Evidence of:

Found:

Not found: II, 3, p. 5-6; IV, 4, p. 9-10

Reason(s) Articulated --

Burden of articulation met (specific reason given for removal)

Burden of articulation not met (no reason or nonspecific reason given)

Found Not True (*See Pretext: Found*)

Found True (*See Pretext: Not Found*)

## Representation:

Adequacy of: (*See: Adequacy of Representation*)

Right to:

## Reprisal:

Adverse Action Requirement: (*See: Reprisal: Per Se and Materially Adverse Action*)

Article about: I, 1, p. 19; IX, 1, p. 10-11; IX, 3, p. 10-11

“Chilling Effect”: (*See: Reprisal: “Per Se” Reprisal*)

Discipline/Negative Action (taken against harassment victim): II, 1, p. 5-6; III, 1, p. 9-10; VII, 1, p. 7-9;

VIII, 1, p. 2-3; IX, 2, p. 5-6; IX, 3, p. 2-3; (*See also: Harassment: Corrective Action: Reassignment of Victim*)

EEOC Compliance Manual (Section 8): I, 1, p. 20

Elements of Claim: I, 1, p. 20; II, 4, p. 7-8; IV, 4, p. 5-6; V, 4, p. 3-4; VI, 2, p. 5-6; VIII, 3, p. 3-5; X, 2, p. 2

Evidence of: I, 1, p. 13, 15, and 18; II, 2, pp. 3, 6, and 8-9; II, 3, p. 5; III, 2, p. 4; IX, 1, p. 2-3; IX, 4, p. 4-5

Frivolous Complaints (because of): IX, 3, p. 10-11 (article about)

Intimidation: (*See: Reprisal: “Per Se” Reprisal*)

Interference (with EEO process): (*See: Reprisal: “Per Se” Reprisal*)

“Materially Adverse” Action: I, 1, p. 20; X, 3, p. 5-6

“Per Se” Reprisal: I, 1, pp. 12; and 20; II, 1, p. 8; II, 2, p. 3; III, 4, p. 2; VII, 1, pp. 6-7 and 7-9;

VII, 3, p. 5-6 and 10-11; VIII, 2, pp. 5-7 and 9-10; IX, 2, p. 6-7

Pretext:

Evidence or Not Evidence of:

Found: I, 1, p. 18; II, 4, p. 8-9; IV, 1, p. 8-9; IV, 3, p. 5-6; V, 2, p. 8-10; VI, 4, p. 5-6;

VII, 2, p. 3-4; VIII, 3, p. 5-6; IX, 1, p. 2-3; IX, 4, p. 4-5

Not found: III, 1, p. 7-8; III, 3, p. 6-7; IX, 3, p. 2-3; X, 2, p. 8-9; X, 3, p. 5-6

Reason(s) articulated --

Burden of Articulation Met (specific reason given for nonpromotion or nonselection)

Burden of Articulation not Met (no reason or nonspecific reason given)

I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 4, p. 2-3 and 4-5

Found not True (see Pretext Found)

Found True (see Pretext Not Found)



# OEDCA DIGEST



Problem Employees: (*See: Problem Employees*)

Protected EEO Activity:

Grievances: **X, 4, p. 5-6**

Knowledge by Management of: III, 4, p. 3-4; IV, 3, p. 5-6; IV, 4, p. 5-6; VIII, 3, p. 3-5; X, 2, pp. 2 and 8

Opposition Type Activity: II, 3, p. 5; VIII, 1, pp. 2-3 and 6-7; X, 1, p. 2; : **X, 4, p. 6-8.**

Discussions with Supervisors about Discrimination: : **X, 4, p. 6-8**

Inquiries about how to File an EEO Complaint: **X, 4, p. 6-8**

OSHA Complaints (not protected activity): **X, 4, p. 5-6**

Participation Type Activity: VIII, 1, p. 6-7; X, 1, p. 2; : **X, 4, p. 5-6**

RMO (responsible management official, named as): VIII, 1, p. 6-7

Threat to File Lawsuit (made by supervisor): VII, 3, p. 5-6

Threat to File EEO Complaint (*See: Reprisal: Protected EEO Activity: Opposition Activity*)

Time Span Between EEO Activity and Adverse Action: III, 4, p. 3-4; IV, 4, p. 5-6; V, 2, p. 8-10; V, 4, p. 3-4; VI, 2, p. 5-6; VIII, 3, p. 3-5; IX, 1, p. 2-3; X, 2, p. 2-3

Treatment before Activity *vs.* Treatment after Activity: II, 2, p. 2

Reassignment (of harassment victim): II, 1, p. 2; II, 3, p. 4; II, 4, p. 5; III, 1, p. 9-10

Supervise (impact of complaints on ability to): VII, 1, p. 9-10; VII, 2, p. 3-4

Technical Violation: (*See: Reprisal: "Per Se" Reprisal*)

"Ultimate" Action: I, 1, p. 20

"Whistle-Blowing" Activities (reprisal due to): III, 3, p. 6-7; **X, 4, p. 5-6**

Responsible Management Official: X, 3, p. 10-11 (article about)

Restraint: (*See: Reprisal: "Per Se" Reprisal*)

Retaliation: (*See: Reprisal*)

Reverse Discrimination:

Age: (*See: Age Discrimination*)

RIFs (*See: Reductions in Force*)

Risk of Future Harm or Injury: (*See: Disability: Direct Threat*)

RMO: (*See: Responsible Management Official*)

## S

Same-Sex Requirement or Policy: (*See: "BFOQ"*)

Same-Sex Urine Screens: (*See: Urine Screens*)

Sanctions (imposed by EEOC judges): VI, 1, p. 5-6

Sex-Based Requirement or Policy: (*See: "BFOQ"*)

Sexual Harassment (*See: Harassment*)

Sexual Identity: (*See: Trans-Gender Behavior*)

Sexual Orientation: IV, 3, p. 13-14

Selection Actions (*See: Promotions/Selections/Hiring*)

Service-Connected Disability: (*See: Disability: Benefit Statutes: Veterans Compensation*)

Settlement Agreements:

Breach of: VIII, 2, p. 3-4

Consideration (absence of): V, 2, p. 4-5

"Meeting of the Minds" (absence of): V, 2, p. 5-6

Mistake of Fact: (*See: Settlement Agreements: Meeting of the Minds*)

Oral Agreements: VIII, 2, p. 3-4

Shortness of Breath: (*See: Disability: Type of*)

Skin Conditions: (*See: Disability: Type of*)

"Similarly Situated": (*See: Employees*)

"Speak English Only" Rules: (*See: National Origin*)

Stating a Claim: (*See: Failure to State a Claim*)

Statistical Evidence: (*See: Evidence*)

Stress: (*See: Disability: Type of*)

Subjective Factors (use of): (*See: Promotions/Selections/Hiring: Pretext*)

## T

Tangible Employment Action: (*See: Harassment: Automatic Liability; See Also: Harassment: Coerced Sex*)

Tangible Harm: (*See: Aggrieved*)

Telework (as a reasonable accommodation for disabilities): (*See: Disability: Accommodation*)

Temporal Proximity (in reprisal cases): (*See: Reprisal: Protected EEO Activity: Time between.....*)

Temporary Disability: (*See: Disability: Temporary*)

Terminations (*See: Removal Actions*)

Threats (*See: Reprisal "Per Se"*)

Timeliness (of complaints): (*See: Untimeliness*)



# OEDCA DIGEST



Title 38 Employees (right of appeal to MSPB): (*See: Reductions in Force*)  
Trans-Gender (Trans-Sexual) Behavior (discrimination due to): VII, 1, p. 5-6  
Touching (of employees): (*See: Harassment: Touching Employees*)  
Typicality: (*See: Class Action Complaints*)

## U

Under-Representation: (*See: Evidence: Statistical*)  
Undue Hardship: (*See: Disability: Accommodation*)  
Unfairness (as evidence of discrimination): (*See: Evidence: Unfairness*)  
Union Officials (complaints filed by): V, 3, p. 12-13  
Untimeliness (dismissal of complaint due to): VI, 1, p. 9-10; VI, 4, p. 6-8; VII, 4, p. 11-12  
Urine Screens: X, 1, p. 9-11

## V

VA Disability Ratings: (*See: Disability: Benefit Statutes: Veterans' Compensation*)  
Veterans' Compensation: (*See: Disability: Benefit Statutes: Veterans' Compensation*)  
Veterans' Preference or Status (cited as a basis of discrimination): IV, 4, p. 9-10; VI, 1, p. 15  
Vision Impairments: (*See: Disability: Type of*)  
Voidance (of settlement agreements): (*See: Settlement Agreements: Consideration and Meeting of the Minds*)

## W

"Whistle Blower" Complaints: (*See: Reprisal: Protected EEO Activity: Whistle Blowing Activities*)  
Witness Credibility: (*See: Credibility*)  
"WOC" Employees/Employment (without compensation): (*See: Employees*)