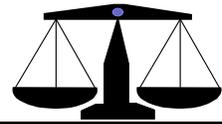




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Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

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

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include disability discrimination involving the "direct threat" and reasonable accommodation theories, problems in nonpromotion cases, "preselection", electing between the EEO complaint process and a negotiated grievance procedure, class action claims, and negative employment references.

Also included in this issue is an article on the U.S. Supreme Court's recent decision concerning the theory of "continuing violations."

The *OEDCA Digest* is available on the World Wide Web at:
<http://www.va.gov/orm/oedca.htm>.

CHARLES R. DELOBE

<i>Case Summaries</i>	2
<i>U.S. Supreme Court's Recent Ruling on "Continuing Violations"</i>	19



I

INNOCENCE OF DECISION MAKERS NOT NECESSARILY A DEFENSE TO DISCRIMINATION -- THE "CAT'S PAW" THEORY

OEDCA recently accepted an EEOC judge's finding of retaliation in a failure to hire case in which the selecting officials - the individuals who actually made the decision not to hire the complainant - acted without retaliatory motive.

The complainant, who had previously left VA employment as a nursing assistant in 1986 to go on disability retirement, made several unsuccessful efforts, beginning in 1995, to be hired or reinstated to a similar position. In 1997, he filed an EEO complaint concerning his difficulty in securing reemployment with the VA.

About a year after filing his complaint, he again applied for a nursing assistant position after a medical review had determined that he was capable of performing the duties of the position. After learning of his nonselection for this position, he filed a second complaint alleging, among other things, that his nonselection was in retaliation for his prior EEO complaint.

An EEOC administrative judge agreed with the complainant's assertion, finding persuasive evidence of retaliatory intent. The record indicated that a personnel management specialist, who was

aware of the complainant's prior EEO complaint, had approached the two designated selecting officials and informed them that the complainant had a history of performance problems and poor attendance when previously employed. Because of this information, the selecting officials, who were not aware of the complainant's prior EEO complaint, did not interview or select the complainant. In their testimony at the hearing, they stated that their sole reason for not considering the complainant was the adverse information provided by the HR specialist. They further stated that they made no attempt to determine if the information on which they were relying was accurate.

After reviewing documentary evidence concerning the complainant's past performance and work record, the EEOC judge found that not only was there was no evidence to support the HR specialist's assertion, there was, in fact, persuasive evidence refuting it. His performance appraisals indicated that his performance had exceeded expectations in most of the elements on which he was rated. As for his attendance, aside from some sick leave due to hospitalization, his work history was devoid of any negative information. In fact, one of his performance appraisals noted that he is "prompt for duty" and "rarely uses sick or annual leave unexpectedly."

Absent any evidence whatsoever to support the claims concerning the complainant's performance and attendance record, the judge concluded that the HR



specialist's motive for providing the false information was, more likely than not, to retaliate against the complainant because of his prior EEO complaint.

The finding in this case is somewhat unusual because the actual decision makers - the two selecting officials -- were innocent of any wrongdoing. They were not even aware of the complainant's prior EEO complaint and, hence, could not have had a retaliatory motive (although it certainly could be argued that they were negligent in not attempting to verify the adverse information before relying on it). Nevertheless, the judge found the Department liable because a retaliatory motive was involved in the complainant's nonselection. The judge quoted the following language from a federal court decision: "Material misrepresentation may influence an otherwise innocent decision maker, thereby transforming that decision maker into the conduit of another's prejudice, and hence subjecting the employer to liability." Another federal court described this rule in more vivid terms: "If the decision maker acts as a 'cat's paw' of another's prejudice, the innocence of the decision maker does not spare the employer from liability."

II

CONSTRUCTIVE ELECTION OF NEGOTIATED GRIEVANCE PROCEDURE RESULTS IN DISMISSAL OF EEO COMPLAINT

In a recent case, the EEOC's Office of Federal Operations affirmed an administrative judge's dismissal of an employee's EEO complaint. The judge found that the employee had essentially waived her right to pursue her EEO complaint because she had also challenged the same matter under a negotiated grievance procedure authorized under a collective bargaining agreement. What makes this case somewhat unusual is that the judge dismissed the EEO complaint even though the complainant had, according to EEOC's regulations, elected the EEO complaint process instead of the negotiated grievance procedure.

EEOC's regulations provide that when a person is employed by an agency subject to certain provisions of Federal law relating to negotiated grievance procedures,¹ and the person is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or grievance on a matter must elect to raise the matter under either EEOC's regulations (*i.e.*, in the EEO complaint process) or under the negotiated grievance procedure, **but not both**. The obvious intent of this rule is to prevent costly and time-consuming dual processing of the same matter.

If an employee disregards this rule and files both an EEO complaint and a grievance on the same matter, EEOC's

¹ The VA is subject to such provisions.



regulations provide that whichever is filed first shall constitute an election to proceed in that forum.

What happened in this case is that an employee filed both an EEO complaint and a grievance concerning the same matter. However, she filed her EEO complaint first, which normally would constitute an election to pursue the matter in the EEO forum and result in the dismissal of the grievance. For reasons that were unclear in the record, the agency continued to process the grievance through to a Step III decision (*i.e.*, a final decision), despite the existence of a previously filed EEO complaint on the same matter, which it was also processing.

The complainant eventually requested a hearing on her EEO complaint, but the judge denied her request. Moreover, he dismissed her complaint on the ground that she had elected to pursue the matter in the grievance process even though she had filed her EEO complaint first. On appeal, the EEOC agreed with the judge, concluding that the complainant, by pursuing her grievance through to a final resolution, had “constructively elected” to pursue the matter in the grievance procedure rather than the EEO process.

The moral of this story is clear. Employees who ignore the rule against dual processing by filing both an EEO complaint and a grievance on the same matter may end up with the matter being decided in a forum that was not

their first choice.

III

USE OF “DIRECT THREAT” DEFENSE BY MANAGEMENT IN DISABILITY CASES REQUIRES INDIVIDUALIZED ASSESSMENT

In the Spring 2002 edition of the OEDCA Digest, we presented an article discussing the legal issues surrounding decisions by management to deny an employment opportunity to a disabled employee or applicant for employment because the disability in question poses a risk of harm to the individual or to others. A recent ruling handed down by the Equal Employment Opportunity Commission (EEOC) highlights some of the common problems and pitfalls surrounding such decisions.

Complainant, a direct patient care nurse at a VA medical facility since 1982, challenged the agency's removal of her in early 1995. Among the bases of alleged discrimination was physical disability (hearing loss, obesity, and hypertension). At the time of her hiring, she weighed 291 pounds and had dual hearing loss. Her hypertension was purportedly controlled through medication. The agency rated complainant at least "Satisfactory" throughout her tenure, which included her 1994 performance appraisal. Complainant wore hearing aids and requested that co-workers look at her when they speak, as a means of



OEDCA DIGEST



accommodation. Phones at her work station contained hearing amplified ear pieces.

In August 1994, complainant's supervisor informed the Associate Chief of the Nursing Service of the following concerns: (1) whether complainant was able to perform cardiopulmonary resuscitation (CPR); (2) staff members' fear that she could not respond to an emergency; and (3) her hearing impairment which, on occasion, led to misinterpretation resulting in the need for immediate conflict resolution. Complainant underwent a fitness for duty examination (FFDE) to evaluate her physical competency. At this point her weight had increased to 323 pounds.

The findings of the FFDE led to the convening of a Physical Standards Board (PSB), comprising three physicians, to determine complainant's future in her position. The PSB concluded that complainant could remain in her position if she did the following: (1) displayed a willingness to reduce her weight to 291 pounds within six months to one year; (2) became certified in CPR within six months; and (3) saw the FFDE physician every three months.

The Chief of Nursing Service objected to the PSB's recommendation, asserting that it did not address "the actual clinical concerns" of complainant's ability to function professionally as a nurse. The Chief raised safety concerns pertaining to complainant's ability to

walk and hear, to respond quickly, and to her lack of CPR training. Consequently, the PSB reconvened and concluded that complainant was "physically incapable of performing the duties of her position without hazard to herself and/or others." The PSB head, a physician, expressed his belief that the Chief's memorandum was designed to pressure the PSB into reversing itself.

The Commission began its analysis by noting that complainant was substantially limited in her ability to hear, even with the help of mitigating measures (hearing aids). The Commission also found that the agency regarded complainant as being substantially limited as to walking as a result of hypertension and obesity.

The Commission further found that complainant was able to perform the essential functions of her position when she was removed, noting her 1994 "Satisfactory" performance appraisal and her previous successful ratings for 12 years. The Commission rejected the agency's argument that complainant was not qualified for her position because her disabilities caused her to be a safety risk. The Commission declared that "to exclude an individual on the basis of a possible future injury, the VA must show more than that an individual with a disability poses a slightly increased risk of harm."

In concluding that the agency had discriminated against the complainant based on disability, the Commission



found that the impetus for the FFDE was unsupported fears rather than actual facts. In this regard, the Commission noted that VA officials could not "identify a single instance when [complainant] did not respond appropriately in an emergency situation and/or placed a patient at risk."

Second, and more troubling to the Commission, were the actions of the VA after the FFDE, citing the PSB head's testimony that he felt pressured to change his previous recommendation. Therefore, the Commission concluded that the complainant had met her burden of showing that she was a qualified person with a disability who was removed from her position because of her disability. It further concluded that management had failed to sustain its burden of proving that the complainant's disabilities posed a significant risk of substantial harm to herself or to patients.

Management talked only in terms of the possibility of such harm, while *The Rehabilitation Act* and its implementing regulations talk in terms of a "high probability" of such harm. Even after the PSB reconvened and changed its recommendation under pressure, it merely stated, in the most general terms, that the complainant posed a risk; it failed to describe and quantify that risk, *i.e.*, it failed to indicate (1) whether the threatened harm was substantial and (2) whether there was a "high probability" of the harm occurring. Accordingly, the Commission ordered the VA to offer the

complainant reinstatement plus back pay and other appropriate relief.

As we noted in our article in the Spring 2002 edition of the OEDCA Digest, due to the complex legal and factual issues involved in these types of cases, management should always seek legal advice from the VA's Office of Regional Counsel **before** making decisions that deny an employment opportunity based on a perceived health or safety threat to the disabled individual or others. In addition, management must never make such decisions based solely on the potential for liability in the event of injury.

It has been OEDCA's experience that in most, if not all of these cases, management officials are making these decisions without knowledge of their legal responsibilities under *The Rehabilitation Act*. The administrative records rarely if ever indicate that they sought legal advice before taking action. Facility directors would be well advised to require such advice as an absolute prerequisite to any personnel action based on an individual's disability.

IV

CONCLUSORY OPINION THAT JOB APPLICANT WAS MEDICALLY UNQUALIFIED FOR A FOOD SERVICE WORKER JOB BECAUSE OF MENTAL ILLNESS RESULTS IN FINDING OF DISCRIMINATION

This case, like the preceding one, is another example of how inattention to the



requirements of *The Rehabilitation Act* in “direct threat” cases inevitably results in a finding of discrimination.

The complainant applied for a part-time Food Service Worker position at the entry-level grade. The complainant’s application showed that he had three to four years of experience in similar jobs. Following an interview, the selecting official indicated her intention to select him, pending successful completion of a physical examination.

The complainant completed the physical exam without difficulty, but just before departing he told the nurse who was conducting the physical that he suffered from paranoid schizophrenia and was being treated at the VA facility by a physician’s assistant (PA) in the Psychiatry Service. The nurse contacted the PA who provided her with a note that advised against hiring because the complainant’s condition was not yet stable enough for regular employment. The note, however, stated that the complainant could do volunteer work at the hospital.

The examining nurse admits that she did not discuss the nature of the job with the PA, the number of hours involved, the complainant’s prior work experience and medical history, the stress level of the job in question, or other factors that might bear on his ability to do this particular job despite his mental illness. Instead, she simply passed the PA’s note on to the final approval authority along with her recom-

mendation against hiring.

The approving official accepted that recommendation and, without further inquiry, found the complainant medically unqualified for the job due to mental illness.

At a hearing conducted by an EEOC administrative judge, the approving official testified that the complainant was unable to perform the duties of a food service worker because individuals with mental disorders such as paranoid schizophrenia could injure themselves, or be violent, and that sometimes “they don’t know what they are doing.” The judge found that explanation unpersuasive and issued a decision finding discrimination due to disability. Thereafter, OEDCA issued a Final Order accepting the judge’s decision, finding that it was factually and legally correct.

The judge correctly noted that the approving official failed to conduct the **individualized assessment** required by law and regulations. Instead, he simply concluded, in stereotypical fashion, that anyone with this type of illness is unsuited for employment. He failed to look at factors such as the complainant’s work history and whether his illness affected his ability to perform successfully in prior similar jobs. He also failed to obtain more specific information about the complainant’s behavior and the duties of the job in question, as well as critical information such as the nature and severity of potential harm to the complainant and/or others if placed in



the job, the likelihood of such harm occurring, and the imminence of such harm. In essence, the approving official merely expressed a generalized fear that individuals with this type of illness could injure themselves. He presented no evidence -- nor did he even assert -- that such harm was highly probable, or that the harm would be substantial.

V

EMPLOYEE'S SUPERIOR QUALIFICATIONS COUPLED WITH FAILURE BY AGENCY TO FOLLOW ITS OWN PROCEDURES AND KEEP RECORDS RESULTS IN FINDING OF DISCRIMINATION

This case is a classic example of how not to conduct a promotion action.

The complainant, an African-American, applied unsuccessfully for a WG-3 Food Service Worker position. When told of her nonselection, she filed a complaint alleging race discrimination. An EEOC administrative judge heard the case and subsequently issued a decision finding discrimination. OEDCA agreed with the judge's decision and issued an order that it be fully implemented.

Applications for the position were initially reviewed by a panel, which rated and ranked the applicants. Those applicants with numerical rating scores falling above the "natural break" or "cut off score" were referred to the selecting official on a promotion certificate. **The**

record indicates that the rating panel kept no records documenting how its members rated and ranked the applicants.

Upon receipt of the promotion certificate, the selecting official gave the names of the applicants to the five supervisors in the kitchen and instructed them to pick their first and second choice. The record, however, indicates that the supervisors received no applications and no verbal or written guidance regarding the criteria they should apply in picking their choices. Thus, each supervisor evaluated the candidates according to his or her own criteria, based primarily on their personal observations, as they did not actually supervise all of the applicants. They then provided the selecting official with their first and second choices. **They provided no written comments to the selecting official documenting the justification for their choices.**

The selecting official states that she awarded points -- three for a first choice and two for a second choice. She then calculated the total point score for each applicant and selected the applicant with the highest total point score. The complainant did not have the highest score. The record indicates that two applicants, one White and one African-American, received the highest score of 11. **Although the facility's internal promotion policy stipulated that "tie scores will be broken" by length of service in the VA, and although the African-American applicant had greater VA seniority, the selecting official**



passed over her in favor of the White applicant.

The facility also had another internal policy or practice, albeit unwritten, regarding promotions, *i.e.*, employees could not be promoted during their probationary period. **Despite the policy against promoting probationary employees, the selecting official chose the only candidate who was still in her probationary period.**

In addition to all of the above, the record indicates that **the complainant appeared to be much better qualified than the selectee.** She had far more experience as a foodservice worker in the VA (5.5 years as opposed to just 11 months for the selectee); far more food service experience prior to her VA employment; and better overall performance than the selectee, as documented in performance appraisals or reviews. In addition, she had recently received a cash award for performance and was, in fact, training the selectee, who as previously noted, was still in her probationary period.

The selecting official attempted to explain all of this by stating that the complainant was a problem employee, thus making her a less attractive candidate. He alleged that she had an attitude problem and was less dependable than the selectee in terms of leave usage. However, **the selecting official was unable to point to any evidence to support his assertion that she was a problem employee.** There was nothing ad-

verse in her performance appraisal, which he reviewed and signed as an approving official. The appraisal indicated nothing other than the fact that she was an excellent employee. In addition, there was no evidence presented to suggest that she had problems with time and attendance or that her leave usage was excessive.

The finding of discrimination in this case resulted from numerous deficiencies in the promotion process coupled with management's inability to adequately explain and document its reasons for not choosing the complainant. Findings of discrimination by EEOC judges are often based on less evidence than was present in this case. The lesson here for management is clear. In any promotion or selection action, make sure there is a process, make sure that process is in writing, and make sure it is followed. If it is not followed, document the particular circumstance justifying the deviation.

In addition, never conduct a promotion or selection action without requiring adequate documentation from every individual involved at each stage in the process. Those responsible for making recommendations or selections should always prepare a contemporaneous, written justification for their actions and should always attach to that justification any documentation supporting their reasoning. This is especially important given the fact that it can take several years between the filing of an EEO complaint and final action on an EEOC



judge's decision. During that time memories often fade, witnesses may no longer be available to testify, and important documents may disappear. In this case, for example, over six years elapsed between the promotion action and the EEOC hearing. Contemporaneously prepared documentation permits OEDCA and EEOC judges to "reconstruct" the process and understand the reasoning involved.

Finally, as a matter of course, management officials should always document in some fashion any problems they are having with an employee. This is often not done for a variety of reasons - too time-consuming, fear of having to confront the employee about the matter, or not wanting to deal with a grievance or complaint. Yet their very failure to do this inevitably comes back to haunt them when they attempt to cite problems with the employee as a justification for their actions. Complainants will understandably point to the lack of documentation to argue that such a reason is simply not true and therefore a pretext for discrimination. Complainants frequently prevail under such circumstances despite the fact that, in some cases at least, they may indeed be problem employees.

VI

NEGATIVE EMPLOYMENT REFERENCE NOT DUE TO DISCRIMINATION

It sometimes comes as a surprise to employers that former employees may bring a legal action against them because of a negative employment reference. It also comes as a surprise to some employees that an employer has every right to give a good-faith evaluation of a former employee's services when questioned by a prospective employer, even if such an evaluation is less than flattering. Indeed, it would be unethical for an employer to mislead another employer concerning a former employee's work history. Consider the following case.

A VA employee was terminated from her accounting technician position during the probationary period. Her supervisor cited low productivity and attendance problems as the reason for the dismissal. When she left the VA, there was no agreement between the parties regarding the type of reference that would be given to prospective employers.

Subsequent to the dismissal, the supervisor received a phone call from a prospective employer about the former employee. The supervisor informed the caller that the complainant was unable to perform assigned tasks and that her overall performance at the VA was poor. She also mentioned the former employee's attendance problems. The prospective employer asked the supervisor if there was anything positive she could say on the former employee's behalf. The supervisor responded that the former employee was professional in



her appearance.

The former employee filed a complaint alleging that the negative employment reference provided to the prospective employer was due to her race. An EEOC judge and OEDCA disagreed, finding that the supervisor's employment reference, although certainly negative, was not motivated by racial bias.

The EEOC judge noted that the complainant offered no evidence suggesting that she was treated differently because of her race in connection with the negative evaluation. Almost all of the employees in the supervisor's unit are the same race as the complainant. The judge also pointed to undisputed evidence in the record showing that the supervisor had counseled the complainant on more than one occasion concerning her low productivity and attendance problems, and that the supervisor had written memos to the Chief Financial Officer advising him of these problems.

The complainant argued that the reference was nevertheless false because she had actually received an award for productivity. The record, however, shows that, subsequent to receiving that award, she had to be counseled regarding her productivity.

This case demonstrates that employers are legally entitled to provide good-faith evaluations to prospective employers regarding former employees. What it

also demonstrates, however, is that employers should ensure that they are able to back up a negative reference with evidence that supports what they say.

In this case, such evidence was presented. Indeed, the fact that the employee was fired is persuasive evidence backing up the supervisor's comments.

Unfortunately, some supervisors who provide negative references are unable to point to any such evidence. As we noted in the preceding case, supervisors often refrain from taking action to address performance or conduct problems. For example, they fail to counsel or discipline the employee; neglect to mention the problem in the employee's performance appraisal; or fail to place the employee on a Performance Improvement Plan (PIP).

They fail to do these things for a variety of reasons - too busy, too time-consuming or disruptive, fear of having to confront the employee about the problem, not wanting to deal with a grievance or complaint, *etc., etc.* Yet their very failure to accept and carry out their supervisory responsibilities inevitably comes back to haunt them when they later attempt to rely on the problem to justify their actions.

In the case of a negative reference, these failures make it difficult to rebut a former employee's claim that the negative reference was unwarranted and, hence, discriminatory. The lack of such evidence could, and in many cases will, re



sult in a finding of discrimination. This is true even if the negative reference was, in fact, made in good faith.

VII

EEOC DISMISSES UNION OFFICIAL'S CLASS ACTION CLAIM FOR FAILURE TO SATISFY PROCEDURAL REQUIREMENTS

OEDCA recently issued a final order accepting an EEOC administrative judge's decision to dismiss a class action complaint filed against the VA by a union official. The reason for the judge's dismissal was that the class agent (*i.e.*, the individual who filed the claim on behalf of the class members) failed to establish that the procedural prerequisites for bringing a class claim had been satisfied.

The class agent had filed her class claim alleging that African-American employees at a VA facility were being subjected to a hostile work environment, and that they were being denied training. The agent presented no specifics regarding these allegations.

The EEOC judge dismissed the class claim, concluding that the class agent had failed to satisfy the procedural requirements for maintaining such an action. More specifically, she failed to show "numerosity," "commonality," "typicality," and "adequacy of representation". To succeed in having a claim certified as a class claim, a class

agent must satisfy all of these requirements. In this case, the class agent satisfied none of them.

For example, the judge noted that "numerosity" requires that the class be so numerous as to make a consolidated complaint of the members impractical. The agent identified only two employees affected by the policy or practice in question. Their claims could easily have been consolidated without the need for a class action.

Moreover, because the number of class members was so few, the judge found no evidence of "commonality" because the agent presented no evidence, statistical or otherwise, to show that the class members had suffered the same injuries and that there were questions of fact common to the members. With so few members in the class, showing this would be impossible.

Likewise, the judge found no evidence of "typicality." This requirement, while similar to the commonality requirement, focuses more on (1) whether the class agent is actually a member of the class he or she wishes to represent (and thus has substantially the same interest as other members of the class) and (2) has suffered the same injury suffered by the class members as a whole.

What makes this class claim unusual is that there was no claim or indication in the record that the class agent was, in fact, a member of the class. She appears, instead, to have filed the claim simply in



her capacity as a union official on behalf of some African-American union members at the facility. She presented no personal claim that was typical of the claims of the class. In other words, she did not claim injuries substantially similar to those allegedly suffered by the class members. A class action requires that the agent acting on behalf of the class be a member of the class and have interests and claims typical of those of the class members.

Finally, the judge found that the class agent could not adequately represent the class. Adequate representation is essential because class members are bound by a judgment in a class action. In this case, the class agent was not an attorney and demonstrated no qualifications, experience or available resources to adequately represent the class. Although the EEOC's regulations do not specifically require attorney representation in class claims, a non-attorney, such as the class agent in this case, rarely will have the background, experience, competence, and resources needed to adequately prosecute a class claim, which by its very nature is complex and expensive. Moreover, even if a class agent retains an attorney, the Commission and the courts will carefully examine the attorney's credentials to determine if the attorney actually has the experience and resources needed to conduct this type of legal action.

The record in this case did indicate that an attorney was advising or representing the agent at one point in the pro-

ceeding, but neither the attorney nor the agent filed any response to the agency's legal brief opposing class certification. The judge concluded, therefore, that even if there were a class that satisfied the "numerosity," "commonality," and "typicality" requirements, the agent had failed to demonstrate that she was capable of adequately representing the class.

This case illustrates the inherent difficulty in having a claim certified by the EEOC or the courts as a class action. However, even though almost all class claims are dismissed for one or more of the reasons noted above, a class agent whose class claim has been dismissed may still pursue his or her individual claim, assuming the agent satisfies the procedural requirements for filing an individual claim. As noted above, however, the agent in this case had presented no individual claim; hence the entire matter was dismissed.

VIII

EVIDENCE OF PRESELECTION AND RACIAL IMBALANCE IN TOP MANAGEMENT POSITIONS NOT SUFFICIENT TO PROVE DISCRIMINATION

The complainant, a Clinical Social Worker, applied but was not selected for the position of Health System Specialist. He thereafter filed a complaint alleging that his nonselection was due to his race and gender (African-American, male). The selectee was a Caucasian female.



In its final agency decision (“FAD”), OEDCA concluded that discrimination did not play a role in the selection action, a conclusion later affirmed on appeal by the Equal Employment Opportunity Commission. What makes this case interesting is that the facts on which the complainant relied might suggest to someone not familiar with EEO law that discrimination did in fact occur.

The evidence indicates that the Health Systems Specialist position is considered an upper level management position at the VA hospital in question. The complainant presented data showing that there were very few African-American males in such positions at the hospital, a claim not disputed by the agency.

In addition to his “statistical” evidence, the complainant claimed that he was better qualified than the selectee, a claim the agency did dispute. The complainant based this claim on the fact that he had eight years of VA experience while the selectee had been with the VA for only one year.

When asked by the agency’s investigator why he chose the selectee, the SO said it was because she was the best qualified, citing her two masters degrees and the superior evidence of qualifications listed in the KSAOs² that she sub-

mitted with her application. He also noted that the complainant did not have a master’s degree.

The problem with the SO’s explanation was that it was simply not true. The complainant did have a master’s degree and none of the applicants in this selection action submitted KSAOs.

An SO’s lack of credibility, such as seen in this case, would generally result in a finding of discrimination. Such evidence would normally be sufficient to show that the SO’s reasons were a pretext to hide a discriminatory motive. What makes this case unusual, however, is that while his explanation was clearly a pretext, other persuasive evidence in the record indicated that his motive was not discrimination.

It was clear to both OEDCA and the EEOC that the SO’s decision was greatly influenced, if not directed, by his supervisor, the Chief of Staff (CS), and there was no evidence that the CS’s preference for the selectee was due to racial or gender considerations. In fact, there was no evidence that the CS was even aware of the identity of the other applicants when he made his preference known to the SO. The record indicates that the CS had “highly recommended” the selectee to the SO. The CS had previously supervised the selectee when they both worked at a private hospital and had been impressed with both her work and ability. In short, the facts

description of their qualifications and experience and how they specifically relate to each “KSAO.”

² “**K**nowledge, **S**kills, **A**ilities and **O**ther” – the factors upon which applicants are rated and compared. As part of the application process, applicants are often required to submit a written



strongly suggested that the SO's false explanation, although certainly troubling, was a pretext to hide a preselection rather than a discriminatory motive.

Other evidence in the record also pointed to a nondiscriminatory motive. Although the complainant had considerably more "VA experience," such experience did not make him better qualified, as his social work experience at the VA involved mostly patient care as opposed to the mainly administrative and managerial functions associated with the position in question. The selectee, on the other hand, although with the VA for only one year, held a top administrative position at a private hospital for over ten years.

The complainant attempted to use "statistics" to bolster his claim, arguing that the paucity of African-American males in top-level positions at the hospital was persuasive evidence of discrimination. Neither OEDCA nor the EEOC were persuaded by this argument. In their final decisions, both agencies noted that such evidence was, in itself, meaningless, as there could be any number of valid, nondiscriminatory explanations. The complainant presented no evidence as to the racial and gender breakdown of the relevant (*i.e.*, qualified) labor pool in that geographic area; nor did he present any evidence of the racial and gender breakdown of the qualified applicant pool at that facility for the types of positions in question; nor did he present evidence as to the actual qualifications

of the applicants in each selection action. Absent such evidence, no statistically valid conclusions can be drawn from the mere fact of underrepresentation. In fact, without such evidence, it is not even possible to reach a valid conclusion that there is an under-representation.

In addition to the use - or misuse - of statistics, this case highlights an evidentiary issue that often arises in EEO cases -- *i.e.*, "preselection." Complainants frequently argue that promotion and selection decisions are often made before a position is even announced, and that the application process is simply a formality used to sanction a pre-ordained result. While this does happen occasionally, it is not necessarily discriminatory, or otherwise illegal, although in some cases it certainly could be.

Although the complainant did not specifically allege "preselection" in this case, both OEDCA and the EEOC concluded in their decisions that "preselection" probably did occur, but that the preselection did not violate civil rights laws. They further noted that, in many cases, including this one, evidence of pre-selection might actually prove the absence of a discriminatory intent!

As noted above, selecting officials sometimes know in advance which individual they will select or hire, even before a vacancy is announced and, hence, before they even know the identity, race, gender, age, *etc.* of the other applicants. This often happens because,



as in the instant case, the selecting officials have previously supervised or worked with the individual and formed a positive opinion about the individual's ability, job performance, work ethic, and other relevant, job-related factors. All of this tends to suggest the absence, not the presence, of a discriminatory motive.

Indeed, selecting officials typically prefer to choose such a known quantity – a “sure bet” -- rather than take a chance on an unknown quantity who may appear well qualified on paper but whose competence and work ethic may be difficult to gauge simply by looking at an application or speaking with a current or former supervisor. Such a reason is legitimate, nondiscriminatory, and merit-related.

Employees, of course, will always perceive such preselections as “unfair.” They will typically allege that the selectee, like the one in this case, had an unfair “advantage” because the selecting official knew or had previously worked with or supervised the selectee. Obviously, selectees in such circumstances do have an undeniable advantage. However, that advantage does not render the selection unfair, let alone illegal. Moreover, even if it could be argued that such an advantage is unfair, civil rights laws do not prohibit “unfairness,” except when the unfairness is due to prohibited discrimination. In this case, as in many cases involving alleged preselection, there was no evidence that discrimination was a motivating factor.

A word of caution is in order here. Although discrimination was not a factor in this selection action, preselection may, depending on the circumstances, be due to discrimination, or otherwise violate merit principles. Selecting officials should always avoid the appearance of impropriety when making selection or promotion decisions. Such decisions must always be based on reasons that are legitimate, nondiscriminatory, and merit-related.

IX

EEOC AGREES WITH OEDCA AND REVERSES ITS OWN ADMINISTRATIVE JUDGES!

In what is a somewhat rare event, EEOC recently reversed its own administrative judges in three separate cases and agreed with OEDCA that discrimination did not occur. One of those cases, involving an alleged failure by the VA to accommodate a disability, is especially instructive for management and employees alike.

The complainant, an industrial equipment mechanic, alleged, among other things, that the VA discriminated against him due to his physical and mental disabilities in connection with his reassignment to a motor vehicle dispatcher position after he became physically unable to perform his job duties as a mechanic because of an injury that resulted in permanent loss of strength and dexterity in his left hand.



To accommodate the complainant, management offered him reassignment to a lower-paid motor vehicle dispatcher position, as there were no other vacant positions at his grade level for which he was qualified. He accepted the offer, which included pay retention, but a few weeks after starting his new position he began to complain that he was unqualified for and unable to do the job and requested reassignment to a trades helper type of position. Management denied his request, stating that such a position was incompatible with his medical restrictions.

He then requested training for the dispatcher position, which management granted by assigning a driver to work with him for four months. He also claimed he had a reading and writing problem that was interfering with his ability to do the job, so management made arrangements for him to attend reading classes, even though his reading and writing ability was sufficient to perform the essential duties of a dispatcher.

He eventually sought medical attention for job-related stress and anxiety. He alleged that he was experiencing performance problems and that, because of such problems, his coworkers subjected him to taunts and name-calling.³ Although two physicians diagnosed him with depression, he was found to have

normal flow of thought, average intellectual functioning, and moderate ability to concentrate.

Following a hearing, an EEOC administrative judge issued a recommended decision finding that the complainant had both a physical and a mental disability, and that the VA discriminated against him by not providing him with reasonable accommodation. OEDCA rejected the judge's recommended decision, finding instead that the VA met its obligation under the *Rehabilitation Act* to accommodate the complainant.

While OEDCA agreed with the judge that the complainant had a physical disability as a result of his hand injury, it disagreed with the judge's conclusion that the complainant also had a mental disability. Although diagnosed with depression, the complainant was unable to identify any major life activities that were significantly limited by his mental impairment. The mere diagnosis of a medical condition, even one such as depression, is not in itself sufficient to prove the existence of a disability. For a medical condition to constitute a disability, the individual must prove that the impairment significantly limits a major life activity.

In the case of depression, for example, which is often a temporary condition, an individual would have to show significant limitations with respect to major life activities such as thinking, concentrating, and making decisions. The complainant offered no medical evi

³ He refused to release to his supervisor the names of the individuals who were allegedly taunting him.



dence of significant limitations in these activities.

The EEOC judge erroneously determined that the complainant's depression was a disability because it significantly limited his ability to work as a dispatcher. In essence, the judge argued that the job was stressful because the complainant experienced performance problems and was subjected to taunts and name calling by his coworkers because of those performance problems. The stress in turn caused his depression.

OEDCA found, instead, that the complainant's mental condition did not significantly limit his ability to work. At most, it only limited his ability to perform the duties of a dispatcher. In order for a medical impairment to significantly limit the ability to work, there must be a significant restriction in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.

In this case the complainant's mental condition limited his ability to do one particular job. The major life activity of working is not substantially limited simply because an individual cannot work in a particular environment or with a particular supervisor because of anxiety or stress.

Because OEDCA found that the complainant was not an individual with a mental disability, management was un-

der no obligation to accommodate his mental condition.

OEDCA also disagreed with the judge's conclusion that management failed to accommodate the complainant's physical disability. The judge reasoned, again erroneously, that the agency could have accommodated the complainant in his mechanic position. OEDCA disagreed, finding that the essential duties of the mechanic position and the accommodations suggested by the complainant were inconsistent with the complainant's physical restrictions as imposed by his own physician who stated that the complainant could no longer work as a mechanic. These restrictions also precluded him from working in other trades helper type jobs.

In addition, the judge argued, again erroneously, that the agency could have reassigned the complainant to other specified positions; and that the agency failed to prove either that he was unqualified for reassignment to those positions, or that such reassignments would have caused an undue hardship. Aside from the fact that there were no such vacant positions, OEDCA pointed out that the agency had no legal obligation to do any of the above because the accommodation that it provided - reassignment to the dispatcher position - was reasonable, and that employees are only entitled to a reasonable accommodation; they are not entitled to the accommodation of their choice. Management is not required to ensure that a disabled individual will be satisfied



with a new job, or that the new job will be stress-free.

The complainant argued that reassignment to the dispatcher position was not a reasonable accommodation because he was unqualified for the job and making a lot of mistakes. All of the evidence, however, indicated that the complainant had the necessary skills and abilities, including reading and writing ability, to adequately perform the essential functions of the position, the duties of which were relatively simple in nature. He received “fully successful” performance appraisal ratings and his supervisor stated that he had no problems with the complainant’s performance. The evidence further indicated that whatever difficulties the complainant experienced in that job stemmed from the fact that he was simply frustrated and dissatisfied with the job because of uncooperative drivers and a lack of supervisory authority.

In short, the complainant was qualified for the job to which he was reassigned, and the reassignment reasonably accommodated his physical disability. Management had no obligation to offer him other positions that would have been more to his liking.

X

U.S. SUPREME COURT SHEDS SOME (BUT NOT ENOUGH) LIGHT ON “CONTINUING VIOLATIONS”

The U.S. Supreme Court recently issued a significant decision in a case involving Amtrak⁴ that addresses the timeliness of a claim under the “continuing violation theory.” Although it is a highly technical decision that received little press notice, it is nevertheless significant.

EEO statutes and regulations impose certain time limits within which public and private sector employees must first raise their claims of discrimination. In the Federal sector, employees must first raise the matter with an EEO counselor within 45 calendar days of the alleged discrimination. Except in very limited circumstances, failure to act within that time limit will generally result in dismissal of the complaint for untimeliness. If this happens, the employee forfeits his or her right to have the complaint investigated and adjudicated on its merits. The rationale for strict adherence to time limits is to ensure even-handed administration of the law.

In some cases, however, the courts have developed a theory – the “continuing violation theory” – that, in some cases, treats as timely matters that were not raised within the appropriate time limit. The theory is not invoked to waive the time limit for a matter not timely raised. To do that good cause must be shown, and showing good cause is difficult under standards established by the courts

⁴ *National R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 88 Fair Emp. Prac. Cases 1601 (2002) (the “Amtrak Case”)



and the EEOC's complaint regulations.⁵ Instead, what the theory does, in applicable cases, is find that the matter was timely raised, even if it occurred more than 45 days before initial contact with the EEO counselor.

Courts developed the theory to deal with situations in which the alleged "act of discrimination" does not occur on a specific date, but rather, is ongoing. Sexual harassment, for example, usually involves repeated acts of misconduct or inappropriate behavior occurring over time and resulting in a hostile work environment. Each individual act, by itself, might not be sufficient to adversely affect the employee's working conditions and, hence, might not provide sufficient ground for filing a complaint. Over time, however, the cumulative effect of the individual acts have a significant adverse impact on the employee's working conditions, thus providing sufficient ground for filing a complaint. In such cases, acts that did not occur within the regulatory time limit (*i.e.*, within 45 days of seeing the EEO counselor) are nevertheless considered an integral and inseparable part of the whole claim, and therefore included in the claim, **provided there is at least one related act that occurred within that time limit**. If no act occurred within the time limit, the entire complaint is untimely and subject to dismissal unless

⁵ Common excuses for delays, such as "I forgot", or "I was just too busy", or "I've been too stressed out lately" do not constitute good cause. On the other hand, evidence that the employer misled the employee about the time limit would constitute good cause.

good cause is shown for the delay.

The "continuing violation" theory has always been much easier to describe than apply, especially since the courts and the EEOC have used different criteria or definitions when applying the theory to specific cases, and because the same fact-finding bodies have often applied the theory inconsistently, even in factually similar cases. Lower court judges frequently use words like "complex" and "diffuse" to describe the theory.

Adding to the confusion is the fact that many so-called "hostile environment" claims do not involve acts of misconduct or inappropriate behavior, and the employee is invoking the theory simply in the hope of avoiding dismissal of some of the issues in the complaint for untimeliness.

For example, if the complaint is about a series of competitive nonpromotions, employees frequently invoke the theory in an attempt to challenge every nonselection or nonpromotion during their career with the VA, no matter how far back in time those events occurred. They also invoke it whenever they are claiming ongoing "harassment" by their supervisor in an attempt to include a multitude of personnel actions or other work-related events that occurred months or even years earlier. Lawyers who represent businesses and government agencies have long argued that the frequency with which the theory is invoked and applied has rendered mean



ingless the regulatory and statutory time limits for filing and unfairly requires employers to defend actions that may have occurred years earlier and for which relevant evidence is no longer available.

Fortunately, the Supreme Court's decision in the Amtrak case eliminates some of the confusion surrounding the theory. Unfortunately, it leaves several questions unanswered.

The Court's decision did answer one significant question dealing with so-called "serial violations." Contrary to the rule set out in the EEOC's Compliance Manual, the continuing violation theory does not apply to a series of discrete acts, even if the untimely acts are related to the timely acts. Thus, under the Court's decision, the theory will no longer be applied to the serial nonpromotion case described above. Nonpromotions that are not timely raised with a counselor must be dismissed unless there is good cause shown to waive the time limit.⁶ This is true even if the timely and untimely actions are related because they involve the same selecting official and the same job or types of jobs.

The Court also made clear that the continuing violation theory does apply to hostile environment claims, also commonly referred to as "harassment" claims. Unlike cases involving discrete

acts, which occur on a specific date and are independently actionable without the need for repeated conduct (*e.g.*, nonpromotions, refusal to hire, discipline, terminations, *etc.*), hostile environment claims involve, by their very nature, repeated acts, some or all of which may not, by themselves, be independently actionable. Thus, for example, while one incident involving a racially offensive comment would generally not suffice to state a claim of racial harassment, a multitude of such comments directed at an individual over a period of time would provide sufficient ground for a complaint.

What is not entirely clear from the Court's decision is whether the continuing violation theory will apply in all "harassment" claims. The theory will obviously apply to sexual harassment claims based on alleged sexual misconduct; and to racial harassment claims based in whole or in part on alleged racially derogatory slurs, jokes, or acts. Racially derogatory comments, ridicule, and jokes contributed to the hostile environment in the Amtrak case. The theory will also certainly apply to other types of harassment claims where the allegations include comments or acts that insult or denigrate individuals because of their national origin, age, religion, disability, *etc.* All of these claims have one thing in common - acts of misconduct or inappropriate behavior clearly related to a prohibited factor for which some form of punishment or other corrective action would be justified.

⁶ Even if they are dismissed, they may be considered as background evidence relating to the timely claim(s).



Fortunately, employees file relatively few of these claims because this type of misconduct or behavior is the rare exception rather than the rule; and when it does occur, it usually involves sexual harassment.

Not all “harassment” complaints, however, allege acts of misconduct or inappropriate behavior. Employees often file complaints claiming simply that they have been aggrieved by a series of job-related actions extending back to their first day on the job. They typically allege that they have been continuously “harassed” with respect to matters such as work assignments, duty hours, training, office location, *etc.* Moreover, they attribute such harassment to their race, gender, age, or other prohibited factor, although they allege no specific act of misconduct or behavior relating to those protected categories. For example, an employee might allege that everything that has happened to him on the job during the last four years constitutes harassment due to his national origin, even though he fails to allege any derogatory comments or other behavior or acts relating to his national origin.

Because these types of complaints often involve “discrete acts” that may have occurred months or even years earlier, the question that arises is whether the employee should be permitted to challenge those discrete acts – acts that would ordinarily be subject to dismissal for untimeliness in a disparate treatment claim – simply by including the words

“harassment” or “hostile environment” in the complaint?

If the answer to that question is no, then what about retaliatory harassment complaints, *i.e.*, claims alleging repeated acts of retaliation against an employee for engaging in EEO protected activity? Such complaints, by their nature, generally do not involve acts of misconduct or inappropriate behavior related to a protected category. The EEOC recognizes claims of retaliatory harassment and typically requires agencies to accept and investigate untimely allegations in other types of “harassment” claims despite the absence of evidence or allegations of misconduct or inappropriate behavior.

Unfortunately, the Supreme Court’s decision in the *Amtrak* case provides no clear answer to these questions, although the facts of the case and some of the language in the decision clearly suggest that evidence, or at least allegations, of misconduct or inappropriate behavior related to a protected category are required to state a claim of hostile environment.

Both the EEOC and the courts will undoubtedly be addressing these and other questions generated by the Court’s ruling in future cases.

