



OEDCA DIGEST



Vol. VIII,
No. 2

Department of Veterans Affairs
Washington, DC

Spring
2005

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 PTSD, enforcement of oral settlement agreements, use of "official time" to prepare for EEO investigations, reprisal for "opposition" activity, reprisal "per se", dismissals for failure to state a claim (complainant not "aggrieved"), and the meaning of "substantially equal" in *Equal Pay Act* claims.

Also included in this issue are articles concerning the use of official time for EEO complaint involvement and the possible consequences of making false statements in EEO complaints.

The *OEDCA DIGEST* is now available on the internet at:
<http://www.va.gov/orm/newsevents.htm>.

CHARLES R. DELOBE

Case Summaries	2
Article: <i>Granting Official Time for EEO Complaints</i>	9
Article: <i>Possible Consequences of Making False Statements in EEO Complaints</i>	11



I

INDIVIDUAL WITH PTSD FOUND TO BE DISABLED, BUT NOT A “QUALIFIED” INDIVIDUAL WITH A DISABILITY”

One of the elements of proof required to establish a *prima facie* case of disability discrimination, is that the individual must show that he or she is a *qualified individual with a disability*. As the following case illustrates, proving the existence of a disability, even a serious one, is not always enough to satisfy this element of proof.

The individual in question (hereinafter referred to as the “complainant”), was hired as a paralegal. The duties of the position required him to review the files of veterans claiming entitlement to disability benefits for service-connected medical conditions. Complainant, like many of these claimants, had developed Post Traumatic Stress Disorder (PTSD) as a result of combat during the Vietnam War.

Shortly after he started working, his PTSD symptoms increased, so he began taking medication. The medication, however, did not significantly relieve his symptoms. He thereafter requested reassignment to work that did not require the review of claims files. In support of his request, he submitted a letter from his psychiatrist, who stated that reviewing claim files involving PTSD was exacerbating the complainant’s PTSD condition. Along with his reassignment request, the

complainant notified his supervisor that working in the proximity of a co-worker of Vietnamese descent was also aggravating his condition, and that he was developing homicidal feelings toward this coworker.

His supervisor eventually decided to recommend his termination after attempting, without success, to locate a position that did not require the review of case files involving PTSD conditions. Upon receiving notice of the termination, the complainant tendered his resignation.

There is no doubt that the complainant, even when medicated, has a serious medical condition that meets the legal definition of “disability” What was in doubt was whether the complainant was a qualified disabled individual at any point during his employment.

An EEOC administrative judge concluded that he was not, as he was unable, from the day he was hired, to perform the essential function of his position – *i.e.*, reviewing claims files, many of which involved PTSD cases. In addition, there was no accommodation available that would enable him to perform this function. By the complainant’s own admission, the high percentage of PTSD claims precluded him from reviewing a sufficient number of non-PTSD claims to meet the production quota for his position.¹

¹ Disabled employees are required to meet the same performance and productivity standards as non-disabled employees. Reasonable accommodation



Although management did look unsuccessfully for a position for which the complainant was qualified, its effort in this regard was more than what was actually required by law. Reasonable accommodation may require that employers consider reassignment to another position when the employee is no longer able to perform the essential functions of the position in question. Such a requirement, however, only applies if the employee was “qualified” when hired. Reassignment is not required where, as here, the employee was not able to perform those functions when hired and, hence, was never actually qualified for the job despite the fact that he was hired.

In this type of situation, the employee should not have been hired in the first place. Hence, for purposes of disability law, he is regarded as an “applicant” rather than an employee. Applicants are not entitled to request reassignment to another position as reasonable accommodation if they are not qualified for the position for which they are applying.

In addition, the judge found that the complainant’s inability to work near or with people of Vietnamese descent would also negate his status as a *qualified* disabled individual, as his condition posed a clear threat to the safety of a coworker.

does not require an employer to reduce such standards.

II

DEPARTMENT BOUND BY ORAL SETTLEMENT AGREEMENT

The complainant and the Department reached an oral settlement agreement during hearing proceedings before an EEOC administrative judge. The agreement called for a \$20,000 payment to the complainant in return for withdrawing her EEO claims. The judge therefore dismissed the complainant’s EEO complaints in light of the agreement.

A short time later, the Department’s representative reduced the oral agreement to a written document, but the complainant refused to sign it because the agreement required her to drop her claim under the *Federal Tort Claims Act (FTCA)* that she had pending against the Department at the time. She claimed that such a requirement was not a term of the oral agreement reached during the hearing. Because of the dispute regarding her tort claim, she thereafter refused to cash a check sent to her in the amount of \$20,000. Instead, she returned the check to the Department, indicating that she was “repudiating” the agreement.

The Department responded by stating that the return of the check would be construed as complainant’s “gift to the United States of America” The complainant later filed a breach of settlement claim, demanding that the Department reissue the check without



requiring her to drop her tort claim. The Department refused, and the complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC) requesting enforcement of the oral agreement.

On appeal, the EEOC found that the Department had breached the settlement agreement reached by the parties at the hearing. First the Commission noted that an oral agreement settling an EEO complaint may be valid and binding when the terms are agreed to by the parties before an EEOC judge at a transcribed hearing (*i.e.*, the terms appear in the hearing transcript); and further, that there is no legal requirement that the oral agreement later be reduced to writing and signed.

Second, the Commission noted that the hearing transcript made no mention of the complainant withdrawing her tort claim. The transcript indicated only that the complainant had agreed to withdraw her “EEO claims and allegations.” The Commission found that the underlined words referred only to her EEO complaints and, contrary to the Department’s assertion, could not reasonably be interpreted as also referring to her tort claim. Moreover, since the complainant did not sign the subsequent written agreement, she was not bound by the additional provision therein regarding withdrawal of her tort claim.

Finally, the Commission held that the return of the check by the complainant

coupled with her statement repudiating the agreement did not justify the Department’s refusal to reissue the check.² The Commission found that the complainant returned the check because of the unresolved dispute regarding her tort claim, not because she wanted to withdraw from the oral agreement reached at the hearing before the judge. The Commission, therefore, construed the complainant’s comment regarding repudiation as referring only to the subsequent written agreement, and only to the extent that it required her to withdraw her tort claim.

The obvious moral of this story is that parties to an oral agreement reached during hearing proceedings should ensure that their intent is clearly and unambiguously expressed on the record before the judge.

III

PARTIAL DENIAL OF “OFFICIAL TIME” TO PREPARE FOR EEO INVESTIGATION UPHeld BY EEOC JUDGE

EEO regulations require agencies to provide complainants, upon request, with a “reasonable” amount of official time to prepare the complaint and to respond to agency and EEOC requests

² The Commission was not amused by the Department’s comment that the returned check would be construed as a “gift to the United States of America”, considering it to be evidence of bad faith on the part of the Department.



for information.³ As the following case demonstrates, disputes may occasionally arise over the meaning of the term “reasonable.”

The employee in this case had filed an EEO complaint wherein he raised a claim of disability harassment. In support of his claim, he identified eight specific incidents or events occurring over a period of approximately three months.

Prior to the investigation of his complaint, he requested 16 hours of “official time” (*i.e.*, “authorized absence”) to prepare for the investigation. Management denied the request for 16 hours, but did grant him eight hours of official time to prepare for the investigation. The complainant objected and filed a second complaint regarding the approval of only 8 of the 16 hours he requested.

After reviewing the matter, an EEOC judge ruled that the Department was in full compliance with EEOC’s regulation regarding the provision of official time to prepare complaints. The judge noted that employers are not required to approve all requests for authorized absence, but only those that are reasonable under the circumstances. What is reasonable depends on the individual circumstances of each complaint. However, because agencies, and not complainants, conduct EEO investigations, the EEOC’s regulation does not envision large amounts of official time being needed

for “preparation” purposes. Consequently, “reasonable” with respect to preparation time for investigations (as opposed to time spent in or preparing for meetings and hearings) is generally defined in terms of hours, and not in terms of days or weeks. Agencies are responsible for establishing a process for determining how much official time to provide complainants.

In this case, the facility had a policy of granting one hour for each claim in the complaint. As there were eight incidents identified in the harassment claim, the facility granted eight hours of preparation time. The judge found this amount to be reasonable under the circumstances. The complainant failed to show that eight hours was insufficient. In other words, he was unable to explain how his case had been prejudiced by the allowance of eight rather than 16 hours. He was unable to suggest what additional evidence he could have obtained, or what additional facts he could have established, had he been given more official time.

IV

EEOC JUDGE FINDS NO REPRISAL BUT ISSUES STERN WARNING TO AGENCY ABOUT “CHILLING” STATEMENTS

Title VII of the Civil Rights Act of 1964 makes it unlawful to retaliate against employees or applicants for employment because of their prior

³ 29 CFR Section 1614.605(b).



EEO activity. Most findings of reprisal involve an adverse action taken against an employee because of his or her prior EEO activity. Occasionally, however, a reprisal finding can result solely from an unfortunate comment or statement by a supervisor or manager, even if no adverse action has been taken against the employee.

An employee filed an EEO complaint alleging gender discrimination and retaliation in connection with several incidents, including receipt of a letter of counseling, being charged leave without pay and absence without leave, denial of a sick leave request, and denial of his request for leave under the Family Medical Leave Act.

The case was heard before an EEOC judge who, after holding a hearing and considering all of the evidence, issued a decision in favor of the VA on all claims. The judge's decision made it clear that this was a close case and that, in the end, the judge found the supervisor's testimony regarding the reasons for the above incidents to be credible, as it was supported by considerable evidence in the record.

The judge issued this finding despite a comment made by the complainant's supervisor to the effect that, in the future, he should spend more time following instructions regarding leave procedures and "less time falsely accusing others of injustice." Notwithstanding his finding, the judge took the opportunity to caution the Department about making statements

that could have a "chilling effect" on an employee's right to complain of unlawful discrimination.

Although the preponderance of the evidence convinced the judge that reprisal was not a factor in any of the incidents in question, he noted that the supervisor's comment about the complainant "falsely accusing others of injustice", which was made after the incidents in question, came very close to constituting "reprisal *per se*," -- *i.e.*, a statement intended to have, or that could reasonably be viewed as having, a chilling effect on an employee's right to file EEO complaints.

The record in this case indicated that the complainant had also previously filed grievances on the same or similar matters, and had a habit of communicating with the Office Human Resources regarding denial of his leave requests without first communicating with the supervisor regarding his reasons for requesting the leave. It was apparently for these reasons that the judge did not view the comment as necessarily referring to the complainant's prior EEO activity and, thus, not a *per se* (*i.e.*, technical) violation of EEOC's anti-retaliation regulations.

The supervisor in this case was fortunate. Another judge could just as easily have reached a different conclusion, by finding that the complainant might reasonably have interpreted the comment to include a veiled warning about filing EEO complaints in the future.



The lesson in this case for supervisors is clear -- think before you speak! Never make statements that could be interpreted by subordinate employees as a warning against filing EEO complaints. This also includes making negative comments of a general nature about employees who utilize the EEO complaint system, or about the EEO complaint system itself, even if such comments are not directed at any one particular employee.

V

EMPLOYEE'S CLAIM DISMISSED BECAUSE SHE FAILED TO SHOW HOW SHE WAS "AGGRIEVED"

In many cases a discrimination complaint is dismissed without being investigated because the complaint fails to satisfy one or more of the prerequisites set forth in the Equal Employment Opportunity Commission's complaint processing regulations. One such requirement is that the complaint must "state a claim." As the following case demonstrates, complaints that allege prohibited discrimination by an employing agency may not necessarily state a claim.

The complainant, an Ergonomics Specialist, filed a complaint alleging that she did not receive appropriate recognition from her supervisor for an ergonomics proposal she submitted that would reduce job-related injuries. According to the record, she submitted her idea to the facility director. Even-

tually, her proposal was accepted and implemented. She received a congratulatory certificate from Human Resources and a monetary award of \$200.00.

Despite this recognition by the facility, she filed a discrimination complaint alleging that her supervisor did not appropriately recognize the award. Specifically, after her supervisor had neglected to mention the award at a weekly staff meeting, she requested the supervisor to do so at the next meeting. Three months later, the supervisor finally mentioned it during a meeting. The complainant, however, claims that the supervisor never looked at her while commenting on the award, and that her comments were not, in the complainant's opinion, sufficiently laudatory.

The complainant was clearly upset by this perceived slight. The procedural question posed by this case, however, was whether the complainant was actually "aggrieved" by the incident. The EEOC has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of the individual's employment for which there is a remedy. Thus, a federal agency is required to investigate EEO complaints only when filed by an individual who has suffered a direct, personal deprivation at the hands of the agency. In other words, the agency's act must have caused some concrete effect on the individual's employment status. Absent such tangible impact,



the individual is not aggrieved and, hence, fails to state a claim.

It is clear from the above facts that the complainant, while perhaps justifiably upset by her supervisor's handling of the matter, was not actually "aggrieved", as such term is defined by the Commission. She suffered no concrete, tangible harm or loss with respect to a term, condition, or privilege of employment. Hence, she failed to state a claim and her complaint was accordingly dismissed on procedural grounds.

The intent of Congress in passing civil rights laws was to prohibit discrimination in connection with the terms, conditions, and privileges of employment, and not to establish a civility code. Bad manners and rudeness by supervisors or an employee's hurt feelings are not, in themselves, sufficient to render an employee aggrieved.

VI

"EQUAL PAY ACT" NOT VIOLATED DESPITE SIMILARITY IN SOME JOB FUNCTIONS

The *Equal Pay Act* is one of the most misunderstood of the civil rights laws. As the following case illustrates, the "equal pay for equal work" rule does not apply when the job functions being compared are similar in some respects, but not substantially equal.

The complainant was employed at a

VA hospital as a Certified Respiratory Therapist Technician (CRT), GS-0640-7. She filed a complaint alleging a violation of the *Equal Pay Act*. Specifically, she claimed that the facility was denying her equal pay for equal work because her male counterparts doing similar jobs were being compensated at the GS-8 level while she was being paid at the GS-7 level.

Even where there is no actual intent to discriminate, an employer may violate the *Equal Pay Act* if it pays wages to employees at a rate less than the rate paid to employees of the opposite sex for equal work on jobs the performance of which require equal skill, effort, and responsibility, and which are performed under similar working conditions.

"Equal work" does not mean that the jobs must be identical, but only that they must be "substantially equal" – meaning they must be similar in the sense of being "closely related" or "very much alike." It is the actual job content and job requirements, and not necessarily the official job "PD", which are controlling when determining if jobs are substantially equal.

If jobs that pay differently are substantially equal, the burden of proof then falls on the employer to show that the pay difference can be explained by one of four defenses specifically permitted under the *Equal Pay Act*. The employer must show that the difference can be explained by a (1) seniority system, (2) a merit system,



(3) a system based on quantity or quality of production, or (4) “any factor other than sex.”

After reviewing the file, an EEOC judge issued a decision without a hearing, which OEDCA adopted as its final action. The decision found no *Equal Pay Act* violation.

According to the record, the complainant was attempting to compare herself with male employees who were functioning as Registered Respiratory Therapists (RRT). The judge’s decision highlighted the differences between the two jobs. To qualify as an RRT, certified therapists must complete additional education requirements. Registered therapists perform all of the functions of certified therapists, but they are also required to consult professional literature on a regular basis in order to remain current with alternative modes of therapy. They must make recommendations to physicians regarding newer alternative treatments. In addition, unlike CRTs, they are required to provide in-service training to other respiratory therapists and nursing personnel.

Based on these differences in job function, the judge concluded that the complainant was unable to establish even a *prima facie* case. It was true that the duties of the two positions were similar in several respects. All of the job functions performed by the CRTs were also performed by the RRTs. However, the RRTs performed

additional functions that required more education and involved a higher level of responsibility. Hence, the two positions were not substantially equal.

VII

GRANTING OFFICIAL TIME FOR EEO COMPLAINTS

The following article is reproduced with permission of “FEDmanager”, a weekly e-mail newsletter for Federal executives, managers, and supervisors published by the Washington, D.C. law firm of Shaw, Bransford, Veilleux, and Roth, P.C.

When can the EEOC issue an award against a federal agency without a finding of discrimination?

According to the EEOC’s Office of Federal Operations in *Zych v. Department of the Air Force*, EEOC Appeal No. 01A11131 (2002), the answer is: When the agency has failed to grant an employee’s reasonable request for “official time” in connection with an EEO complaint. The EEOC has the authority to reverse an agency’s decision to deny official time and can restore any leave used by the employee.

With this in mind, Federal managers should be careful when dealing with an EEO complainant who wants time for EEO complaint activities. Does this mean the employee can stop working on official assignments altogether? No, but knowing how to handle requests for official time will pro-



tect you in deciding how much is too much.

The EEOC's regulations provide that an employee is entitled to a "reasonable" amount of official time. Since the EEOC gets to make the final decision as to how much time is reasonable, it's a good idea to back up your decision to deny a request with documentation. By maintaining an accurate record of amounts requested and amounts approved, the agency will be in a position to demonstrate that its actions are reasonable. The record should indicate the dates for which official time was requested and whether the request was approved or denied.

The EEOC explained in *Zych* that it does not look to see whether a denial was motivated by discrimination or retaliation. Instead, it looks to see whether the justification for the denial was reasonable. For this reason, some information identifying the basis for any denials would also be helpful to show the reasonableness of the agency's actions.

It is reasonable for an agency to require employees to submit requests for official time in advance. Employees have an obligation to account for time used during duty hours, and the requirement of prior approval will help the agency's tracking efforts. A request need not be submitted, however, to attend a hearing with an EEOC Administrative Judge, since employees are automatically carried in duty status during such hearings.

It might also help to know whether the employee is requesting official time in connection with the employee's own complaint or to represent a fellow employee who has filed a complaint. The EEOC explained in *Zych* that its regulations do not authorize official time for an employee to represent someone else.* (Of course, if the employee requesting official time is a union representative, the collective bargaining agreement may have its own provisions authorizing official time to represent other employees.)

Finally, a word to the wise: Don't complain about the amount of official time the agency has approved for an employee. Even if your concern is legitimately about the workload, the only appropriate (and safe) approach is to deny requests for unreasonable amounts of time. Gripes about the use of official time can get you in trouble down the road because they may create the appearance of retaliation for protected EEO activity.

** Editor's Note: A point of clarification. In Zych, the Commission was addressing the question of whether a representative had standing to file a complaint about being denied official time to represent another employee. The Commission stated that only the complainant has standing to complain about the denial of official time for his or her representative.*

VIII

The following article is reproduced with permission of "FEDmanager", a weekly e-mail



newsletter for Federal executives, managers, and supervisors published by the Washington, D.C. law firm of Shaw, Bransford, Veilleux, and Roth, P.C.

POSSIBLE CONSEQUENCES OF FALSE STATEMENTS MADE IN EEO COMPLAINTS

This week's tip concerns the liability of employees who make false statements in administrative proceedings and the severe consequences that can result.

In *United States v. Smith*, No. 03-4467 (August 3, 2004), the U.S. Court of Appeals for the Fourth Circuit, in the context of an EEO case, upheld convictions for perjury, making false statements and making false claims against a woman who was found to have testified falsely under oath before an Administrative Judge at an EEOC hearing. Her testimony concerned claims of sexual harassment against her supervisor. These criminal charges arose out of the defendant's sexual harassment accusations against her manager.

The judge found that Smith's claims had no merit, that the evidence "tended to show" no sexual harassment took place and that sexual relations between Smith and her supervisor were consensual. The United States Attorney for the District of South Carolina proceeded to indict Smith for four counts of making false statements, three counts of perjury, and two counts of making a false claim. At trial, Smith was convicted of all but two counts of perjury (that

were dismissed by the court) and was sentenced to 27 months in prison.

Many think that EEO complainants have the ability to file frivolous, false or unfounded complaints with impunity. While there is some truth to this belief, there also are limits. The Smith case is an example of a complainant who went too far. Federal managers who believe they are victims of false complaints can take some comfort in the justice that sometimes occurs, even in the context of a federal EEO complaint.

