



OEDCA DIGEST



Vol. X,
No. 1

Department of Veterans Affairs
Washington, DC

Winter
2007

***SUMMARIES OF SELECTED DECISIONS ISSUED BY THE OFFICE OF
EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION***

FROM THE DIRECTOR

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

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include "EEO protected Activity", inadequate legal representation at hearings, disparate impact due to age discrimination, mental impairments, reasonable accommodation in back injury cases, omission of names from promotion eligibility certificates, and same-sex urine screens -- the "BFOQ" exception. Also included in this issue is EEOC's recent guidance on blindness and visual impairments in the workplace.

In response to user requests, the *OEDCA Digest* now contains a comprehensive cumulative index.

The *OEDCA DIGEST* appears on the internet at: <http://www.va.gov/orm/oedca.asp> and on the intranet at <http://vaww.va.gov/orm/oedca.htm>.

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I

“AA” MEETINGS NOT PROTECTED ACTIVITY FOR PURPOSES OF REPRISAL CLAIM.

A regional office employee recently filed an EEO complaint alleging, among other things, that her supervisor was harassing her in retaliation for her prior EEO protected activity. She cited 15 incidents or events as evidence of the alleged harassment against her.

When asked to provide evidence of the prior EEO protected activity upon which she based her reprisal claim, the complainant stated that she attends *Alcoholics Anonymous* (AA) meetings, and that she once asked her supervisor to attend meetings with her. She claims that ever since inviting her supervisor to attend meetings with her, he has engaged in a pattern of harassment against her that has created a hostile and abusive work environment.

Without holding a hearing, an EEOC administrative judge issued a decision in favor of the Department. First, the judge found that the incidents complained of either did not occur or, if they did occur, were not severe or pervasive enough to rise to the level of harassment, as that term is defined in the law.

Next, the judge ruled that even if the harassment did occur as alleged, the reprisal claim would still fail, as the

complainant failed to establish even a *prima facie* case of reprisal. Specifically, the judge found that she failed to show that she had engaged in EEO protected activity prior to the occurrence of the complained of events.

In explaining her ruling, the judge noted – correctly – that attendance at “AA” meetings is not EEO protected activity. Likewise, inviting her supervisor to attend meetings with her was not EEO protected activity. EEO protected activity involves either “participation” in any stage of administrative or judicial proceedings in which claims of unlawful discrimination are presented, or activity in “opposition” to prohibited discrimination. “Opposition” may include a variety of activities such as boycotts, protests, picketing, community involvement in civil rights organizations and activities, and complaints about, or contact with, officials concerning discrimination.

The complainant’s AA activities involved neither “participation” nor “opposition” activity. Hence, her reprisal claim failed.

II

ALLEGED INADEQUATE LEGAL REPRESENTATION NOT GROUNDS FOR NEW HEARING

The following claim is not unusual. Complainants disappointed with the outcome of their complaint occasionally blame their lawyer or other representative. As the following case dem-



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onstrates, such claims are a matter strictly between them and their lawyer.

A complainant requested a hearing before an EEOC administrative judge on her claim of harassment against a regional office supervisor. Despite her request for a hearing, the judge opted to issue a summary judgment (*i.e.*, a decision without a hearing) after concluding that there were neither genuine issues of material fact in dispute, nor any genuine issues as to credibility. The judge's decision found in the Department's favor. The complainant appealed the adverse ruling to the EEOC's Office of Federal Operations (OFO).

On appeal, the complainant alleged, among other things, that her lawyer failed to represent her adequately at the hearing stage, and that the judge's decision should therefore be set aside and her case remanded to the judge for new proceedings. While her claim in this regard was not specific, she appeared to be alleging that her lawyer failed to present evidence to the judge that she claimed was available at the time.

The OFO rejected her appeal, stating that complainants are not allowed a second bite at the apple based on accusations that errors in their case are attributable to their lawyers. The OFO reminded the complainant that she voluntarily chose her attorney, and that she cannot now avoid the consequences of the acts or omissions of that freely selected agent. If an at-

torney's conduct falls substantially below what is reasonable under the circumstances, the client's sole remedy is against the attorney in a malpractice lawsuit.

III

DISPARATE IMPACT DUE TO AGE NOT FOUND WHERE NURSE FAILED MANDATORY "TAKE DOWN" TRAINING

The complainant, 59 years of age at the time, had worked as a nursing assistant for over twenty years in the mental health unit at a VA hospital prior to her reassignment to another unit. The reassignment occurred as a result of her inability to successfully complete the mandatory "Prevention and Management of Disturbed Behavior" training, part of which requires each participant to demonstrate the physical "take-down" techniques taught in the training program.

After being given a second opportunity to demonstrate the proficiency and failing again to do so, she was asked to prepare a list of other units in the hospital where she would be willing to work. She submitted a list and was reassigned to one of the units on her list -- an extended care unit. She thereafter filed a complaint alleging, among other things, that she was discriminated against due to her age when she was reassigned after failing to successfully complete the training program.



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According to the investigation file, the complainant and other mental health nurses were expected to complete this training in the past, but many nurses, including the complainant, either intentionally or unintentionally failed to do so. Following a series of “Code Green” incidents¹ in which not all nurses participated as required, it was determined that patient care had been compromised and at least one staff injury was attributed to the lack of participation. As a result, successful completion of the training became mandatory for all mental health nurses.

After reviewing the evidence, OEDCA concluded that the complainant had failed to establish a *prima facie* case of age discrimination under the disparate treatment theory (*i.e.*, intentional discrimination). In other words, she failed to show that she was treated less favorably than other similarly situated nurses who were younger. All mental health nurses, regardless of age, were required to complete the training. Hence, the complainant’s claim of intentional age discrimination failed.

Although the complainant did not specifically allege the “disparate impact” theory of discrimination, OEDCA examined her complaint under that theory also, as her allegations closely resembled those generally found in a disparate impact claim. In other words, the complainant was alleging, in essence, that the strenuous physical requirements involved in demonstrat-

ing the “take down” procedure had a disproportionately adverse impact on older nurses -- meaning nurses her age or older.

According to the record, although some younger nurses also failed the test, four out of five (80%) of the mental health nurses as old as or older than the complainant failed the test. Thus the “take down” requirement had a disproportionate impact on older nurses. The complainant therefore established a *prima facie* case of age discrimination under the disparate impact theory.

The burden that normally shifts to management in a disparate impact claim requires a showing that the practice or policy at issue is job-related for the position in question and justified by business necessity. If the employer makes such a showing, the employee may still prevail by showing that the employer refuses to adopt an alternative practice or policy that would have less of an adverse impact.

In age discrimination claims, however, the U.S. Supreme Court has held that the burden on the employer is not as onerous as in other types of impact claims. If an employee establishes a *prima facie* case of disparate impact due to age, the burden on the employer is simply to show that the policy or practice “is based on a reasonable factor other than age.” If the employer makes such a showing, the employer prevails, even if there exists an alternative means that would have less of an adverse impact.

¹ The code used for response procedures involving behavioral emergencies.



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In this case, OEDCA found that the ability to demonstrate the “take-down” procedure for mental health nurses was “reasonable” in light of the nature of the position and the previous problems encountered in the mental health unit involving Code Greens. OEDCA further found that the requirement was based on a “factor other than age.” Hence, the complainant failed to establish that she was discriminated against due to her age under the disparate impact theory.

IV

POLICE OFFICER’S REASSIGNMENT NOT DUE TO PERCEIVED MENTAL DISABILITY

Pursuant to a January 2000 VA directive requiring all VA police officers to carry a firearm, the complainant received notice that he would be required to complete a written psychological assessment to determine his suitability. The record shows that this requirement applied to all officers.

After reviewing the complainant’s written assessment, a contract psychologist determined that he should undergo further testing, including an interview. She administered a standardized psychological test and interviewed the complainant, after which she submitted a written report.

Her report contained a recommendation that the complainant was not psychologically suited for an armed police officer position because of con-

cerns about his unusual behaviors (refusing to sit in a chair where someone’s body heat remains), stress and frustration tolerance, poor employment history, problem-solving skills, poor judgment, and ability to behave responsibly.

Based on that report, management reassigned the complainant from his Police Officer position to a position as a Program Assistant, despite receiving a second report from the complainant’s psychologist indicating that the complainant had no personality disorders, and was suitable for retention as an armed Police Officer.

In response to his reassignment, the complainant filed a claim alleging that the reassignment was due, in part, to disability discrimination. Specifically, he argued that while he did not have a mental disability, a Medical Standards Board nevertheless perceived him as having a mental disability. An EEOC administrative judge disagreed and found no violation of the Rehabilitation Act.

In reaching his conclusion, the EEOC judge noted that the law defines a disabled individual as one who (1) has a physical or mental impairment that substantially limits one or more of such person’s major life activities, (2) has a “record of” such an impairment, or (3) “is regarded as” having such an impairment.

An individual is “regarded as” being disabled if (1) the individual has a medical impairment that is not sub-



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stantially limiting but is perceived by the employer as constituting a substantially limiting impairment; or (2) the individual has an impairment that is substantially limiting because of the attitudes of others toward the impairment, or (3) the individual has no impairment at all, but is regarded by the employer as having a substantially limiting impairment.

Based on the medical evidence of record, the EEOC judge concluded that the complainant did not have a medical impairment and further, that management officials did not perceive the complainant as having a medical impairment. While they did perceive him as having problems with judgment, stress and frustration tolerance, and unusual and irresponsible behavior, these personality traits and issues are not mental impairments as defined by *The Rehabilitation Act* (i.e., mental or psychological disorders, such as retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.)

The psychological assessment reports presented to the Medical Board did not conclude or even suggest that the complainant had a mental or psychological disorder. In fact, the reports indicated that his personality traits were not sufficient to warrant a diagnosis of personality disorder.

Hence, while the complainant's personality traits called into question his suitability to serve as an armed law enforcement officer; there was no evidence that he was perceived as having

a substantially limiting mental impairment.

V

MANAGEMENT'S ACTIONS FOUND IN COMPLIANCE WITH "THE REHABILITATION ACT"

The complainant worked as a Pharmacy Technician. Several years prior to being hired, he had injured his back in a construction accident. Since the injury, periods of prolonged standing have aggravated the injury and caused back pain.

The essential functions of a pharmacy technician include filling prescriptions, tending to inventory, answering the phone, inputting refill orders, stocking the inventory, performing inspections, taking care of the crash carts, delivering medications to the wards, and inputting the mail.

Of these, the primary function is filling prescriptions, which requires standing at a counter and serving customers between 7 to 8 hours each day. It also requires walking to places where the meds are stored, and to kneel, bend, stoop, and/or twist the body in order to retrieve the prescribed medicine. One function, the inputting of mail, can be accomplished entirely while seated, but it requires a relatively short period of time to complete.

Prior to 1999, there was sufficient pharmacy staff to permit the com-



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plainant to vary his duties between filling prescriptions and performing other pharmacy tasks. His total time spent filling prescriptions on most days was 3 to 3½ hours.

In December 1999, there was a reduction in pharmacy staff, resulting in fewer technicians to fill prescriptions. As a result, the complainant was directed to fill prescriptions on an almost full-time basis, averaging about 7 hours per day. He soon began to experience back pain.

In January 2000, he aggravated his back injury while on the job. He thereafter informed his supervisor that prolonged standing was causing him pain and requested an accommodation that would allow him to perform other duties that did not require standing. The supervisor informed him that he had to provide a statement from his physician specifying his work restrictions in order to be accommodated. The complainant's chiropractor provided a statement indicating the complainant could not lift over five pounds, stand for more than 15 minutes every two hours, climb, twist, stoop, or reach above the shoulder.

In February 2000, the complainant filed a claim with the Office of Worker's Compensation (OWCP) for his on-the-job injury. In accordance with standard practice, management placed the complainant on temporary light duty as a telephone operator in the file room, pending the OWCP determination. When OWCP denied his

claim in June 2000, management notified him that his light duty status would end on July 1, 2000. Because of his medical restrictions, he was not allowed to return to work until he provided a medical release from his provider.

The complainant provided the requested release in August 2000, along with an accommodation request. The medical release stated that he could work a full day as a pharmacy technician, provided he limit standing to four hours per day. The accommodation request involved lowering the height of the counter, and providing a shock-absorbing mat and a chair that allowed him to sit when dispensing prescriptions. Management granted the request and the complainant returned to full-time duty in the pharmacy. He was now able to perform all of the essential functions of his position within his prescribed medical restrictions.

The complainant nevertheless filed a disability complaint alleging a failure to accommodate him in his pharmacy technician position, beginning in January 2000. Following a hearing, an EEOC judge ruled against the complainant, finding that the Department's actions did not violate *The Rehabilitation Act*.

The judge correctly noted that prior to August 2000, the complainant could not establish even a *prima facie* case of disability discrimination, as he was not a "qualified individual with a disability", meaning that he could not,



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even with an accommodation, perform all of the essential functions of the pharmacy technician position. Aside from standing, the essential duties of the position (for example -- medication retrieval) require frequent bending, stooping, lifting, and reaching above the shoulders, none of which he was medically permitted to do. As he was not a “qualified individual with a disability” during that time frame, he was not entitled to a reasonable accommodation.

Beginning in August 2000, with the submission of a medical release, the complainant was now a “qualified individual with a disability”, in that he could now perform all of the essential functions of his position with a reasonable accommodation,--*i.e.*, a lower counter and use of a chair enabling him to sit while prescribing medications. Because he was now able to perform all of the essential functions of his position, the accommodation was effective and complied with the requirements of *The Rehabilitation Act*.

The complainant argued that, at the very least, he was not accommodated during the period between his removal from light duty on July 1, 2000, and the granting of his accommodation request in August 2000. Again the EEOC judge disagreed, noting correctly that during this time frame management was properly engaged in the “interactive process”; *i.e.*, in determining the complainant’s current medical status and need for accommodation. The time frame in question

was short and management acted promptly and appropriately as soon as it received the medical information and accommodation request.

VI

OMISSION OF APPLICANT’S NAME FROM CERTIFICATE OF ELIGIBLES NOT DUE TO DISCRIMINATION

The following case illustrates the fact that not every clerical or administrative error has a discriminatory motive behind it.

The complainant applied for an Information Technologist position. His application was complete and otherwise satisfied all vacancy announcement requirements, and although he was sufficiently qualified to be eligible for consideration, an HR specialist omitted his name from the “Certificate of Eligibles” forwarded to the selecting official. The selecting official chose an individual from among the names appearing on the certificate. When the complainant learned what had happened, he filed an EEO complaint alleging race discrimination and reprisal.

The HR specialist testified that the complainant was indeed sufficiently qualified and eligible for consideration, and that the omission of his name from the certificate was an inadvertent, administrative error. The HR specialist denied that discrimination motivated the omission. He fur-



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ther testified that he did not know the complainant, was not aware of his race, and had no knowledge of any prior EEO activity by the complainant.

After reviewing the evidence, OEDCA issued a final agency decision (FAD) finding no discrimination or reprisal. The complainant offered no evidence refuting the HR specialist's testimony that the omission was simply an error, and presented no other evidence that might point to a discriminatory motive.

Errors such as the one in this case, while not frequent, do occasionally occur. However, as seen above, the likelihood of prevailing on a discrimination complaint is slim if the HR specialist does not know the complainant – which is typically the case – and where there is no other evidence of a discriminatory motive.

VII

EEOC UPHOLDS APPEAL FILED BY OEDCA IN SAME-SEX URINE SCREEN CASE

In a highly significant ruling, the EEOC appellate division recently reversed one of its own judges and instead upheld OEDCA's rejection and appeal of an EEOC judge's ruling that a same-sex urine screen policy at a VA medical facility was discriminatory on its face and did not fall within the "bona fide occupational qualification" exception ("BFOQ").

The material facts of the case were not in dispute. A female health tech complained to management about a male patient behaving inappropriately while she was observing him provide a urine sample. The incident occurred at a Medical Center Domiciliary. The mission of the Domiciliary is (1) to provide short-term rehab for patients with chemical addiction problems, PTSD, traumatic brain injury, and patients who are homeless, and (2) to provide long-term maintenance care for patients with a history of psychiatric and medical problems.

Patients admitted to the chemical addiction program must agree in writing to remain alcohol and substance-free and submit to regular testing, which includes providing urine samples in the presence of a health tech. The health tech is required to observe the flow of the urine into the specimen bottle. Without such observation, the testing would have little meaning.

Because of the health tech's complaint about the male patient's behavior during the screen, the facility formed the "Urine Specimen Collection Workgroup" for the purpose of making recommendations as to policies and procedures for the collection of urine samples, with specific regard to the patient's privacy and confidentiality. In its Final Report, the workgroup recommended, among other things, a same-sex policy for urine screens; *i.e.*, restricting health techs from taking a urine sample from a patient of a different gender. The workgroup's rationale for the policy was to "safeguard



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patient rights and staff safety when conducting [urine screens].”

As most of the patients at the facility were male, the male health techs, at least for while, were required to perform the vast majority of urine sample procedures.² Consequently, they filed a complaint alleging that the same-sex policy discriminated against them on the basis of gender.

An EEOC judge found no material facts in dispute and issued a decision without a hearing in the complainants’ favor. Specifically, the judge found that the gender-based urine collection policy was facially discriminatory and not a “*bona fide* occupational qualification”, as the policy was instituted in response to a sexual harassment complaint by an employee. OEDCA disagreed with the ruling and appealed.

In a well-reasoned decision, the EEOC’s Office of Federal Operations (OFO) agreed with OEDCA that the same-sex policy, while facially discriminatory, fell within the narrow “BFOQ” exception and, hence, did not violate Title VII of the Civil Rights Act. The OFO, citing numerous cases, noted that gender may constitute a BFOQ in certain circumstances, including situations where a patient’s privacy interests are implicated. To establish a BFOQ in cases involving privacy interests, the OFO stated that an employer must (i) assert a factual basis for believing that hiring or using members of one sex would undermine

² Eventually, the facility hired a full-time health tech whose sole function was urine screening.

the privacy interests of patients; (ii) show that those interests are entitled to legal protection, and (iii) that no reasonable alternatives exist to protect those interests other than a gender-based policy.

As for the first test, the OFO cited evidence that some patients had voiced concerns about how their privacy rights were being violated by having female techs observe them while urinating. Some had even refused to give samples to HTs of the opposite sex.

As for the second test, the OFO noted that the Domiciliary’s Operations Manual specifically affords its patients a “right to privacy, personal freedom, and dignity.” Moreover, the OFO cited several court decisions finding that patients have a right to privacy that is entitled to protection under the law.

Finally, the OFO found that the Domiciliary had satisfied the third test because the naked body must be seen in order to view the urine entering the specimen container. Without such observation, the validity of the testing could not be ensured, and the mission and goals of the facility’s program would be compromised. Hence, the same-sex policy was the least restrictive method possible that would ensure both respect for patient privacy rights and furtherance of the institution’s treatment goals.

Rejecting the complainants’ claim that patient privacy interests were not implicated in this case, the OFO cited one court decision that stated:



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“We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”

Although the same-sex policy came into existence as a consequence of an employee’s sexual harassment complaint, that fact was not sufficient to invalidate it, as claimed by the judge, since there was also a factual and legal basis to support it as a BFOQ.

VIII

(The Equal Employment Opportunity Commission has published the following guidance on blindness and visual impairments in the workplace. The guidance is also available at: <http://www.eeoc.gov/facts/blindness.html>)

Questions and Answers about Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act

INTRODUCTION

The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination on the basis of disability. Title I of the ADA makes it unlawful for any employer to discriminate against a qualified applicant or employee because of a disability in any aspect of employment. The ADA covers employers with 15 or more employees, including state and local gov-

ernments. Section 501 of the Rehabilitation Act provides the same protections for federal government employees and applicants. In addition, most states have their own laws prohibiting employment discrimination on the basis of disability. Some of these state laws may apply to smaller employers and provide protections in addition to those available under the ADA.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. This is part of a series of question-and-answer documents addressing particular disabilities in the workplace.⁽¹⁾ It explains how the ADA might apply to job applicants and employees with vision impairments. In particular, this document discusses:

- when a vision impairment is a disability under the ADA;
- under what circumstances an employer may ask an applicant or employee questions about a vision impairment;
- what types of reasonable accommodations employees with visual disabilities may need; and,
- how an employer can prevent harassment of employees with visual disabilities or any other disability.

GENERAL INFORMATION ABOUT VISION IMPAIRMENTS

Estimates vary as to the number of Americans who are blind and visually impaired. According to one estimate,



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approximately 10 million people in the United States are blind or visually impaired.⁽²⁾ Other estimates indicate that one million adults older than the age of 40 are blind, and 2.4 million are visually impaired.⁽³⁾ Over the next 30 years, as the baby-boomer generation ages, the number of adults with vision impairments is expected to double.⁽⁴⁾ Recent figures also indicate that only 46% of working-age adults with vision impairments and 32% of legally blind working-age adults are employed.⁽⁵⁾

The Centers for Disease Control and Prevention (CDC) define "vision impairment" to mean that a person's eyesight cannot be corrected to a "normal level."⁽⁶⁾ Vision impairment may result in a loss of visual acuity, where an individual does not see objects as clearly as the average person, and/or in a loss of visual field, meaning that an individual cannot see as wide an area as the average person without moving the eyes or turning the head. There are varying degrees of vision impairments, and the terms used to describe them are not always consistent. The CDC and the World Health Organization define low vision as a visual acuity between 20/70 and 20/400 with the best possible correction, or a visual field of 20 degrees or less.⁽⁷⁾ Blindness is described as a visual acuity worse than 20/400 with the best possible correction, or a visual field of 10 degrees or less. In the United States, the term "legally blind," means a visual acuity of 20/200 or worse with the best possible correction, or a visual field of 20 degrees or less. Although there are varying de-

grees of vision impairments, the visual problems an individual faces cannot be described simply by the numbers; some people can see better than others with the same visual acuity.⁽⁸⁾

There are many possible causes for vision impairment, including damage to the eye and the failure of the brain to interpret messages from the eyes correctly. The most common causes of vision impairment in American adults are: diabetic retinopathy,⁽⁹⁾ age-related macular degeneration,⁽¹⁰⁾ cataracts,⁽¹¹⁾ and glaucoma.⁽¹²⁾ Additionally, many individuals have monocular vision - perfect or nearly perfect vision in one eye, but little or no vision in the other. Vision impairment can occur at any time in life, but as a person's age increases, so does the likelihood that he or she will have some form of vision impairment.⁽¹³⁾

Persons with vision impairments successfully perform a wide range of jobs and can be dependable workers. Yet, many employers still automatically exclude them from certain positions based on generalizations about vision impairments and false assumptions that it would be too expensive, or perhaps even too dangerous, to employ them. Thus, employers may erroneously assume that any accommodation that would allow a person with a vision impairment to do her job would be too costly. Employers also may have liability concerns related to the fear of accidents and/or injuries.

1. When is a vision impairment a disability under the ADA?



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A vision impairment is a disability if: (1) it substantially limits a major life activity; (2) it was substantially limiting in the past (i.e., if an individual has a "record of" a substantially limiting impairment); or (3) an employer "regards" or treats an individual as having a substantially limiting vision impairment. Major life activities are those basic activities, including seeing, that an average person can perform with little or no difficulty.

Whether a vision impairment actually substantially limits a major life activity depends on how significant the visual loss is. While a person who has no sight at all is obviously substantially limited in seeing, the assessment of most vision impairments requires a more individualized approach. Although mitigating measures that the individual uses, such as corrective lenses and compensatory strategies that the body has developed, must be taken into account, they do not automatically exclude someone from coverage under the first part of the ADA's definition of "disability."

Example 1: An individual with a vision impairment wears eyeglasses, but they improve his poor vision only slightly. Even with eyeglasses, he cannot drive and needs strong magnification to read standard-sized print. This individual is substantially limited in seeing.

Mitigating measures do not include devices, reasonable accommodations, or compensatory strategies that sim-

ply compensate for the fact that an individual is substantially limited in seeing. For example, a totally blind person still meets the ADA's first definition of "disability" even if she can move about freely with the use of a white cane or service animal, can work with assistive technology or a reader, and can use her hearing to do what others can do using sight (e.g., cross a street).

Individuals with monocular vision also may meet the ADA's first definition of disability.⁽¹⁴⁾

Example 2: An individual lost all of his sight in one eye as the result of an accident several years ago. He has learned some compensatory strategies, such as turning his head slightly to adjust for his loss of visual field and using shadows, highlights, and other visual cues to judge longer distances. However, he has loss of both peripheral vision and stereopsis (the ability to combine two retinal images into one that people with vision in both eyes accomplish easily). The loss of peripheral vision means that he is limited in seeing people or objects on his blind side and must position himself accordingly in meetings, theaters, or while walking down the street. Because he cannot see people approaching or standing on that side, he must rely on his hearing to detect that someone is near him and then must turn his head to see the person. The loss of stereopsis means that he has difficulty judging distances within a six-foot range, and thus cannot use his vision to guide him in reaching for objects or putting



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objects down on a table or other surface. Because of his lack of stereopsis, he must rely on memory or the sense of touch rather than vision to guide him in picking up and placing objects such as tools, pots and pans, books and pens. Similarly, he must rely on memory and tactile clues to negotiate stairs and stepping on and off curbs. All such tasks are more difficult for him because of his loss of vision and take him longer to perform than they take the average person. This individual still is substantially limited in seeing, despite the use of compensatory strategies such as using hearing, touch, or memory to substitute for his lack of vision in one eye.

Some individuals with monocular vision have learned to compensate visually (e.g., by turning their head or using "monocular cues," such as shadows and highlights, to judge distances) effectively enough that they no longer are substantially limited. These individuals (as well as many others), however, still may meet one of the ADA's other definitions of disability.

A person who has a record of an impairment that substantially limited a major life activity in the past or who is regarded by his employer as having such an impairment also has a disability and, therefore, is covered by the ADA. Although the second part of the definition -- having a record of a substantially limiting impairment -- does not apply frequently to individuals with vision impairments, examples of when it might apply would include situations in which someone's vision has been corrected surgically, or when an individual with monocular vision

that was once substantially limiting has developed compensatory strategies over time.

Being "regarded as" substantially limited in seeing is a more common basis for coverage.

Example 3: As part of the hiring process for a manufacturing position, an employer requires a physical exam, including a vision test. An applicant with monocular vision fails the vision test, which requires a minimum of 20/40 vision in the better eye with correction, and no less than 20/100 vision in the weaker eye. The physician who conducted the physical examination recommends to the human resources department that the applicant not be hired, indicating in a notation on the application: "Failed vision test; essentially blind in one eye and lacks depth perception; recommend against hiring for any manufacturing work." In accordance with its typical practice of deferring to the recommendation of the employer's doctor, the human resources department withdraws its offer of employment to the applicant, never assessing whether she can in fact perform the essential functions of the job. If the doctor's statement that the applicant should not be hired for "any manufacturing work" meant that the applicant was unsuitable for manufacturing work generally and not just for a particular job in the employer's plant, the employer will have regarded the applicant as substantially limited in working in a class of jobs.



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OBTAINING AND USING MEDICAL INFORMATION

Job Applicants

Before an Offer of Employment is Made

The ADA limits the medical information that an employer may seek from a job applicant. An employer may not require a job applicant to submit to a medical examination or ask about an applicant's disability before making a job offer. This means, for example, that an employer may not:

- ask about any medical procedures an applicant has had related to her vision (e.g., whether the applicant ever has had eye surgery);
- inquire as to whether the applicant uses any prescription medications, including medications for conditions related to the eye; and
- ask whether an applicant has any condition that may have caused a vision impairment (e.g., whether the applicant has diabetes if the employer suspects that the applicant has retinopathy).

An employer, however, may ask all applicants if they will need a reasonable accommodation for the application process. For example, an employer may include on an application contact information for the person who will handle accommodation requests. Additionally, an employer may ask all

applicants whether they can meet job-related requirements and may conduct non-medical tests that require the use of vision and that measure the applicant's ability to perform job-related functions.

Example 4: An employer who runs a warehouse may ask all applicants if they can read the labels on products so that they can be stocked in the appropriate places, or may ask each applicant to demonstrate that he or she can perform this function.

2. Are there ever situations in which an employer may ask about an applicant's visual disability before making a job offer?

Yes. If a disability is obvious (or if an applicant discloses that she has a visual disability) and an employer reasonably believes the applicant will require a reasonable accommodation to perform the job, the employer may ask whether the applicant will need a reasonable accommodation and, if so, what type.

Example 5: A woman appears with her guide dog for an interview for a job as a school principal. The position requires significant reading. Because her vision impairment is obvious, the employer may ask her if an accommodation will be needed to perform functions that involve reading and, if so, what type.

An employer also may ask a person with a non-obvious vision impairment who requests a reasonable accommo-



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dation for the application process to provide documentation demonstrating that the condition is a disability and that the accommodation is necessary. (*For more information about an employer's right to request reasonable documentation, see Question 12, below.*)

After an Offer of Employment is Made

3. May an employer ask about an applicant's vision impairments or conduct medical examinations to test vision after making a job offer?

Yes. Once the employer has made a job offer, it may ask questions about the applicant's health (including questions about whether the applicant has a visual disability) and may ask for, or require, a medical examination, as long as all applicants for the same type of position are treated the same (*i.e.*, all applicants are asked the same questions and are subject to the same examination). The job offer must be "real," meaning that the employer has obtained and evaluated all non-medical information that was reasonably available before making the offer.

If an employer learns from a post-offer inquiry or medical examination that an applicant has a vision impairment, it may ask medically related follow-up questions or may conduct medically-related examinations. An employer may not withdraw an offer from a person whose vision impairment is a disability, however, unless it can demon-

strate that the applicant is unable to perform the essential functions of the position, with or without a reasonable accommodation, or that the applicant will pose a direct threat to safety. (*For more information on "direct threat," see Question 15, below.*)

Example 6: A county sheriff with monocular vision applied for a position with the state police as a criminal investigator. He was highly qualified for the job and was conditionally offered a position pending qualification under the state police department's medical criteria for criminal investigators. The doctor who conducted the medical examination of the applicant determined that because of his monocular vision he did not meet the state's standards, and the conditional offer of employment was withdrawn. The state police department did not violate the ADA by requiring the medical exam. However, if the applicant's monocular vision is a disability, the department must be prepared to show that the applicant was unable to do the essential functions of the job, with or without a reasonable accommodation, or that he would have posed a direct threat if he had been hired.

Employees

4. When may an employer ask an employee questions or require a medical examination related to the employee's vision impairment?

The ADA strictly limits the circumstances under which an employer may



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ask questions about an employee's medical condition or require the employee to undergo a medical examination. Generally, an employer may ask an employee for medical information if the employer has reason to believe that: (1) there is a medical explanation for some change in the employee's job performance; or (2) the employee's medical condition may pose a direct threat to safety. (*For other situations in which an employer may ask about an employee's vision impairments, see Question 5, below.*)

Example 7: A data entry clerk has recently been making numerous errors when entering information into the employer's computer system. For example, he seems to be confusing the numbers 1, 7, and 9. The clerk's supervisor also has begun to see the clerk rubbing his eyes frequently and looking more closely at both his computer screen and printed materials. The employer has a reasonable belief based on objective evidence that the clerk's performance problems are related to a medical condition (i.e., an eye problem) and, therefore, may ask for medical information.

Poor job performance, however, often is unrelated to a medical condition and, therefore, should generally be handled in accordance with an employer's existing policies concerning performance.

Example 8: A receptionist, with a known degenerative eye condition, has not been answering all the calls that come in to the office in her usual

friendly manner. The employer may counsel the receptionist about how she answers the phone, but may not ask her questions about her eye condition unless there is evidence that this may be the reason for her changed demeanor.

5. Are there other instances when an employer may ask an employee about a vision impairment?

Yes. An employer may ask an employee with a non-obvious vision impairment who has requested a reasonable accommodation for documentation demonstrating that he has a disability and needs the accommodation. (*See Question 12, below.*)

In addition, an employer may ask an employee with a vision impairment to justify the use of sick leave by providing a doctor's note or other explanation, as long as it requires all employees to do so.

Example 9: An employer's leave policy requires all employees who are absent because of a medical appointment to submit a note from their doctor verifying the appointment. An employee who uses sick leave for an ophthalmologic examination must submit a note to this effect from her doctor in accordance with the policy. However, the employer may not require that the note include information about the results of the examination, or a statement about the employee's diagnosis or treatment (if any).



Finally, medical information about a vision impairment may be collected and an eye examination may be conducted as part of an employer's voluntary wellness program. For example, an employer may offer a voluntary annual screening for glaucoma so that employees can promptly obtain treatment where necessary. A wellness program is voluntary if an employee is neither required to participate, nor penalized for non-participation.⁽¹⁵⁾

Keeping Medical Information Confidential

An employer must keep all medical information separate from general personnel files and treat it as a separate, confidential medical record. Issues regarding confidentiality more frequently arise in regard to non-obvious conditions; however, even if the impairment is obvious, information about it must be kept confidential.

Example 10: Most of the paralegals in a large firm have outdated computer monitors. A paralegal who is on medication for a disability that causes vision problems requests, and is given, a new monitor with a special program that allows her to see the screen better. If the other paralegals ask why she has a new screen and they do not, the employer may not divulge any information about her impairment, including the fact that the monitor is a reasonable accommodation.

6. Are there any exceptions to the ADA's confidentiality require-

ments that might justify disclosing information about an employee's vision impairment?

Yes. Information that is otherwise confidential under the ADA may be disclosed:

- to supervisors and managers who need the information in order to provide a reasonable accommodation or to meet the employee's work restrictions;
- to first aid and safety personnel if the employee would need emergency treatment or other assistance in the event of an emergency (e.g., in case of a fire), because of his vision impairment;
- to officials who are investigating compliance with the ADA and similar state or local laws;
- to state workers' compensation offices or workers' compensation insurance carriers in accordance with state workers' compensation laws; or
- for insurance purposes.

ACCOMMODATING INDIVIDUALS WITH VISUAL DISABILITIES

An accommodation is any modification or adjustment to a job or work environment that will permit a qualified individual with a disability to apply for a job, to perform a job's essential functions (i.e., fundamental duties), or to enjoy equal benefits and privileges of employment. Under the ADA, employers must provide reasonable accommodations to the known physical



or mental limitations of persons with disabilities. Generally, an individual with a disability must request a reasonable accommodation before an employer will have an obligation to provide one. Once an accommodation has been requested, an employer should engage in an interactive process to determine whether an individual has a disability that requires an accommodation and, if so, must make a reasonable effort to determine the appropriate accommodation. Accommodations vary depending on the needs of the person with the disability.

7. What types of reasonable accommodations may people with visual disabilities need?

People with visual disabilities may need one or more of the following accommodations:

- Assistive technology, including:

A closed circuit television system (CCTV) for reading printed materials

An external computer screen magnifier

Cassette or digital recorders

- Software that will read information on the computer screen
- An optical scanner that can create documents in electronic form from printed ones
- Written materials in an accessible format, such as in large print, Braille, audio cassette, or computer disk
- Modification of employer policies to allow use of a guide dog in the workplace

- Modification of an employment test
- A reader
- A driver or payment for the cost of transportation to enable performance of essential functions
- An accessible website
- Modified training or training in the use of assistive technology

Example 11: An employer has decided to upgrade its computer programs. In order to teach its staff about the new systems, it has set up five "hands-on" training classes in which groups of employees will be shown how to execute various functions using the new software and then will have an opportunity to complete a series of exercises using those functions with guidance from the instructor. Most of the demonstrations and exercises will involve use of a computer mouse to execute functions. A blind employee who uses a screen reading program is unable to use a computer mouse effectively and will require individualized instruction that will enable her to learn how to perform necessary functions using keyboard commands.

- A modified work schedule

Example 12: A blind employee does not have easy access to public transportation and must rely on paratransit service to get to work most mornings. He asks that, on days when his ride to work arrives after the employer's usual 8:30 a.m. start time, he be allowed to work later in the evening to make up the time rather than being required to take annual leave or face



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discipline for tardiness. The employer must grant this accommodation as long as it would not result in undue hardship.

- Time off, in the form of accrued paid leave or unpaid leave if paid leave has been exhausted or is unavailable

Example 13: An employer provides a total of three weeks of leave (sick and annual leave) per employee each year. An employee with a degenerative eye condition has, over time, lost most of her vision and has decided to start using a guide dog. Training the guide dog will require her to attend a six-week residential program. Although the six weeks of leave that are needed exceed the amount of leave provided to each employee, the employer must provide additional unpaid leave as a reasonable accommodation, absent undue hardship. The same rule would apply if the employee needs time off for treatment related to a visual disability.

- Reassignment to a vacant position

Example 14: A city police officer is shot and blinded during an attempt to stop a robbery. He no longer is able to perform his job as a police officer, but he is qualified for a vacant 9-1-1 emergency operator position. The job pays less than a police officer, but it is the closest vacant position in terms of pay, status, and benefits for which the officer is qualified. The city must reassign the officer to the 9-1-1 emergency

operator position as a reasonable accommodation.

Although these represent some examples of the types of accommodations commonly requested by applicants or employees with visual disabilities, other employees may need different changes or adjustments.⁽¹⁶⁾ Further, although a particular accommodation may work for one person, an employer should not assume that the same accommodation will work for another person with the same apparent visual disability.

8. What kinds of reasonable accommodations are related to the "benefits and privileges" of employment?

Reasonable accommodations related to the "benefits and privileges" of employment include accommodations that are necessary to provide individuals with disabilities access to facilities or portions of facilities to which all employees are granted access (*e.g.*, employee break rooms and cafeterias), access to information communicated in the workplace, and the opportunity to participate in employer-sponsored training and social events.

Example 15: An employer offers employees opportunities to accept six-month assignments to jobs outside of their work group or department. The temporary assignments are considered valuable training opportunities that can lead to employee advancement. An employee with a visual disability, who has worked successfully in her current



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position with only slight modifications to her computer equipment, requests a temporary assignment to a position that will involve considerably more reading and asks that a part-time reader be provided. The employer may not deny the temporary assignment because of the need to make a reasonable accommodation, but must provide a reader or some other effective accommodation if this would not result in undue hardship.

Example 16: An employer typically posts job openings on bulletin boards. An employee with a visual disability requests that electronic notices of all job postings be emailed to him so that he will have timely notice of the postings. Unless this would result in undue hardship, the employer must provide this accommodation.

Example 17: An employer holds a retirement party for a long-time employee. The event includes a dinner and various presentations by the employee's co-workers and company management. A formal program is printed for the event, and an employee with a visual disability requests a copy of the program in large print. The employer must provide this accommodation, absent undue hardship.

9. How does a person with a vision impairment request an accommodation?

The request for a reasonable accommodation must be communicated to the employer. However, no magic words (*e.g.*, "reasonable accommoda-

tion" or "ADA") are needed. The request may be made in plain English, orally, or in writing, and it may come from the applicant/employee or from a family member, friend, or other representative.

Example 18: A blind man calls regarding a job opening he heard advertised on the radio. The employer explains that part of the application process is a written exam and part is an in-person interview. The man simply says that he will need some help with the exam because of his impairment. This is a request for a reasonable accommodation.

Example 19: While an employee has been out on extended medical leave for her diabetes, her visual disability has gradually gotten worse. When she returns to work, she presents a note from her doctor stating that she will need "some assistance" in order to perform the essential functions of the job. This is a request for a reasonable accommodation.

10. Does an employer have to grant every request for a reasonable accommodation?

No. An employer does not have to provide a reasonable accommodation if doing so would be an undue hardship. Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense.

In determining whether the provision of a particular accommodation would



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result in undue hardship, an employer should consider not only the cost of the accommodation in relationship to its own resources, but also other resources that may be available in the form of tax incentives or funding from third parties. For example, there are federal tax credits and deductions to help offset the cost of accommodations,⁽¹⁷⁾ and some states may offer similar incentives. Additionally, applicants or employees who are clients of a state's vocational rehabilitation system may be eligible for funding to pay for workplace accommodations. If a requested accommodation is too difficult or expensive, an employer must determine whether there is another easier or less costly accommodation that would meet the employee's needs.

An employer does not have to remove an essential job function (*i.e.*, a fundamental job duty), lower production standards, excuse violations of conduct rules that are job-related and consistent with business necessity, or provide employees with personal use items, such as eyeglasses or other devices that are used both on and off the job.

11. Does an employer have to provide the specific reasonable accommodation the person wants?

No. The employer may choose among different reasonable accommodations as long as the chosen accommodation is effective. Therefore, as part of the interactive process, the employer may offer more than one suggestion for a reasonable accommodation. Where two

possible reasonable accommodations exist, and one costs more or is more burdensome than the other, the employer may choose the less expensive or less burdensome option as long as it is effective. Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. The preference of the person with the disability should be given primary consideration.

Example 20: An editor for a publishing company has a visual disability and needs magnification to read text. She asks the company to hire a full-time reader for her. The employer is able to purchase a computer program that will magnify text on the screen and speak the words to her. If this is cheaper and easier for the employer to do, and allows the editor to do her work just as effectively, then it may be provided as a reasonable accommodation.

Example 21: A blind job applicant requests a reader for an employment test. The employer requires the applicant to take the test in Braille instead, although he has told the employer he is not proficient in Braille. In this situation, because providing the test in Braille is not an effective accommodation, the employer must provide a reader unless to do so would be an undue hardship.

12. May an employer ask for documentation when a person requests a reasonable accommodation because of a vision impairment?



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Sometimes. When a person's vision impairment is not obvious, the employer may ask the person to provide reasonable documentation about how the condition limits major life activities (i.e., whether the person has a disability) and why a reasonable accommodation is needed. The request for documentation must be reasonable. An employer may not ask for information about conditions unrelated to the one for which accommodation has been requested or more information than is necessary for the employer to determine whether an accommodation is needed.

Example 22: A customer service representative with a non-obvious vision impairment requests a larger computer monitor. The employee's ophthalmologist provides a letter describing the employee's impairment and its limitations. The letter explains that the employee cannot drive and can read standard-sized print but only very slowly, for short periods of time, and with considerable effort. The condition is not expected to deteriorate further, but no improvement is expected either. The ophthalmologist concludes that providing some kind of magnification device for the computer or a larger monitor would be helpful. The employee has provided sufficient documentation that his eye condition is an ADA disability and that he needs a reasonable accommodation. The employer may not request further documentation, such as the results of all the tests conducted to diagnose the condition.

13. May an employer be required to provide more than one reasonable accommodation for the same person with a disability?

Yes. Certain individuals with visual disabilities may require only one reasonable accommodation, while others may need more than one. Additionally, because the obligation to provide reasonable accommodation is ongoing, an employer may have to provide a different reasonable accommodation when an employee's needs related to a visual disability or the nature of a job change.

Example 23: An employee who is blind has assistive technology for his computer that works with the employer's network and enables him to send and receive email messages easily. When the employer upgrades computer equipment for all employees, it must provide new or updated assistive technology so that the blind employee will be integrated into the new networks, absent undue hardship.

Example 24: An employee with retinitis pigmentosa, a degenerative eye condition that results, over time, in total or near total blindness, has been able to read printed materials related to her job with a magnifier and some adjustments to the lighting in her work area. When she is no longer able to do this, she asks for a reader. Absent undue hardship, the employer must provide a reader or some other effective accommodation.



14. Is an employer required to provide a reasonable accommodation for a vision impairment that alone does not rise to the level of a disability but results from an underlying disability?

Yes. An employer must accommodate a vision impairment that results from another disability even if the vision impairment is not itself substantially limiting.

Example 25: An applicant with insulin-dependent diabetes has developed a vision impairment. He wants to apply for a job as a hotel concierge. One part of the application process is a written test. Even if his vision problems alone do not rise to the level of a substantial limitation, the employer is required to make accommodations for this employee because his vision impairment results from his diabetes, which is a disability. Accordingly, the employer might allow this applicant more time to take the written portion of the test if that would accommodate his limitation.

SAFETY CONCERNS

15. When may an employer exclude someone with a vision impairment because of concerns that the individual will pose a safety risk?

When it comes to safety concerns, an employer should be careful not to act on the basis of myths, fears, or stereotypes about vision impairments. Instead, the employer must evaluate

each individual's knowledge, skills, and experience, as well as how the impairment affects his or her ability to perform a particular job safely. In other words, in order to exclude someone whose vision impairment is a disability under the ADA from a job for safety reasons, an employer must determine that a "direct threat" exists. A "direct threat" is a significant risk of substantial harm to an individual with a disability or to others that cannot be reduced or eliminated through reasonable accommodation.⁽¹⁸⁾ This assessment must be based on objective, factual evidence that takes into account the nature of the risk, the severity of the potential harm, the likelihood that the harm will occur, and the imminence of the harm, as well as the availability of any reasonable accommodation that might reduce or eliminate the risk.

Example 26: An assembly line worker has lost much of his vision, but because he has held his job for more than ten years, he can effectively perform the job's functions using a combination of his remaining limited vision and touch. The employer's normal practice is to flash an alarm light when there is an assembly line malfunction that could cause injuries to workers. Rather than discharging the employee because he no longer is able to see the flashing light and may therefore be in harm's way, the employer should consider installing an audio alarm to accommodate him.

Example 27: A blind sous-chef who began working as a line cook and has



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worked in restaurants for 15 years in positions of increasing levels of responsibility applies for a job at a newly opened restaurant. Although it initially takes him slightly more time than other workers to learn the layout of the kitchen, once he does so he is able to move about easily and safely. The combination of his experience, his use of touch to perform some tasks that other workers perform visually, and a few simple accommodations, such as Braille labels on oven controls, enables him to use all kitchen equipment and to supervise kitchen staff. The restaurant may not refuse to hire this chef on the ground that he cannot work safely in a busy kitchen.

Example 28: An individual with a severe visual disability is hired to work as a line cook. He has difficulty, however, learning the layout of the kitchen and barely avoids bumping into three different co-workers, two of whom were carrying trays of food just removed from the oven and one who was carrying a pot of boiling water. He also has been warned several times about placing his hands too close to open flames and fryers filled with hot oil, but he has failed to do anything to correct these problems. This individual poses a direct threat to his own health and safety and to the health and safety of others.

"OTHER FEDERAL LAWS" DEFENSE

16. May an employer refuse to hire an individual with a visual dis-

ability because another federal law requires it to do so?

Yes. There are federal safety laws that may require an employer to exclude individuals with certain kinds of visual disabilities from certain types of jobs. For example, the U.S. Department of Transportation (DOT) has regulations that require a certain level of visual acuity for interstate drivers of commercial motor vehicles weighing more than 10,000 pounds. An employer may defend a claim of discrimination under the ADA on the ground that it was complying with the DOT regulation.

However, an employer may not rely on this defense where the other federal law does not in fact require exclusion of the individual with a disability (*e.g.*, where the employer applies federal standards to jobs other than those to which they are specifically intended to apply).

Example 29: A courier service that uses vans and small trucks weighing less than 10,000 pounds may not use the DOT standards applicable to commercial motor vehicles weighing more than 10,000 pounds to automatically exclude applicants with monocular vision from driver jobs. The employer may exclude a particular applicant with monocular vision only if it can demonstrate that she would pose a direct threat. (*See Question 15, above.*)

HARASSMENT



Employers are prohibited from harassing or allowing employees with disabilities to be harassed in the workplace. When harassment is brought to an employer's attention, management and/or the supervisor must take steps to stop it.

17. What constitutes illegal harassment under the ADA?

The ADA prohibits unwelcome conduct based on disability that is sufficiently severe or pervasive to create a hostile or abusive work environment. Acts of harassment may include verbal abuse, such as name-calling, behavior such as offensive graphic and written statements, or conduct that is physically threatening or harmful or humiliating. The law does not protect workers with disabilities (or any workers) from merely rude or uncivil conduct. To be actionable, conduct related to an employee's visual disability must be perceived by the affected individual as abusive and must be sufficiently severe or pervasive that a reasonable person would perceive it as hostile and abusive.

Example 30: A grocery store cashier with a visual disability is frequently taunted by his co-workers. They regularly ask him how many fingers they are holding up and take away his white cane and tell him to go find it. This behavior is actionable disability-based harassment.

18. What should employers do to prevent and correct harassment?

Employers should make clear that they will not tolerate harassment based on disability or on any other basis (*i.e.*, race, sex, religion, national origin, or age). This can be done in a number of ways, such as through a written policy, employee handbooks, staff meetings, and periodic training. The employer should emphasize that harassment is prohibited and that employees should promptly report such conduct to a manager or other designated official. Finally, the employer should immediately conduct a thorough investigation of any report of harassment and take swift and appropriate corrective action. For more information on the standards governing harassment under federal EEO laws, see

<http://www.eeoc.gov/policy/docs/harassment.html>.

LEGAL ENFORCEMENT

19. What should someone do who believes that his or her rights under the ADA may have been violated in connection with a matter involving federal employment?

Any person who believes that his or her federal employment rights have been violated because of a disability and wants to file a complaint against a federal agency or department must first contact an EEO counselor within 45 days of the date of the incident or event alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action. If informal counseling does not result in resolution of the matter,



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the person may then file a formal complaint against the agency or department. For more information on the Federal Sector EEO complaint process, see: <http://www.eeoc.gov/facts/fs-fed.html>.

RETALIATION

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a complaint of employment discrimination, or testifies or participates in any way in an investigation, proceeding, or litigation. This is true even if the person who files the complaint is not a person with a disability. Persons who believe that they have been retaliated against may file a complaint of retaliation as described above.

1. See, *Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA)*, <http://www.eeoc.gov/facts/diabetes.html>, See also *Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act (ADA)*, <http://www.eeoc.gov/facts/epilepsy.html>, *Questions and Answers About People with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act*, http://www.eeoc.gov/facts/intellectual_disabilities.html, and *Questions and Answers About Cancer in the Workplace and the Americans with Disabilities Act (ADA)*, <http://www.eeoc.gov/facts/cancer.html>.

2. American Foundation for the Blind (AFB), <http://www.afb.org>.

3. *Vision Problems in the U.S.: Prevalence of Adult Impairment and Age-Related Eye Disease in America (2002)*, joint report by the National Eye Institute and Prevent Blindness

America, <http://www.nei.nih.gov/eyedata/pdf/VPUS.pdf>.

4. Id.

5. Job Accommodation Network, Work-Site Accommodation Ideas for Individuals with Vision Impairments, citing AFB statistics from 2000, <http://www.jan.wvu.edu/media/Sight.html>.

6. CDC, National Center on Birth Defects and Developmental Disabilities (NCBDDD), <http://www.cdc.gov/ncbddd/dd/ddvi.htm>.

7. A person with a visual acuity of 20/70 can see at 20 feet what a person with normal sight can see at 70 feet. A person with a visual acuity of 20/400 can see at 20 feet what a person with normal vision can see at 400 feet. The visual fields normally extend outward over an angle of about 90 degrees on either side of the midline of the face. A normal visual field is about 160-170 degrees horizontally. Id.

8. <http://www.cdc.gov/ncbddd/dd/ddvi.htm>.

9. Diabetic retinopathy is the term used to describe changes in the blood vessels of the retina due to diabetes, which can cause vision impairments and blindness. Not all people with diabetes develop this condition. See Major Causes of Blindness (National Federation of the Blind 1995), at <http://www.blind.net> (follow "General Information About Blindness" hyperlink; then follow "Major Causes of Blindness" hyperlink).

10. Macular degeneration refers to the breakdown of the macula, the part of the retina which forms the sharpest view of an object. The disorder, which occurs with age, varies in the speed with which it affects people and often can be corrected with magnifying lenses. Id.

11. Cataracts are opacities and clouding of the lens of the eye that block the passage of light. They can be present at birth but tend to increase with age. They often can be surgically corrected. Id.



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12. Glaucoma is a condition characterized by a build-up of the clear fluid in the forward part of the eye that does not drain properly and causes increased pressure inside the eye. If left uncontrolled, the condition can cause damage to the eye that results in blurred vision, a narrow field of vision, and eventually total blindness. Glaucoma can often be successfully controlled with medication, though surgery is sometimes necessary. Glaucoma is responsible for one of every seven or eight cases of blindness. *Id.*



13. National Center for Health Statistics, U.S. Dept. of Health and Human Services, Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2002, Vital and Health Statistics, Series 10, No. 222 (DHHS Publication No. 2004-1550) (July 2004).

14. See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)(While monocular vision "inevitably leads to some loss of horizontal field of vision and depth perception" and "ordinarily" will constitute a disability, the ADA requires individuals to prove, on a case-by-case basis, that their limitations are "substantial.")

15. See, *EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) at Question 22* (July 26, 2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

16. See the Job Accommodation Network's Searchable Online Accommodation Resource (SOAR), <http://www.jan.wvu.edu/soar/vision.html>.

17. See, *Know the Rules Regarding Tax Incentives for Improving Accessibility for the Disabled* (2003), <http://www.irs.gov/businesses/small/article-0,,id=113382,00.html>. For additional information on tax benefits, contact the U.S. Internal Revenue Service at 800-829-3676 (voice) or 800-829-4059 (TDD).

18. 29 C.F.R. § 1630.2(r).



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Duty of Victim to Timely Report: III, 4, p. 8-10; IX, 4, p. 9-10
Duty of Victim to Avoid Harm: VI, 3, p. 3-4
Management's Response: (*See: Harassment: Liability of Employer*)
National Origin: (*See: Harassment: Because of*)
Race: (*See: Harassment: Because of*)
Rejection (of sexual advances): (*See: Harassment: Coerced Sex*)
Report (duty of victim to): (*See: Harassment: Liability: Harassment Committed by Supervisors:
Affirmative Defense*)
Retaliation (against victim of): (*See: Reprisal: Discipline*)
Romance (workplace): VII, 3, p. 11-12 (article)
Rudeness (of supervisor): VII, 4, p. 10-11; VIII, 2, p. 7-8
Sex (harassment because of): (*See: Harassment: Because of*)
Same Sex: I, 1, p. 10-11; III, 4, p. 8-10
"Severe or Pervasive": I, 1, p. 10-11; II, 3, p. 4; III, 2, p. 4-5; III, 4, p. 4-5; IV, 2, p. 2-3
IV, 3, pp. 4-5 and 11-13; V, 1, pp. 7 and 7-8; VI, 2, pp. 2-3 and 5-6 and 8-10; VI, 4, p. 6-8;
VII, 1, p. 5-6; VII, 4, p. 10-11; VIII, 1, p. 2-3; VIII, 3, p. 7-8; VIII, 4, p. 9; IX, 2, p. 2
Sexual Conduct: IV, 3, p. 11-13
Strict Liability: (*See: Harassment: Automatic Liability*)
Sexual Orientation: (*See: Sexual Orientation; See also: Harassment: Because of*)
Submission (to sexual advances): (*See: Harassment: Coerced Sex*)
Subordinates (romancing of): VII, 3, p. 11-12 (article)
Tangible Employment Action: (*See: Harassment: Automatic Liability; See also:
Harassment: Coerced Sex*)
Touching Employees: III, 3, p. 11-12; III, 4, p. 4-5; IV, 3, p. 3-4, 4-5, and 11-13; VI, 2, p. 8-10;
VII, 4, p. 6-8; VIII, 1, p. 2-3; IX, 3, p. 2-3
Trans-Gender (Trans-Sexual) Behavior: (*See: Trans-Gender Behavior*)
Unwelcome: I, 1, p. 10-11; IV, 3, pp. 3-4 and 4-5; VI, 3, p. 3-4
Harm (need to show): (*See: Aggrieved*)
Health Records (*See: Disability: Medical Records*)
Hearing Impairments: (*See: Disability: Type of*)
Hearing Process (cooperation during): III, 1, p. 3-5
Heart Conditions: (*See: Disability: Type of*)
Hiring: (*See: Promotions/Selections/Hiring*)

I

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

J

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

K



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L

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

M

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

N

National Origin: V, 4, p. 12-15; VI, 2, p. 2-3
Negative Employment Actions: (*See: Disciplinary/Negative Actions*)
Negative Employment References: V, 3, p. 10-12
Negotiated Grievance Procedure (election to pursue): (*See: Election of Remedies*)
Non Job-Related Injuries: (*See: Disability: Accommodation*)
Non-Sexual Harassment: (*See: Harassment*)
Numerosity: (*See: Class Action Complaints*)
Nurses:

Examinations (Nursing Board): IX, 1, p. 6-7
GNT (Graduate Nurse Technician) Program: IX, 1, p. 6-7
Licensure: I, 1, p. 2; VII, 2, p. 8-10
Lifting Restrictions: (*See: Disability: Type of*)
Nurse Professional Standards Board: I, 1, p. 16
Performance: (*See: Nurses: Promotions (non-competitive): Performance*)
Promotions (non-competitive): I, 1, p. 16; IV, 4, p. 2-3; VI, 2, p. 6-8
Nurse Qualifications Standards: I, 1, p. 16; VI, 2, p. 6-8
Performance (as justification for): IV, 4, p. 2-3; VI, 2, p. 6-8
Proficiency Reports: I, 1, p. 16; VI, 2, p. 6-8

O

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

P

Paranoid Schizophrenia: (*See: Disability: Type of*)
Parking Spaces (*See: Disability: Accommodation*)
Participation (in EEO complaint process): (*See: Reprisal: Protected EEO Activity*)
Performance (removal/termination because of): (*See: Removal Actions*)
Performance Appraisals:
 Pretext:
 Found:
 Not Found:
 Reason(s) articulated for --
 Burden of articulation met (specific reason given for nonpromotion or nonselection)



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Burden of articulation not met (no reason or nonspecific reason given)
I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 2, p. 3-4

Found not true (see Pretext Found)

Found True (see Pretext Not Found)

Use of (in promotion/selection actions): II, 3, p. 3

Performance Problems (need to document): V, 3, pp. 8-10 and 10-12; VI, 4, pp. 2-3 and 5-6

Physical Impairment: (See: *Disability: Type of*)

Pregnancy (discrimination because of): VII, 4, p. 8; IX, 2, p. 6-7

Pre-Selection: (See: *Promotions/Selections/Hiring: Pre-Selections*)

Priority Consideration: (See: *Promotions/Selections/Hiring: Priority Consideration*)

Privacy (right to): **X, 1, p. 9-11** (urine screening)

Problem Employees: V, 3, pp. 8-10 and 10-12; VI, 4, p. 5-6; VII, 1, p. 9-10 (article); VII, 2, p. 3-4
(See also: *Performance Problems*)

Procedural Dismissals: (See *specific ground(s) for dismissal – e.g., failure to state a claim, untimeliness, etc.*)

Promotions/Selections/Hiring:

- Affirmative Action Plans (use of): II, 1, p. 7
- Applications: II, 3, p. 3; V, 2, p. 2; VI, 2, p. 10-12; VIII, 4, p. 3-4.
- Disqualification (by HR specialist): VI, 2, p. 10-12; **X, 1, p. 8-9**
- Documentation (need to retain): III, 4, p. 5-6; IV, 4, p. 4-5; V, 3, p. 8-10; VI, 1, p. 5-6;
VI, 4, pp. 2-3 and 8-9; VIII, 4, p. 10-11; IX, 4, p. 4-5
- Education: (See: *Qualifications: Education*)
- Experience: (See: *Promotions/Selections/Hiring: Pretext: Evidence*)
- Innocence of Decision Maker: V, 3, p. 2-3;
- Manipulation of the Process: V, 1, pp. 4-5 and 5-6 and 12; VIII, 4, p. 10-11
- Mistakes: (See: *Promotion/Selections/Hiring: Pretext: Evidence*)
- Nurses (non-competitive promotions): (See: *Nurses: Promotions*)
- Panels (interview and rating): V, 3, p. 8-10; VII, 3, p. 10-11; IX, 4, p. 4-5
- Performance Appraisals (use of): II, 3, p. 3
- Position Descriptions: V, 4, p. 8-9
- Pre-Selections: III, 4, p. 7-8; V, 3, p. 13-16; V, 4, p. 4-5; VIII, 4, p. 10-11 (article)

Pretext:

- Evidence or Not Evidence of:
 - Affirmative Employment Plans (use of): II, 1, p. 7-8
 - Derogatory Comments: II, 2, p. 3
 - Education: (See: *Qualifications: Education*)
 - Experience: II, 1, p. 7; III, 1, p. 13; VI, 3, p. 4-5
 - Interview Not Granted as: II, 1, p. 7-8
 - Opinion (of complainant as to his/her qualifications as): (See: *Qualifications: Opinion*)
 - Mistakes: V, 1, p. 5-6; **X, 1, p. 8-9**
 - Performance Appraisals: V, 1, p. 4-5; VI, 4, p. 2-3
 - Priority Consideration (use of as): (See: *Promotions/Selections/Hiring: Priority Consideration*)
 - Prior Nonselections as: II, 1, p. 7
 - Seniority: IV, 3, p. 9-11; V, 3, p. 8-10
 - Subjective Factors (use of by selecting official): IV, 3, p. 9-11
- Found: I, 1, p. 15; II, 2, p. 2-3; II, 4, p. 9-11; IV, 3, p. 9-11; IV, 4, pp. 2-3 and 8-9; V, 1, p. 4-5 and 5-6; V, 3, p. 8-10; IX, 4, p. 4-5
- Not Found: I, 1, p. 16; II, 1, p. 7; II, 2, p. 7; II, 3, p. 3; III, 3, p. 4-5; IV, 3, p. 9-11; IV, 4, p. 5-6; V, 3, 13-16; V, 4, p. 4-5; V, 4, p. 8-9; V, 3, p. 13-16; VI, 2, p. 10-12; IX, 1, p. 6-7; IX, 3, p. 6; **X, 1, p. 8-9**

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

Procedures/Policies (failure to follow): V, 3, p. 8-10; **X, 1, p. 8-9**

Proficiency Reports (nurses):

- If issue involves use in noncompetitive promotions: (See: *Nurses: Promotions*)
- If issue relates solely to the rating: (See: *Performance Appraisals*)

Rating Panels: V, 1, p. 5-6

Reason(s) articulated --

- Burden of Articulation Met (specific reason given for nonpromotion or nonselection)
- Burden of Articulation not Met (no reason or nonspecific reason given)
I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 4, p. 2-3 and 4-5
- Found not True (see Pretext Found)
- Found True (see Pretext Not Found)
- Inability to Accommodate: (See: *Disability: Accommodation or Religion*):



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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
 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)



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- Found Not True (*See Pretext: Found*)
Found True (*See Pretext: Not Found*)
- Other Reasons (because of):
Pretext:
Evidence or Not Evidence of:
Found:
Not found: II, 3, p. 5-6; IV, 4, p. 9-10
- Reason(s) Articulated --
Burden of articulation met (specific reason given for removal)
Burden of articulation not met (no reason or nonspecific reason given)
Found Not True (*See Pretext: Found*)
Found True (*See Pretext: Not Found*)
- Representation:
Adequacy of: (*See: Adequacy of Representation*)
Right to:
- Reprisal:
Adverse Action Requirement: (*See: Reprisal: Per Se*)
Article about: I, 1, p. 19; IX, 1, p. 10-11; IX, 3, p. 10-11
"Chilling Effect": (*See: Reprisal: "Per Se" Reprisal*)
Discipline/Negative Action (taken against harassment victim): II, 1, p. 5-6; III, 1, p. 9-10; VII, 1, p. 7-9;
VIII, 1, p. 2-3; IX, 2, p. 5-6; IX, 3, p. 2-3; (*See also: Harassment: Corrective Action: Reassignment of Victim*)
EEOC Compliance Manual (Section 8): I, 1, p. 20
Elements of Claim: I, 1, p. 20; II, 4, p. 7-8; IV, 4, p. 5-6; V, 4, p. 3-4; VI, 2, p. 5-6; VIII, 3, p. 3-5
Evidence of: I, 1, p. 13, 15, and 18; II, 2, pp. 3, 6, and 8-9; II, 3, p. 5; III, 2, p. 4; IX, 1, p. 2-3; IX, 4, p. 4-5
Frivolous Complaints (because of): IX, 3, p. 10-11 (article about)
Intimidation: (*See: Reprisal: "Per Se" Reprisal*)
Interference (with EEO process): (*See: Reprisal: "Per Se" Reprisal*)
"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; **X, 1, p. 2**
Opposition Type Activity: II, 3, p. 5; VIII, 1, pp. 2-3 and 6-7; **X, 1, p. 2**
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; IX, 4, p. 4-5
Not found: III, 1, p. 7-8; III, 3, p. 6-7; IX, 3, p. 2-3
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*)
Reverse Discrimination:
Age: (*See: Age Discrimination*)
RIFs (*See: Reductions in Force*)
Risk of Future Harm or Injury: (*See: Disability: Direct Threat*)



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S

Same-Sex Requirement or Policy: (See: "BFOQ")
Same-Sex Urine Screens: (See: *Urine Screens*)
Sanctions (imposed by EEOC judges): VI, 1, p. 5-6
Sex-Based Requirement or Policy: (See: "BFOQ")
Sexual Harassment (See: *Harassment*)
Sexual Identity: (See: *Trans-Gender Behavior*)
Sexual Orientation: IV, 3, p. 13-14
Selection Actions (See: *Promotions/Selections/Hiring*)
Service-Connected Disability: (See: *Disability: Benefit Statutes: Veterans Compensation*)
Settlement Agreements:
 Breach of: VIII, 2, p. 3-4
 Consideration (absence of): V, 2, p. 4-5
 "Meeting of the Minds" (absence of): V, 2, p. 5-6
 Mistake of Fact: (See: *Settlement Agreements: Meeting of the Minds*)
 Oral Agreements: VIII, 2, p. 3-4
Shortness of Breath: (See: *Disability: Type of*)
Skin Conditions: (See: *Disability: Type of*)
"Similarly Situated": (See: *Employees*)
"Speak English Only" Rules: (See: *National Origin*)
Stating a Claim: (See: *Failure to State a Claim*)
Statistical Evidence: (See: *Evidence*)
Stress: (See: *Disability: Type of*)
Subjective Factors (use of): (See: *Promotions/Selections/Hiring: Pretext*)

T

Tangible Employment Action: (See: *Harassment: Automatic Liability*; See Also: *Harassment: Coerced Sex*)
Tangible Harm: (See: *Aggrieved*)
Telework (as a reasonable accommodation for disabilities): (See: *Disability: Accommodation*)
Temporal Proximity (in reprisal cases): (See: *Reprisal: Protected EEO Activity: Time between.....*)
Temporary Disability: (See: *Disability: Temporary*)
Terminations (See: *Removal Actions*)
Threats ((See: *Reprisal "Per Se"*)
Timeliness (of complaints): (See: *Untimeliness*)
Title 38 Employees (right of appeal to MSPB): (See: *Reductions in Force*)
Trans-Gender (Trans-Sexual) Behavior (discrimination due to): VII, 1, p. 5-6
Touching (of employees): (See: *Harassment: Touching Employees*)
Typicality: (See: *Class Action Complaints*)

U

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

V

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

W

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