



OEDCA DIGEST



Vol. IX,
No. 2

Department of Veterans Affairs
Washington, DC

Spring
2006

**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 Deputy 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 dismissals for failure to state a claim, diabetes as a disability, the concept of “similarly situated”, retaliation, pregnancy discrimination, use of “official time” to prepare EEO complaints, and “Equal Pay Act” claims.

Also included in this issue is an article that provides a thumbnail sketch of an employer’s obligation to provide reasonable accommodation for disabled employees or applicants for employment.

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

CHARLES R. DELOBE

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I

EEOC UPHOLDS VA'S DISMISSAL OF COMPLAINT FOR FAILURE TO STATE A CLAIM OF HARASSMENT

The complainant alleged that she was subjected to a hostile environment on account of her gender. In support of her claim she alleged that she had a verbal confrontation with a coworker during which the coworker uttered a profanity. In addition, she alleged that some workers spread a rumor that she engaged in oral sex with three employees.

After reviewing the claim, the VA's Office of Resolution Management issued a procedural decision wherein it dismissed the complaint on procedural grounds (*i.e.*, without investigation) because it failed to state a claim of harassment. The complainant appealed, but the EEOC's Office of Federal Operations upheld the VA's dismissal.

In so doing, it noted that the complainant had failed to show how she was harmed with regard to a term, condition, or privilege of employment. The Commission noted that the two incidents in question, assuming they occurred as alleged, and even when considered together, did not constitute the degree of severe or pervasive conduct required to demonstrate a hostile work environment.

The case is a good example of why so

many "hostile environment" claims fail at the procedural level. Harassment claims, by definition, generally involve a series of events or incidents occurring over a period of time. Complainants must satisfy the "severe or pervasive" test, which means they must show either that the incidents occurred so frequently as to create a hostile environment, or that the incidents, though not frequent, were sufficiently egregious in nature that a hostile work environment nevertheless resulted. In rare cases, a single incident, if sufficiently egregious, may suffice to state a claim of harassment; *e.g.*, racially derogatory remark by a supervisor to a subordinate employee.

Many harassment claims fail simply because they do not allege conduct that is either so frequent or so egregious as to rise to the level of a hostile environment, as that term has been defined by the courts. As the U.S. Supreme Court has noted, Title VII of *The Civil Rights Act of 1964* is not a civility code. Its purpose is not to guarantee a pleasant workplace or shield employees from the ordinary trials and tribulations of the everyday work environment. While the conduct at issue in this case was indeed unfortunate and no doubt upsetting to the complainant, it did not, as a matter of law, rise to the level of a Title VII violation.

II

COMPLAINANT'S DIABETIC



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CONDITION NOT A DISABILITY

This case illustrates an often-misunderstood fact; *i.e.*, that an individual diagnosed with a disease may not necessarily have a “disability” as defined by *The Americans with Disabilities Act*. This case involves diabetes mellitus, a serious and growing medical problem in the United States.

The facts are relatively simple. The complainant was terminated during his probationary period for failure to meet performance expectations. The complainant alleged, among other things, that the real reason for his termination was not poor performance, but rather his diabetic condition.

The record established that the complainant had been diagnosed with Type II diabetes. Beyond that, however, the complainant offered no testimony or other evidence that would show why his diabetic condition should be considered a disability. In other words, he presented no evidence that his medical condition substantially limited any of his major life activities.

By itself, the diagnosis merely indicates that the complainant has a medical impairment. However, a medical impairment is not necessarily a disability, as there are many people with medical impairments who are not substantially limited in any of their major life activities. For an impairment to qualify as a “disability” within the meaning of civil rights law, the individual must show that the impair-

ment substantially limits a major life activity. In this case, the complainant was unable to make such a showing.

This is not to say that an individual with diabetes will never be considered an individual with a disability. Clearly, the severity and impact of such an impairment can vary widely from individual to individual. The Equal Employment Opportunity Commission, in its decisions addressing this issue, has found that some individuals with diabetes mellitus are individuals with disabilities within the meaning of civil rights law, while others are not. The key is whether the impairment is substantially limiting. In cases where the Commission has found a substantially limiting impairment, the diabetes itself has caused debilitating complications (*e.g.*, loss of a foot, blindness, *etc.*); medication has not successfully controlled the condition; or the regimen involved in monitoring and controlling the condition itself imposes a substantial limitation on the individual. Obviously, each case must be decided on its own unique facts.

One should also bear in mind that even if the individual’s diabetic condition is not now substantially limiting, the individual might have a past record of the condition being substantially limiting (*i.e.*, before it was diagnosed and adequately treated), or the individual’s condition is not substantially limiting but the employer treats the individual as if it is. In either situation (“record of” or “regarded as”),



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the individual will be deemed to have a disability within the meaning of *The Americans with Disabilities Act*.

To supplement its case law in this area, the Commission has issued useful guidance in the form of *Questions and Answers about Diabetes in the Workplace and The Americans with Disabilities Act*. The guidance is available on the Commission's website at www.eeoc.gov/facts/diabetes.html.

VA managers and supervisors should become familiar with the above guidance. Moreover, they should always seek legal advice from the Office of the Regional Counsel whenever issues involving diabetes or any other claimed disability arise in the workplace.

III

COMPARISONS WITH OTHER EMPLOYEES IN DISCIPLINE CASES NOT VALID IF SITUATIONS ARE NOT COMPARABLE

This case illustrates why so many EEO complaints involving discipline fail.

The complainant, a Program Support Assistant, received a notice of termination during his probationary period. The reasons given for the termination included three patient care complaints, confrontations with co-workers, violation of the dress code policy, and improper use of a cell phone on duty. The complainant chal-

lenged the termination by alleging that it was racially motivated.

After reviewing the Department's investigative file, an EEOC administrative judge issued a decision without a hearing in the Department's favor. The judge noted that the burden of proof in a discrimination claim rests with the complainant, and that the first step in meeting that burden is to establish a *prima facie* case of race discrimination. In complaints such as this involving discipline, establishing a *prima facie* case generally requires evidence that another employee of a different race was treated less harshly under similar circumstances. In other words, absent other evidence that might give rise to an inference of discrimination, the complainant must show that another employee accused of the same or similar misconduct received no discipline at all – or less severe discipline.

Although the complainant pointed to another employee -- a "comparator" -- who he contended was treated more favorably, the EEOC judge correctly determined that the comparator was not *similarly situated*. In other words, the circumstances in the comparator's case differed significantly from the complainant's situation. That employee was not in a probationary status and, in fact, had over twenty years of VA service. In addition, although she has occasionally been counseled about the dress code policy, she has never been counseled for any of the other issues mentioned in the



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complainant's termination notice. As the complainant was not similarly situated with respect to that employee, it is reasonable to assume that they would not be treated similarly, given the dissimilarities noted above.

To be *similarly situated* for comparison purposes, the events in question must generally involve the same supervisor. For example, two employees who engage in the exact same misconduct, but who work for different supervisors, might receive different punishment. This is not unusual. No two supervisors handle misconduct cases in the same manner. Some are more reluctant to impose discipline than others; and some tend to discipline more harshly than others.

In addition to considering the type of misconduct involved, supervisors must also consider an employee's work record and history of prior discipline when determining an appropriate punishment. A first time offender often receives lighter punishment for an infraction than an employee charged with a second or third offense; and greater length of service is often a legitimate factor used to justify less severe punishment.

As can be seen from the above discussion and examples, proving that another employee is *similarly situated* in a case involving discipline is not easy, as there are many factors that must be considered. It is for this reason that many discrimination

complaints involving discipline fail at the *prima facie* stage of the analysis.

IV

FACILITY RETALIATES AGAINST EMPLOYEE WHO COMPLAINED OF SEXUAL HARASSMENT

As shown in the following case, employees need not be successful in their underlying complaint in order to prevail on a claim that management retaliated against them because of that complaint. OEDCA recently took final action by accepting an EEOC administrative judge's decision finding that an employee [hereinafter "complainant"] was subjected to retaliation for having complained of sexual harassment.

Complainant, a male RN, filed an EEO complaint alleging sexual harassment by a male police officer. The complaint alleged inappropriate physical contact as well as frequent and demeaning questions and comments of a sexually graphic nature. Shortly after filing his complaint, his supervisor began taking actions against him, such as denying leave, charging him with AWOL, placing him on sick leave certification, and citing him for leaving a meperidine syringe in the lock box in the "med" room.

Upon receipt of the sexual harassment complaint, management promptly appointed an Administrative Board of Investigation (ABI). The Board inquired into the allegations and issued



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a report, which concluded that while there was evidence of an inappropriate touching and sexual banter, there was insufficient evidence to suggest that the complainant had been sexually harassed.

The board based its conclusion on evidence that there was a history of horseplay between the complainant, the police officer, and other employees at the facility, and that the complainant had contributed to the sexual banter in the workplace. The Board, however, did recommend appropriate disciplinary action against the police officer, given the nature of his position, for the inappropriate touching and comments of a sexual nature. The Board did not recommend any action be taken against the complainant.

Upon receipt of the Board's report, the complainant's supervisor recommended that he be terminated for "misconduct" described in the Board's report, even though the Board did not recommend discipline. The police officer, on the other hand, for whom discipline was recommended, received only a formal counseling – and was later promoted.

The EEOC judge, as did the Board, ruled against the complainant on his sexual harassment claim. The judge noted that management was not liable, as it acted promptly and effectively to address the matter as soon as it learned of the complaint, and that the complained of conduct ceased after the filing of the complaint and the

Board's investigation.

The judge, however, did rule in the complainant's favor on the reprisal claim. The judge noted that the complainant was disciplined even though the Board did not recommend that he be disciplined; and that the harasser was not disciplined, but instead only counseled, even though the Board recommended that he be disciplined. Moreover, the judge found that a preponderance of the credible evidence demonstrated that the other matters for which the complainant was charged (AWOL, sick leave certification, and leaving a syringe in the lock box) were merely a pretext for retaliation.

V

VA PHYSICIAN DISCRIMINATED AGAINST BECAUSE OF HER PREGNANCY AND THREATENED WITH RETALIATION IF SHE COMPLAINED

The complainant, a female physician, was accepted into the podiatric residency program at a VA medical center. The residency class consisted of the complainant and two males. The attending physicians in the Podiatry Department, all male, were the chief of the department, the Acting Residency Program Director, and a part-time physician. All three of these physicians had supervisory authority over the residents.

The Podiatry Department was organi-



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zationally under the Department of Medicine, whose Deputy Chief supervised the podiatry chief and podiatry residency director.

The complainant testified that she was repeatedly harassed because of her pregnancy by the Acting Residency Program Director and the Deputy Chief of Medical Services. She testified that the acting director asked her if she planned on getting pregnant again; asked whether her pregnancy was planned; told other residents that they would have to do complainant's work because of her pregnancy; told her that if her doctor's appointments interfered with his clinic, she would be dealt with; called complainant's mentor in medical school to complain about her performance and ask if she was pregnant during medical school; and told complainant and the Deputy Chief of Medical Services that complainant could not get another residency program because she has too many children and no one else wanted the complainant in a residency program.

Although complainant reported this harassment to the Deputy Chief of Medical Services, he failed to take immediate corrective action to end it.

In addition to the above harassment, the record shows that both the Acting Residency Program Director and the Deputy Chief of Medical Services both threatened the complainant with retaliation if she complained about the harassment. On one occasion, the act-

ing program director told the complainant if she complained to the union or Human Resources, she would be fired. In addition, the Deputy Chief told her that another resident had been fired for writing letters and speaking out about attending physicians, and that if she continued with her EEO complaint, she would not get recommendations for hospital privileges.

An EEOC administrative judge correctly found such conduct to violate Title VII's provisions prohibiting pregnancy discrimination as well as Title VII's anti-retaliation provisions. As for the retaliation finding, the judge noted that EEOC's regulations and guidance regarding prohibited retaliation do not require evidence of an adverse action. The mere threat, in itself, is a violation.

VI

OFFER OF ALTERNATIVE DATE FOR "OFFICIAL TIME" TO PREPARE PENDING EEO COMPLAINT NOT IMPROPER

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 for information.¹ As the following case illustrates, this right is not absolute, and management may impose reasonable restrictions regarding when such

¹ 29 CFR Section 1614.605(b).



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time may be taken.

The complainant contacted his supervisor and requested several hours of official time that day (*i.e.*, paid administrative leave) to work on his pending EEO complaint. The supervisor inquired as to whether there were any imminent deadlines in the case. The complainant provided a vague response that did not support the urgency of his request. The supervisor then gave him an opportunity to provide paperwork that would support the urgency. When the complainant failed to provide such paperwork, the supervisor denied the request, but offered an alternative date during the following week. The supervisor explained that vacationing staff would be back the following week and he would be better able at that time to provide coverage and patient care. The complaint objected to the delay, claiming that the denial and offer of an alternative date was harassing and retaliatory.

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 found the offer of an alternative date to be eminently reasonable under the circumstances, and that the complainant had failed to show how he was harmed by the delay. Moreover, the judge noted that the offer of an alternative date clearly did not have a chilling effect on or otherwise unduly restrain or interfere with the complainant's right to engage in EEO ac-

tivity.

As we noted in the Spring 2005 edition of the *OEDCA Digest*, in a case involving the amount of official time requested, employers are not required to approve all requests for authorized absence, but only those that are reasonable under the circumstances. What is reasonable, of course, will depend on the individual circumstances of each complaint. As the EEOC judge found in this case, the supervisor's offer of an alternative date due to patient care needs was not unreasonable, especially given that the complainant was unable to articulate why he could not wait until the following week.

VII

NO VIOLATION OF "EQUAL PAY ACT" WHERE FEMALE MEDICAL RECORDS TECHNICIAN WAS PAID LESS THAN MALE EMPLOYEE WHO WAS DOING THE SAME JOB

The following is a typical case arising in the VA involving an alleged violation of the *Equal Pay Act*.

The complainant, formerly a patient Services Assistant (GS-5), applied and was selected for promotion to the position of Medical Records Technician, GS-6, Step 1 (Target GS-8). She applied under internal vacancy announcement procedures, which are governed by VA and OPM regulations. One year after her selection, she was promoted to GS-7, Step 1. At the time



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of her promotion to the GS-6 position, the complainant was only minimally qualified. She had no medical records background. She had managed to qualify for the GS-6 entry-level position solely by virtue of her GS-5 grade and her time in that grade.

Shortly after her promotion to GS-7, Step 1, the medical center hired a male applicant to do the same job, but at the GS-6, Step 10 level, which at the time paid \$38,297.00, considerably more than the complainant's GS-7, Step 1 salary. According to officials responsible for the hiring, they negotiated with the applicant in order to provide him with a salary as near as possible to the salary he was receiving in his private sector job, which involved working with medical records. The male applicant had been earning \$40,999.00 annually when he applied for the VA position. Disgruntled by the pay difference, the complainant filed an *Equal Pay Act* complaint, alleging that the difference in pay was due to her gender.

After reviewing the agency investigation file, an EEOC administrative judge determined that the case was appropriate for summary judgment and issued a decision in the Department's favor. Specifically, the judge found that, while the complainant and the male comparator² were doing exactly the same job, the VA had demonstrated convincingly that it was not violating the *Equal Pay Act*, as the

pay differential was justified under one of the four affirmative defenses available to employers under the Act, *i.e.*, it was based on "a factor other than sex." The facility needed to pay the male a higher starting salary in order to recruit him. The complainant's salary, on the other hand, was subject to VA and OPM regulations governing internal promotions. Those regulations define the exact pay grade and step that she was qualified to receive when selected and the rate at which her salary could increase in future years for that position. Because of those regulations, her salary rate was not negotiable.

The judge also rejected the complainant's gender discrimination claim alleging disparate treatment under *Title VII of the Civil Rights Act*. Here, the judge correctly found that the complainant was unable to establish even a *prima facie* case of disparate treatment due to her gender. First, she was unable to show that she was treated less favorably than a similarly situated male employee. The judge noted that the male comparator was not similarly situated; he was hired under entirely different circumstances and pursuant to different statutory and regulatory authorities and procedures. Second, there was no other evidence in the record to suggest that gender may have accounted for the difference in salary.

Many *Equal Pay Act* claims filed against the VA stem from pay differentials caused by recruiting considera-

² The person with whom the complainant was comparing herself.



tions, such as the need to match private sector salaries. Such differentials, if discovered, can obviously cause morale problems. Nevertheless, the *Equal Pay Act* does permit employers to consider prior or current salary along with market demand. Such considerations, if reasonable, will constitute “a factor other than sex”, an affirmative defense that excuses the employer from liability. Other affirmative defenses available under the Act include differentials based on a seniority system, a merit system, or a system based on quantity or quality of production.

VIII

REASONABLE ACCOMMODATION – A THUMBNAIL SKETCH

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.

With an increasing number of disabled employees and job applicants entering and remaining in the Federal workforce each year, some will need and will be rightly entitled to a reasonable accommodation in order to perform their jobs. On the other hand, not everyone who claims to have a physical or mental impairment is entitled to a reasonable accommodation at work. One reason there is a reasonable accommodation request process is to properly consider these requests, and

managers should not rush to judgment on reasonable accommodation requests based solely on their knowledge of the requester and his or her condition. Careful and thorough consideration should be given to every request, since each is unique and dependent on the facts of the situation. Also, when managers issue adverse decisions on reasonable accommodation requests, they can become vulnerable when those decisions are challenged in the EEO or union grievance process.

In a nutshell, a reasonable accommodation is any change in the working environment that would enable a “qualified individual with a disability” to partake in equal employment opportunities in the workplace. Employees and job applicants generally have the burden of proving that they are disabled, of requesting a reasonable accommodation, and of showing that they can perform the essential functions of their position either with or without an accommodation. Requests do not have to contain any specific wording. Although the requests and management’s responses can be made orally, the best practice is for the entire process to be documented in writing or completed electronically. If a dispute arises at a later time about the request or how it was handled, there will be a clear record as to the chronology of the events.

Once a reasonable accommodation request is received, managers are permitted to ask the requestor to provide reasonable documentation of his dis-



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ability. This does not mean that managers can ask for medical records unrelated to the disability, or that they can ask for excessive medical documentation beyond what is needed to make an informed decision. Unreasonable requests for medical documentation can be perceived as harassment.

Managers should also initiate and engage in an informal, flexible, interactive process with employees and applicants to evaluate the available options and possible solutions in response to their accommodation requests, so that all possibilities for an accommodation are exhausted. Managers can do this by holding an informal meeting with the employee or job applicant; requesting any additional information about the condition, limitations, and what accommodations are sought; communicating in some fashion that the request was considered; and offering and discussing viable alternatives if the request is overly burdensome for the agency. Even if it is ultimately determined through this interactive process that employees or applicants are disabled and require an accommodation to perform their jobs, accommodation requests can still be denied if they will cause an undue hardship on the agency. In plain terms, this might mean that the accommodation would be too costly, cause a disruption of the workplace, or would alter of the nature of the agency's fundamental operations.

Disability and reasonable accommodations are often very complicated areas

for management. For this reason, it is strongly recommended that managers review their agency's written reasonable accommodation policy and consult with their human resources office, disability resource center and legal office before rendering a decision on a reasonable accommodation request. Although this could lengthen the process, it will result in a more sound decision.





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I

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K

L

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P

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 - Pretext:
 - Found:
 - Not Found:
 - Reason(s) articulated for --
 - Burden of articulation met (specific reason given for nonpromotion or nonselection)
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 - 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
 - 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
 - Education: (*See: Qualifications: Education*)
 - Experience: (*See: Promotions/Selections/Hiring: Pretext: Evidence*)
 - Innocence of Decision Maker: V, 3, p. 2-3;
 - 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
 - Performance Appraisals (use of): II, 3, p. 3
 - Position Descriptions: V, 4, p. 8-9



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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

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

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

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

Priority Consideration: III, 3, p. 4-5

Procedures/Policies (failure to follow): V, 3, p. 8-10

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

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: 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

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



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- 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
 - 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*)
- 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
 - 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*)
- Reprisal:
- Adverse Action Requirement: (*See: Reprisal: Per Se*)
 - Article about: I, 1, p. 19; IX, 1, 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**; (*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
 - 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
 - Intimidation: (*See: Reprisal: “Per Se” Reprisal*)
 - Interference (with EEO process): (*See: Reprisal: “Per Se” Reprisal*)
 - “Material” Action: I, 1, p. 20
 - Protected EEO Activity:
 - Knowledge by Management of: III, 4, p. 3-4; IV, 3, p. 5-6; IV, 4, p. 5-6; VIII, 3, p. 3-5
 - Participation Type Activity: VIII, 1, p. 6-7



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- Opposition Type Activity: II, 3, p. 5; VIII, 1, pp. 2-3 and 6-7
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
Treatment before Activity *vs.* Treatment after Activity: II, 2, p. 2
“*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
Not found: III, 1, p. 7-8; III, 3, p. 6-7
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)
Problem Employees: (*See: Problem Employees*)
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
- Restraint: (*See: Reprisal: “Per Se” Reprisal*)
Retaliation: (*See: Reprisal*)
RIFs (*See: Reductions in Force*)
Risk of Future Harm or Injury: (*See: Disability: Direct Threat*)
- S**
Sanctions (imposed by EEOC judges): VI, 1, p. 5-6
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*)



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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

V

VA Disability Ratings: (*See: Disability: Benefit Statutes: Veterans' Compensation*)
Veterans' Compensation: (*See: Disability: Benefit Statutes: Veterans' Compensation*)
Veterans' Preference (cited as a basis of discrimination): IV, 4, p. 9-10; VI, 1, p. 156VI, 1, p.
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*)