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

FROM THE DIRECTOR

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

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include the *Equal Pay Act*, the right of student-trainees to file EEO complaints, religious accommodation, disability accommodation, class actions, and retaliation.

Also included in this issue is the fifth in a series of articles concerning frequently asked questions and answers pertaining to the rights and responsibilities of employees and employers with regard to requests for reasonable accommodation of a disability. This issue discusses management's obligation to consider reassignment as a possible accommodation.

The *OEDCA Digest* is available on the World Wide Web at: www.va.gov/orm.

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<i>Case Summaries</i>	2
<i>EEOC Issues Its Internal Policy Guidelines on Reasonable Accommodation</i>	9
<i>Frequently Asked Questions and Answers on Reasonable Accommodation</i>	9



I

EQUAL PAY ACT VIOLATION FOUND

OEDCA recently issued a final order finding an *Equal Pay Act* violation in a case where a female employee was paid less for performing the same duties as two male coworkers.

The complainant's job title was "Program Assistant," GS-8, while that of two male co-workers was "Vocational Rehabilitation Specialist", GS-9 (promotion potential to GS-11). The position descriptions (PDs) for the two positions indicated that the GS-8 position was administrative in nature, while the GS-9/11 positions held by her male coworkers were professional. On paper, at least, the two jobs appeared to be very different.

Notwithstanding the difference in job titles and PDs, the evidence conclusively demonstrated that the complainant had, over time, assumed different and additional duties and, for approximately two years, had been doing the same professional case management work as two male coworkers, both of whom were being paid at the GS-11 level. Her supervisors admitted that she was doing "exactly the same work" and, in fact, had attempted over a period of time to upgrade her. Eventually, they were able to upgrade her to the GS-9 level, but she was, by that time, no longer eligible for a GS-11 grade because the "Rehabilitation Specialist" position had changed from a GS-9/11, to GS-9 with no known promotion potential. A new GS-11 position, that of "Vocational Rehabilitation Counselor" was created, but it required a Masters Degree, which complainant

did not have.

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

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

If jobs that pay differently are substantially equal, the burden of proof then falls on the employer to show that the pay difference can be explained by one of four defenses specifically permitted under the *Equal Pay Act*. The employer must show that the difference can be explained by a (1) seniority system, (2) a merit system, (3) a system based on quantity or quality of production, or (4) "any factor other than sex."

In this case, it was undisputed that the complainant was performing "equal work." Moreover, management was unable to show that the differential was based on any of the four exceptions permitted under the Act. The fourth exception – "any factor other than sex" – includes bona fide job classification systems, a defense which management



asserted. However, this defense is only available if the job classifications are, in fact, *bona fide*, that is, they accurately reflect the actual duties performed by the individuals in the different classifications. In this case, although the complainant and her male coworkers were in different job classifications and had different PDs, the actual duties they performed were the same. The classifications were artificial and, therefore, not *bona fide*. Hence, management was unable to assert this defense.

OEDCA's final action included a back pay award, as well as any step increases and promotions the complainant would have received had she been correctly classified as a Rehabilitation Specialist.

II

GRADUATE STUDENTS TRAINING IN VA MEDICAL CENTERS MAY BE ENTITLED TO FILE EEO COMPLAINTS CONCERNING MATTERS RELATING TO THEIR VA TRAINING

EEOC has reaffirmed its long-held position that graduate students doing a practicum or other similar training program at a VA facility in connection with their educational degree requirement, may be entitled to the protections afforded to employees by Title VII of the *Civil Rights Act* and other anti-discrimination laws.

Normally such protections are available only to employees or applicants for employment. Although the EEOC acknowledges that these students are not employees or applicants, it does assert

that, in certain cases, they may be "volunteers" and, hence, have standing (*i.e.*, the right) to file a discrimination complaint concerning matters that occurred in connection with their training at the VA.

The general rule is that volunteers are entitled to the protections afforded by civil rights laws if it can be shown that volunteer work leads to regular employment with the employer. This does not require proof that volunteer work will always or almost always lead to regular employment. Instead, the individual need only show that there is a linkage between volunteer work and regular employment. This normally occurs when an employer grants a preference, explicitly or implicitly, to former volunteers.

In one case involving the VA, the EEOC ruled that the complainant had established such a linkage where 10 of the last 25 positions in the field for which she had trained at the VA had been filled with former student-trainees. The EEOC therefore allowed her to pursue her claim that she was discriminated against during her practicum training at the VA, even though she was not an employee or applicant for employment at the time.

In another VA case, the Commission found that a student-trainee was not a volunteer and, hence, not entitled to file a discrimination complaint concerning her VA training experience. In that case, the student did no actual work while training at the VA facility, but instead was merely observing and reporting on clinic procedures. The Commission noted that the volunteer



rule applies only in situations where an individual performs volunteer work or actual assignments for the employer in connection with the training he or she is receiving at the employer's facility.

III

REPRIMANDING AN EMPLOYEE FOR REFUSING TO WORK ON GOOD FRIDAY NOT RELIGIOUS DISCRIMINATION WHERE MANAGEMENT OFFERED A REASONABLE ACCOMMODATION

OEDCA recently accepted an EEOC administrative judge's decision finding that the Department did not discriminate against an employee because of his religious beliefs (Christian) when it directed him to work for approximately two hours on Good Friday and then reprimanded him when he refused and failed to report for work.

The complainant was one of three physicians staffing the Spinal Cord Injury (SCI) unit. The undisputed facts show that he submitted a request to his supervisor (Jewish) for 8 hours of annual leave on Good Friday. His request was submitted on short notice and did not reach the Chief's desk until 3 days before the requested leave date. The Chief, who had previously scheduled leave on that same day, denied the complainant's request, citing the need for adequate coverage on the SCI unit. The other physician worked only part-time, and because Fridays were especially busy days on the unit, one part-time physician could not meet patient needs if the complainant were to take the entire day off.

As an accommodation, he offered the complainant the option of reporting to work for a few hours in the morning on Good Friday. This would enable him to complete his rounds, attend to patient needs, and take the remainder of the day off.

The complainant rejected this offer, calling it "totally unacceptable". Instead, he suggested that the part-time physician be required to report to work earlier, and work longer hours than usual, so that he could take the entire day off. The Chief rejected that suggestion and directed the complainant to report to work for approximately two hours in the morning on Good Friday. When the complainant refused and failed to report as ordered, the Chief gave him a written reprimand.

The complainant claims that the issuance of the reprimand was an act of discrimination against him because of his religious beliefs and/or practices. In other words, he is claiming that he would not have received the reprimand had management fulfilled its legal obligation to accommodate his religious beliefs and/or practices.

OEDCA agreed with the EEOC administrative judge that the Chief's offer to the complainant to work only a few hours in the morning constituted a reasonable accommodation under the circumstances. The judge correctly noted that an employee is not entitled to the accommodation of his or her choice. Moreover, the judge noted that an employee has an obligation to cooperate with an employer's attempt at accommodation. When an employer has more



than one reasonable means of accommodation from which to choose, it is free to choose the means that poses the least hardship on its business operation. In this case, the Chief chose a means that would have satisfied the needs of SCI patients, while at the same time providing the complainant with much of what he had requested. As the Chief's offer was reasonable, the complainant's failure to report to work was not justified. Hence, the reprimand he received was not the result of religious discrimination.

IV

MANAGEMENT'S FAILURE TO ENGAGE IN AN INTERACTIVE PROCESS FOLLOWING DISABLED EMPLOYEE'S REQUEST FOR REASONABLE ACCOMMODATION RESULTS IN FINDING OF DISCRIMINATION.

OEDCA recently found discrimination in a case that illustrates a common error that managers and supervisors make when confronted with an employee's request for reasonable accommodation of a disability. The error is failing to engage in an "interactive process" with the employee once the request is made.

The complainant in this case, a telephone operator, had a history of severe depression triggered by stressors and bio-chemical activities in the brain. She took medication for the problem, but the medication would eventually lose its efficacy, requiring her to come off the medication and start a new regime. During periods in which she was changing meds, her condition would become intense, resulting in sick leave usage and behavioral problems.

During one such period, she notified her supervisor in writing of her condition and requested a temporary assignment to a less stressful clerical position in the mailroom until she was able to get her new meds under control. Along with her request she submitted medical documentation from her treating psychologist, which described her mental condition and the impact it had on all areas of her functioning. He described her condition as "disabling" and suggested that she be given time off when needed.

The supervisor acknowledges receiving the accommodation request and the medical documentation to support it. In his opinion, however, the documentation was inadequate because he could not determine if the complainant had a "valid medically certified disability." Moreover, he stated that he was not qualified to determine if her behavioral problems were associated with her disability. Accordingly, he took no action on her request. Instead, he placed her on sick leave certification because of his belief that her sick leave usage was excessive.

Three months later, the complainant was hospitalized for major depression. Upon her return to work, her supervisor directed her to undergo a fitness-for-duty medical exam, the stated purpose of which was to determine her continued ability to perform her duties as a telephone operator. He also placed her on administrative leave.

He ordered the exam because of reports and pressure he received from the complainant's coworkers regarding her recent erratic behavior, which included in-



appropriate language and threatening statements made to other telephone operators. The complainant refused to submit to the examination. Based on the reports about her behavior, she received notice of a proposed fourteen-day suspension, later mitigated to a one-day suspension. A few days after she received the notice of proposed suspension, management reassigned her to a less stressful clerical position in another service.

OEDCA concluded from the above facts that management officials failed to satisfy their obligation to engage in the interactive process that is required by law once an employee makes a request for reasonable accommodation. The complainant's written request and supporting documentation were sufficient to warrant the accommodation requested.

Even if it could be argued that the complainant's documentation was inadequate in some respect, as claimed by the supervisor, the documentation served, at the very least, to place management on notice of the complainant's disability and need for accommodation. That notice automatically triggered management's obligation to do what it failed to do in this case – engage in an interactive process, *i.e.*, an informal dialogue with the complainant concerning her request. That dialogue would have included seeking any additional information management deemed necessary to act on the accommodation request.

Instead of engaging in that process, management simply concluded that the documentation provided was inadequate, took no positive action on the re-

quest, and placed the complainant on sick leave certification. Management's failure in this regard resulted in liability for failing to provide a reasonable accommodation. Although she was placed in a less stressful position some five months after her accommodation request, this did not excuse management's prolonged inaction with regard to her request.

The lesson here for managers and supervisors is clear. Requests for accommodation of a disability must receive appropriate and timely consideration. In particular, management must be mindful of its obligation to engage in an interactive process – an informal dialogue -- with employees who request accommodation.

V

EEOC DISMISSES CLASS ACTION CLAIM FOR FAILURE TO SATISFY PROCEDURAL CRITERIA FOR CLASS CLAIMS

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

The class agent had filed his class claim alleging that the facility's personnel policies and practices over the last 25 years have resulted in the denial of equal employment opportunity for African-



American employees. The only specific personnel action raised by the complainant in the claim was his own non-selection for a certain position. In addition to his own individual claim, he presented a general claim that African-Americans have historically been discriminated against with respect to matters such as, but not limited to, hiring, promotions, awards, performance appraisals, training, and terminations. Moreover, he claimed that he wished to represent African-American employees at the facility with respect to these matters and “build an historical case based on the last 25 years.”

The EEOC judge correctly concluded that the class agent’s claim was essentially an individual one concerning his recent nonselection, and not a true class action claim, which requires evidence of “numerosity”, “commonality”, “typicality”, and “adequacy of representation”. To succeed in having a claim certified as a class claim, a class agent must satisfy all of these requirements. In this case, the class agent satisfied none of them.

For example, the judge noted that “numerosity” requires that the class be so numerous as to make a consolidated complaint of the members impractical. Other than to speculate that there must have been “many”, the complainant presented no evidence as to the number of African-American employees actually involved in the personnel issues mentioned in his claim.

Moreover, the judge found no evidence of “commonality” in the complainant’s claim, because the injuries allegedly suffered by the class members vary widely, from hiring to firing and every-

thing in between. Moreover, the class agent failed to identify any specific policy or practice at the facility that caused the alleged discrimination. Hence, in a general “across-the-board” type claim like the one presented in this complaint, common questions of law and fact do not predominate over the class agent’s individual claim, which focuses on his own nonselection.

Likewise, the judge found no evidence of “typicality.” This requirement, while similar to the commonality requirement, focuses more on (1) whether the class agent is actually a member of the class he or she wishes to represent (and thus has substantially the same interest as other members of the class) and (2) has suffered the same injury suffered by the class members as a whole. Although the class agent is African-American, his claim is not typical in the sense that his injury (*i.e.*, his nonselection) is not typical of the injuries allegedly suffered by the class members as a whole, which encompass far more than just nonselections.

Finally, the judge found that the class agent could not adequately represent the class. Adequate representation is essential because class members are bound by a judgment in a class action. In this case, the class agent was not an attorney; demonstrated no qualifications, experience or available resources to adequately represent the class; and did not retain an attorney to represent him. Although the EEOC’s regulations do not require attorney representation in class claims, a non-attorney, such as the class agent in this case, rarely will have the background, experience, competence, and resources needed to ade-



quately prosecute a class claim, which by its very nature is complex and expensive. Moreover, even if a class agent retains an attorney, the Commission and the courts will carefully examine the attorney's credentials to determine if the attorney actually has the experience and resources needed to conduct this type of legal action.

This case illustrates the inherent difficulty in having a claim certified by the EEOC or the courts as a class claim. However, even though almost all class claims are dismissed for one or more of the reasons noted above, a class agent whose class claim has been dismissed may still pursue his or her individual claim, assuming the agent satisfied the procedural requirements for filing an individual claim. In this case, the agent satisfied those requirements, and OEDCA ordered the Department to accept and investigate his individual claim regarding the nonselection.

VI

ELIMINATION OF TWO-WEEK NOTICE PERIOD BEFORE TERMINATION IMMEDIATELY FOLLOWING COMPLAINANT'S EEO COMPLAINT ACTIVITY RESULTS IN FINDING OF REPRISAL

In a recent case, OEDCA accepted an EEOC administrative judge's finding that a complainant had been subjected to unlawful reprisal in connection with the manner in which Department officials processed her termination.

The day after the complainant received her two-week notice of termination, she

contacted an EEO counselor by telephone. To avoid interruption while on the call, she posted a message on her door stating that she was on the phone with an EEO counselor and asking that she not be disturbed. While she was on the phone, another employee who needed access to a file in her office opened her door, entered, obtained the file, and slammed her door while exiting. He then reported the matter to her supervisor, including the fact that she was on the phone speaking to an EEO counselor.

On that same day, upon returning from lunch, she found a document on her desk signed by her supervisor requesting elimination of the two-week notice period and immediate termination. The reasons cited in the document were disruptions in the workplace and the complainant being on the phone. Later that day, she received a letter signed by the facility's Human Resources Manager, informing her that her employment was being terminated immediately "due to disruptions in the workplace."

The supervisor denied that the complainant's EEO activity (*i.e.*, her phone discussion with the EEO counselor) prompted his request for elimination of the two-week notice period. He claimed, instead, that on that same day two radiologists had expressed some concern to him that, as a disgruntled employee, the complainant would be in a position to sabotage records and that her notice period should be shortened.

The EEOC administrative judge concluded, and OEDCA agreed, that the supervisor's explanation lacked credibility and was a mere pretext to mask his



real reason, which was the complainant's EEO activity. First, the judge noted that one of the two radiologists denied expressing concern about possible sabotage, noting that her only concern was possible inaccuracies in some of the more complex reports the complainant might transcribe due to the turmoil created by the termination decision. Second, the supervisor's explanation – *i.e.*, the possibility of sabotage -- is inconsistent with the specific reason cited in the termination letter – *i.e.*, "workplace disruptions". Finally, the judge noted that, while both the supervisor's letter and the HR Manager's letter cited "workplace disruptions" as the reason for eliminating the notice period, the only event that could be construed as a "disruption" involved the complainant's phone conversation with an EEO counselor while her door was closed.

OEDCA's final action ordered the Department to provide the complainant with appropriate equitable relief, which included reimbursing her for all back pay and other benefits to which she would have been entitled had she remained employed during the two-week notice period prior to her termination.

VII

EEOC'S INTERNAL REASONABLE ACCOMMODATION POLICY PROVIDES GUIDANCE FOR FEDERAL AGENCIES AND MANAGERS

Federal managers and employees now can look to procedures issued by the EEOC for guidance on making reasonable accommodations. Implementing the requirements of Executive Order

13164, the EEOC has publicly issued written procedures on how it will process reasonable accommodation requests submitted by its own employees. The EEOC's internal procedures, while not binding on other Federal agencies, will serve as an example to other agencies. The procedures address the following issues: Who can receive and process requests for reasonable accommodation; the importance of a dialogue between the person making the request and the manager who will decide whether to grant it; and the time frames for processing and providing accommodation. The newly issued procedures also include appendices addressing certain types of reasonable accommodations, such as sign language interpreters. For more information, go to the EEOC Website at <http://www.eeoc.gov>.

VIII

FREQUENTLY ASKED QUESTIONS AND ANSWERS CONCERNING THE DUTY TO ACCOMMODATE AN EMPLOYEE'S DISABILITY

(Complaints concerning an employer's failure to accommodate an employee's disability account for a significant number of discrimination complaints filed against private and Federal sector employers. Unfortunately, this is one of the most difficult and least understood areas of civil rights law. This is the fifth in a series of articles addressing some frequently asked questions and answers concerning the reasonable accommodation requirement. The Q&As below address the requirement to consider reassignment as a possible accommodation.)



The Americans with Disabilities Act (ADA) specifically lists "reassignment to a vacant position" as a form of reasonable accommodation. This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.

Q. 1. Must the employee be qualified for the new position?

A. 1. Yes. An employee must be "qualified" for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation. **The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.**

Q. 2. Must the employer assist the individual to become qualified?

A. 2. No. There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job. The employer, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to anyone hired for or transferred to the position.

Example A: An employer is considering reassigning an employee with a disability to a position which requires the ability to speak Spanish in order to perform an essential function. The employee never learned Spanish and wants the employer to send him to a course to learn Spanish. The employer is not required to provide this training as part of the obligation to make a reassignment. Therefore, the employee is not qualified for this position.

Example B: An employer is considering reassigning an employee with a disability to a position in which she will contract for goods and services. The employee is qualified for the position. The employer has its own specialized rules regarding contracting that necessitate training all individuals hired for these positions. In this situation, the employer must provide the employee with this specialized training.

Q. 3. When should the employer consider reassignment as a reasonable accommodation?

A. 3. Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. **Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other accommodations would impose an**



undue hardship. However, if both the employer and the employee **voluntarily** agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.

Q. 4. What is the definition of a "vacant" position?

A. 4. "Vacant" means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time. A "reasonable amount of time" should be determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time. A position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position. The employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.

Example A: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.

Example B: An employer is seeking a reassignment for an employee with a

disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent position plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to her because six months is beyond a "reasonable amount of time." (If, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)

The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified. Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee's current position in terms of pay, status, etc. If it is unclear which position comes closest, the employer should consult with the employee about his/her preference before determining the position to which the employee will be reassigned. **Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion.**

Q. 5. Is a **probationary employee** entitled to reassignment?



A. 5. Employers cannot deny a reassignment to an employee solely because s/he is designated as "probationary." An employee with a disability is eligible for reassignment to a new position, regardless of whether s/he is considered "probationary," as long as the employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose.

The longer the period of time in which an employee has adequately performed the essential functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability. If, however, the probationary employee has **never** adequately performed the essential functions, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never "qualified" for the original position. In this situation, the employee is similar to an applicant who applies for a job for which s/he is not qualified, and then requests reassignment. Applicants are not entitled to reassignment.

Example A: An employer designates all new employees as "probationary" for one year. An employee has been working successfully for nine months when she becomes disabled in a car accident. The employee, due to her disability, is unable to continue performing the essential functions of her current position, with or without reasonable accommodation, and seeks a reassignment. She is entitled to a

reassignment if there is a vacant position for which she is qualified and it would not pose an undue hardship.

Example B: A probationary employee has been working two weeks, but has been unable to perform the essential functions of the job because of his disability. There are no reasonable accommodations that would permit the individual to perform the essential functions of the position, so the individual requests a reassignment. The employer does not have to provide a reassignment (even if there is a vacant position) because, as it turns out, the individual was never qualified -- *i.e.*, the individual was never able to perform the essential functions of the position, with or without reasonable accommodation, for which he was hired.

Q. 6. Must an employer offer reassignment as a reasonable accommodation **if it does not allow any of its employees to transfer** from one position to another?

A. 6. Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.



Q. 7. Is an employer's obligation to offer reassignment to a vacant position **limited to those vacancies within an employee's office, branch, agency, department, facility, personnel system** (if the employer has more than a single personnel system), **or geographical area**?

A. 7. **No!** This is true even if the employer has a policy prohibiting transfers from one office, branch, agency, department, facility, personnel system, or geographical area to another. The ADA contains no language limiting the obligation to reassign only to positions within an office, branch, agency, etc. Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship. If an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses, unless the employer routinely pays such expenses when granting voluntary transfers to other employees.

Q. 8. Does an employer have **to notify an employee with a disability about vacant positions**, or is it the employee's responsibility to learn what jobs are vacant?

A. 8. The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time. In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant

positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications.

An employer should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly an employer can search for and identify whether an appropriate vacant position exists. For a very small employer, this process may take one day; for other employers this process may take several weeks. When an employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.

Q. 9. Does **reassignment** mean that the employee **is permitted to compete** for a vacant position?

A. 9. No. Reassignment means that the employee gets the vacant position **if s/he is qualified for it**. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.

Q. 10. If an employee is reassigned to a lower level position, **must an employer**



maintain his/her salary from the higher level position?

A. 10. No, unless the employer transfers employees without disabilities to lower level positions and maintains their original salaries.

