OEDCA DIGEST

Vol.VI, No. 1 | Department of Veterans Affairs Office of Employment Discrimination Complaint Adjudication | Winter 2003

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 liability for sexual harassment, disabilities, retention of promotion records, "light duty" as a reasonable accommodation, untimely appeals, sexual harassment of supervisors by subordinates, job stress as a disability, and EEO claims based on denial of veterans preferences.

Also included in this issue are questions and answers concerning the equitable remedy of back pay.

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

Charles R. Delobe

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I

MANAGEMENT'S FAILURE TO ADDRESS SEXUAL HARASSMENT CLAIM RESULTS IN LIABILITY

A mentally unstable female employee became infatuated with the complainant, a casual workplace acquaintance, and sought a relationship with him. Although he expressed no interest in her, she nevertheless pursued him. She waited for him in his office. When he told her not to do that, she complied, but began leaving long, intimate messages in his voicemail. She also sent him email messages. This continued for over two years, even after the female employee took a position at another VAMC. The complainant repeatedly told her to leave him alone. He hoped that she would eventually lose interest and stop bothering him, but she did not.

Ultimately, the female employee assumed the complainant's name and obtained a state ID card and social security card under his name. She also held herself out to be the complainant's ex-wife. Using the false identification, she was rehired at the VAMC where the complainant worked. The complainant learned that his pursuer once again worked at the same facility as he did, and that she was using his name and claiming to be his ex-wife. He also learned that she had gained access to his personnel and/or medical records. He contacted a Human Resources employee, who informed him that the female employee's personnel records showed her to have his last name. The complainant then filed a complaint with the VA police. He did not want to press charges; he only wanted her to stop bothering him. The investigators confirmed the complainant's assertions concerning the employee and had her sign a statement that she would no longer annoy or harass him. However, she continued to contact him.

The complainant reported the employee's conduct to her supervisor (a Nurse Manager) and to the Administrative Officer who managed the employee's work. Both officials listened to voicemail messages the complainant had received from his putative ex-wife. The Administrative Officer did not know whom to believe, so he did nothing. The Nurse Manager explained that she took no action because she had not witnessed any harassment, and because the conduct of the female employee toward the complainant did not affect her, her work section, or the female employee's duty performance. She apparently assumed that she had no authority or responsibility regarding the complainant's claims.

The complainant thereafter contacted an EEO counselor. Shortly before he filed his formal complaint of discrimination, the female employee was terminated during her probationary period for conduct and performance problems that were unrelated to the complainant.

OEDCA found that the complainant established a *prima facie* case of hostile en-

vironment harassment and sexual harassment. He was subjected to unwelcome verbal conduct, some of which was sexual in nature. Also, it is clear that the unwelcome conduct was based on the fact that he is male. Finally, the conduct was sufficiently severe and pervasive to unreasonably interfere with the performance of his duties and to create an objectively hostile, intimidating, or offensive work environment. After the complainant's pursuer returned to work at his VAMC, he went out of his way to avoid her and her work area. He became concerned when he learned that she had assumed his name, that she had accessed his medical or personnel records, and that she continued to pursue him even after the VA police intervened and she had agreed not to contact him again. He stated that, although he tried not to be "paranoid" about the whole matter, it was distracting and a "pretty trying time" for him. He realized that she was mentally unstable, and he did not know what element of danger might be involved or what might take place if her conduct continued.

OEDCA also found that the Agency is liable for the conduct of the female employee because management officials failed to take prompt, effective remedial action after receiving the complainant's reports of harassment. To avoid liability for non-supervisory hostile environment harassment, management must take prompt, appropriate action upon learning of allegations of harassment in the workplace. Usually such action includes separating the parties and conducting an immediate administrative inquiry into the allegations to gather as much factual information as possible. Management then decides what further action is appropriate based on the results of the inquiry.

In this case, both officials approached by the complainant failed to act on the information he provided. The Administrative Officer did not act because he did not know whom to believe. The Nurse Manager did not act because she did not think it was her responsibility to do so, as the complainant did not work for her. Failure to act is not excusable, even where it is based on ignorance rather than on specific discriminatory intent.

II

EEOC JUDGE FINDS THAT ECZEMA IS NOT A DISABILITY

A medical center employee [hereinafter referred to as the "complainant"], who worked as a scrub technician in an emergency room, alleged that the VA failed to accommodate his disability. He described his disability as a skin condition – eczema – that caused the skin on his right hand to crack and bleed when it came into contact with water, soap, chemicals, or any combination thereof.

When he advised his head nurse of the condition, she initially reduced the number of duties that required him to scrub and wear gloves, and later com-

pletely relieved him of his scrubbing duties for a three-month period. During this period his condition improved.

Approximately one year after first reporting his condition to his head nurse, he presented his supervisor with a diagnosis from his physician. The diagnosis stated that the complainant had hand eczema that was aggravated by his surgical scrub. The physician recommended that he wear cotton glove liners with vinyl gloves, wash his hands with specified types of soap, and use a certain type of skin cream.

Although the complainant claimed that his supervisor did not provide him with the liners, vinyl gloves, and proper soaps and cream, the credible evidence indicated that those items were available in supply. Moreover, an HR specialist testified that the complainant admitted to her that he did not regularly use the proper soaps and gloves as a preventive measure, choosing instead to wait for his condition to worsen before using them. The head nurse testified that the complainant had everything he needed to work in his area, and that she provided him with opportunities and assignments where he did not have to wash his hands as often.

An EEOC judge found, and OEDCA agreed, that the complainant was not "an individual with a disability", as EEO law and regulations define that term. An "individual with a disability" is one who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such impairment.

"Major life activities" are activities that are of central importance to daily life, and include, among other things, caring for oneself, manual tasks, walking, seeing, hearing, breathing, learning, and working.

According to the complainant, the only life activities affected by his skin condition were recreational ones such as hunting, fishing, and gardening. Because such activities are not of central importance to the daily life of the average person in the general population, they do not fall within the legal definition of "major life activities." As for work, the complainant was able to perform the duties of his position, provided he utilized the protective measures prescribed by his physician. Thus, the complainant was not substantially limited with respect to any major life activities, including working. Hence, he was not an individual with a disability as defined by the *Rehabilitation Act* and EEOC's governing regulations. Because he was not an individual with a disability, the Department had no legal obligation to accommodate his skin condition.

To its credit, management in this case did, in fact, do all that would have been required of it in terms of accommodation had the complainant's condition actually qualified as a disability.

III

FAILURE BY HUMAN RESOURCES MANAGEMENT SERVICE TO RETAIN PROMOTION RECORDS RESULTS IN FINDING OF DISCRIMINATION

This case illustrates the importance of retaining records regarding personnel actions that are the subject of an EEO complaint.

The complainant alleged, among other things, that she was discriminated against because of her age when she was not chosen for a temporary Program Clerk position. After reviewing her application, a Human Resources (HR) specialist advised her by letter that she was unqualified for the position because the job announcement required at least one year of experience in drafting letters, typing, and maintaining files, and her application failed to indicate the number of hours she worked in her former jobs. In response, the complainant claimed that her application did, in fact, contain that information; and that her qualifications, as described in her application, were plainly superior to those of the much younger selectee. An EEOC judge agreed with the complainant.

To prove her claim of superior qualifications, the complainant pointed to her OF-612 (*Optional Application for Federal Employment*), which she submitted along with a copy of her résumé. Form OF 612 showed that she had worked 40+ hours per week as an owner of a sporting goods store for over seven years, which involved managing daily operations and a full range of clerical responsibilities. She also worked 40 hours per week for a three-month period for the VA as a temporary clerk. Unfortunately, she failed to include that information, -*i.e.*, the number of hours worked - in the résumé she attached to her OF 612. Her résumé also indicated two years of clerical experience with a local church. In contrast to the complainant's approximately 10 years of relevant experience, the selectee's application showed only two years of clerical experience. In addition, the selectee's application showed that she could type only 55 words per minute, while the complainant's application indicated she could type 65 words per minute.

According to the HR specialists responsible for this personnel action, whenever an applicant submitted both an OF 612 and a résumé, both would be stapled together and examined during the initial HR review process. However, the HR specialists seemed to be claiming that they reviewed only the complainant's résumé, which did not contain specific information about the number of hours worked.

In order to resolve the discrepancy raised by their testimony, the EEOC judge ordered the agency to produce all applications for this position as well as the eligibility evaluations. Specifically, the judge wanted to determine if all applicants who submitted both an OF 612 and a résumé were evaluated in the

same manner as the complainant, -*i.e.*, whether HR ignored their Form OF 612 also and looked only at their résumés.

Unfortunately for the agency, HR was unable to comply with the judge's order because it had destroyed the promotion files. Because the agency failed to comply with the judge's order, the judge imposed a sanction on the agency. Specifically, the judge drew an adverse inference that if the requested information had been provided, it would have been favorable to the complainant and unfavorable to the agency. That inference, coupled with evidence of the complainant's superior qualifications, resulted in a decision in favor of the complainant.

It is not entirely clear how this case would have been resolved if the agency had not destroyed the files. That evidence might have shown that HR treated all applicants who filed both an OF 612 and a résumé in exactly the same manner during the initial review process and, hence, the complainant's failure to qualify was not due to age discrimination. However, the agency's failure to produce the files resolved that question in favor of the complainant.

It is critical for HR officials to ensure that documents pertaining to personnel actions that are the subject of a pending EEO complaint are not destroyed. In the ordinary course of business, and in accordance with the General Services Administration's records disposal regulations, agencies regularly destroy records that are no longer needed. Those regulations require, however, that all records relevant to an EEO complaint must be preserved until after final resolution of the complaint.

What most likely happened in this case is that HR personnel at the facility failed to check with the VA's Office of Resolution Management field office to ensure that there were no pending EEO complaints pertaining to the records they were about to destroy. Failure to do so could, and in this case did, result in sanctions, including an adverse finding against the Department.

IV

EEOC CAUTIONS AGENCY ABOUT DENYING "LIGHT DUTY" ASSIGNMENTS FOR NON JOB-RELATED INJURIES

In the Fall 2002 edition of the OEDCA Digest, we warned management officials about the widespread misperception that there is no requirement to provide "light duty" assignments to employees who incur injuries that are not job-related. In the reported case, the EEOC judge found no discrimination because the complainant was unable to prove that he was an "individual with a disability; hence, management had no legal obligation to accommodate him. In so ruling, however, the judge warned the agency that the facility's written reasonable accommodation policy was invalid, as it categorically precluded the possibility of a light duty assignment for

employees whose injuries are not job-related.

Within days of publishing the Fall 2002 edition, OEDCA received another decision from an EEOC judge containing an identical warning regarding a facility's invalid reasonable accommodation policy. Because there is so much confusion in the field regarding the issue of light duty *vis-à-vis* the reasonable accommodation requirement in *The Rehabilitation Act*, we decided to revisit the issue in the hope that EEO managers and regional counsel attorneys will bring the matter to the attention of HR and other management officials.

In the most recent case dealing with this issue, an employee injured his left ankle in a non-work related accident. Six years after the accident, he underwent surgery to fuse the ankle. Prior to the surgery, he had occasionally taken some leave because of his ankle, but the injury had imposed no significant restrictions, and he did not consider himself disabled during that time frame. Subsequent to the surgery, however, the complainant's physician certified that he could return to work subject to limitations: he was not to climb ladders or lift objects weighing more than twenty pounds until the ankle fusion healed.

The complainant presented the physician's certification to his supervisor and verbally requested a light duty assignment. The supervisor denied the request, citing the facility's written Reasonable Accommodation Policy #05-27, which categorically states that light duty is not authorized for employees whose injuries do not occur on the job. The complainant was therefore forced to use approximately six months of accrued sick leave until he was medically cleared to return to work without restrictions.

The complainant's subsequent EEO complaint alleged that his ankle surgery had rendered him temporarily disabled, and that management's refusal to provide him with a light duty assignment following his surgery constituted a failure to reasonably accommodate in violation of the *Rehabilitation Act*.

After reviewing the record, an EEOC judge disagreed with the complainant's claim and found no discrimination. The judge correctly noted that the complainant was not an "individual with a disability" because his impairment following the surgery was only temporary in nature, with no long-lasting or permanent effects and, hence, not "substantially limiting." Because he was not an "individual with a disability," management had no duty to accommodate him with a light duty assignment.

As a general rule, temporary impairments are not considered disabilities, as they do not substantially limit major life activities for an extended period. While it is sometimes possible for a temporary impairment to rise to the level of a disability, the impairment must be long lasting and significantly restrict major life activities for an extended period.

As did the judge in the case reported last quarter, the judge in this case warned the agency that if she had found the complainant to be an individual with a disability, she would have also found the facility's reasonable accommodation policy regarding light duty to be invalid. The judge correctly noted that the *Rehabilitation Act* does not permit an employer to deny a request for reasonable accommodation simply because the disability does not stem from a job-related incident. For purposes of the reasonable accommodation requirement, it matters not what caused the disability.

If a non job-related injury results in a permanent or otherwise long-lasting impairment that significantly restricts a major life activity, management does have an obligation to provide a reasonable accommodation. Moreover, depending on the circumstances, the only effective accommodation available in some cases may be something similar or equivalent to a light duty position.[1] If such is the case, management may not avoid its obligation to accommodate simply by asserting that the injury did not derive from an occupational injury. It would have to provide the accommodation unless it could demonstrate that doing so would impose an undue hardship. The EEOC will not find undue hardship if management refuses to reassign a disabled employee to a vacant light duty position reserved for occupationally-injured employees on the theory that it would then have no other vacant light duty positions available if an employee were injured on the job and needed light duty.

Experience demonstrates that most disability discrimination complaints involving injuries result in a finding of no discrimination because the injuries are almost always temporary in nature with no long lasting or permanent effects and, thus, do not qualify as disabilities. Hence, reasonable accommodation policies, such as the one criticized by the EEOC judge in this case, will not affect the outcome of the case, however invalid they may be.

Occasionally, however, an injury, whether job-related or not, does result in a long-lasting or permanent impairment that substantially limits one or more of the employee's major life activities. In such a case, if the employee requests a reasonable accommodation that sounds like a request for some form of "light duty", management must engage in an interactive process to determine if granting such a request would be possible without causing undue hardship on the organization's operation. This is true notwithstanding any "reasonable accommodation policy", written or otherwise, that reserves light duty assignments for employees with job-related injuries.

As we have noted previously, disability law is the most complex and misunderstood area of civil rights law. Managers

[1] See, EEOC Enforcement Guidance: *Worker's Compensation and the ADA*, Q&As 27 through 29 (September 3, 1996).

and supervisors should always consult with the Office of Regional Counsel before taking any action, or refusing to take action, in connection with any matter relating to an employee's disability or alleged disability.

V

EEOC DISMISSES APPEAL FOR UNTIMELINESS

It is not an uncommon occurrence for the Equal Employment Opportunity Commission to dismiss a complainant's appeal because the complainant failed to file the appeal within the 30-day time limit required by EEOC's regulations. The following case is a good example.

The complainant signed for receipt of the Department's Final Agency Decision (FAD) on May 31, 2000. The final decision included a standard notice that fully explained the complainant's right to appeal the decision to the EEOC's Office of Federal Operations in Washington, D.C. Included in the notice was the EEOC address to which the appeal should be mailed and the time limit (i.e., 30 days) within which the appeal must be postmarked. The notice also specifically warned the complainant that if he filed his appeal beyond the 30-day time limit, he should provide the Commission with an explanation as to why the appeal should be accepted despite its untimeliness. Moreover, the notice advised the complainant that if he did not explain why timeliness should be excused, the Commission might dismiss his appeal as untimely.

As noted above, the complainant received OEDCA's final decision on May 31, 2000. Hence, any appeal to the EEOC had to be filed no later than June 30, 2000. According to EEOC's appellate decision, the complainant did not file his appeal until July 5, 2000 -- 5 days beyond the 30-day time limit. Moreover, he failed to offer any explanation in his appeal for his untimeliness. Accordingly, EEOC simply dismissed the appeal as untimely without considering its merits.

The EEOC frequently dismisses untimely appeals, accepting them only when the complainant is able to provide a good reason for the delay in filing. But what constitutes a good reason? What may sound like good reasons to complainants often will not suffice to convince EEOC to ignore the untimeliness and accept and adjudicate the appeal. Common excuses such as "I forgot about the time limit", or "I was under a lot of stress at the time", or "I lost my decision", or "I had trouble finding an attorney to handle my appeal", or it was my attorney's fault" are not the types of reasons that will convince EEOC to excuse the delay.

The EEOC is not at all lenient when it comes to waiving time limits, because the burden of filing an appeal is not an onerous one – it requires nothing more than a one-sentence letter saying that the party wishes to appeal. Generally,

the agency must somehow be responsible for the untimeliness, or there must have been some unusual or exceptional circumstance or event that prevented the complainant from filing a timely appeal.

For example, EEOC has waived the time limit where there is evidence that the agency, either intentionally or inadvertently, misled the complainant about the time limit, or failed to notify the complainant about the appeal right or the time limit. EEOC has also waived the time limit where complainants have presented medical evidence that the delay was due to a physical or mental incapacitation that effectively prevented them from conducting their affairs during the appeal filing period. Unusual events such as natural disasters might also excuse filing delays, provided the complainant presents evidence that it was, in fact, the disaster that caused the delay.

In one recent case, a VA employee claims that the Postal Service delivered the final agency decision to his neighbor. He went on to state that his neighbor signed for the decision on March 1st, gave it to his [the complainant's] son on an unspecified date, his son forgot to give it to him, and that he "found" it on March 17th. He did not file his appeal until April 9th, 39 days after the March 1st delivery date.

EEOC rejected this explanation and dismissed the appeal as untimely. The Commission acknowledged that while the return receipt bears the signature of someone other than the complainant signing for it on "3/1/02," the complainant presented no evidence at the time he filed his appeal that the decision was delivered to an address other than his own. He failed to present a statement from his neighbor or his son to corroborate his story.

In keeping with their regular practice in such cases, the Commission did not bother to go back to the complainant and invite him to submit evidence in support of his version of the events; instead, it simply dismissed the appeal.

The lesson for complainants who wish to appeal unfavorable agency decisions to the EEOC is simple. Follow the instructions provided in the agency's final decision; and be sure to file the appeal within 30 days of receipt of the decision. If the appeal is filed beyond the 30-day period, include in the appeal correspondence (1) the reason for the untimeliness and (2) any evidence proving that the delay was due to the claimed reason.

VI

SUBORDINATE EMPLOYEE'S CONDUCT TOWARD HIS FEMALE SUPERVISOR NOT SEXUAL HARASSMENT

Although rare, sexual harassment claims are sometimes brought by supervisors against their subordinate employees. Although it is technically pos-

sible that the conduct of a subordinate employee toward his or her supervisor could constitute hostile environment harassment, most such claims fail for a variety of reasons. The following is a case in point.

A female supervisor in a medical clinic complained that one of her subordinate employees, a male health care technician, was sexually harassing her in retaliation for a written counseling she had previously given him for insubordination. The incident that precipitated her complaint occurred when she directed her subordinate to move patients who were blocking a hallway entrance. A short time later, she returned to the area and noticed that the patients had not been moved as she had directed. She called the subordinate into a nearby examination room and asked him why he had not moved the patients. The subordinate responded by stating that she should have moved them herself. She told him once again to move the patients out of the area then and left the examining room.

She walked a short distance down the hallway and then entered a small room, at which point she noticed that the subordinate employee was following her. As she turned toward him, the employee said to her, "Well [supervisor's name], I have a problem with that." The supervisor testified that the employee then repeated the phrase two more times, and that while doing so he was "in [her] face." She stated that he was so close to her that his chest was touching her breasts.

She further testified that he was blocking the entrance, that she quietly asked him a few times to allow her to exit the room, that he ignored her request, that she had to raise her voice before he eventually moved aside and allowed her to leave, and that throughout the incident his voice was angry and threatening.

The supervisor further stated that a few days later, the subordinate employee said to her, "Good morning [name]. You're looking mighty pretty today. That's a pretty dress you're wearing." The supervisor then told another employee to tell the subordinate not to speak to her. The subordinate did not speak to the supervisor after the incident.

The supervisor took no action against the subordinate because of the above incidents. Instead, she filed a discrimination complaint alleging that the subordinate had sexually harassed her.

After reviewing the administrative record, an EEOC judge determined that a hearing on the matter was not warranted and issued a decision concluding that the above facts did not support a finding of sexual harassment. OEDCA agreed and accepted the judge's decision.

Specifically, the judge concluded that the incident in question, although clearly intimidating, inappropriate, and

threatening, and although it amounted to insubordination, did not occur because of the supervisor's sex -- *i.e.*, it was not sexually driven. The incidental contact with her breast appears to have been accidental, having occurred in the context of a verbal altercation between the supervisor and her subordinate, as opposed to an attempt by him to get close to her for sexual reasons.

As for the subordinate's comment about her appearance, the judge noted that the subordinate had previously complimented her on how she looked, and that the supervisor had given no suggestion that his comments were unwelcome. Moreover, he made no further comments after she let it be known that he was not to speak to her.

The supervisor obviously handled the situation poorly. She should have taken or requested disciplinary action against the subordinate employee rather than filing a sexual harassment claim. She had both the authority and responsibility to deal with her subordinate's misconduct, and she failed to do so.

As we noted earlier, there are circumstances where the conduct of a subordinate employee toward his or her supervisor could constitute hostile environment harassment for which the employer might be liable. For that to happen, however, the supervisor would have to show that the conduct was severe enough to create a hostile work environment; the supervisor lacked the independent authority to discipline the offender, and higher level supervisors or managers were aware of the conduct and failed to take prompt, appropriate, and effective corrective action against the offender.

If the supervisor in this case had the independent authority to discipline the offender, including removal if necessary, she should have exercised that authority. If she lacked that authority, she should have requested higher-level officials to take such action. She did neither.

VII

JOB-RELATED STRESS AND ANXIETY STEMMING FROM REASSIGNMENT NOTICE NOT A DISABILITY

Not every impairment described as "disabling" by a medical professional constitutes a disability under EEO law and regulations. A VA employee recently discovered this fact after filing a disability discrimination complaint alleging that his removal was improper because management failed to accommodate his job-related stress and anxiety.

The employee in question had been serving as an Assistant Canteen Chief in State X for approximately three years when he was informed that he was being detailed to a similar position at a facility in State Y that had just lost its Assistant Chief. A few weeks after reporting for what he thought would be only a

temporary assignment away from home, Canteen Service officials informally notified him of his "directed reassignment" - *i.e.*, permanent assignment - to that facility. They told him that he would be permitted to return home for a week before reporting to his new assignment.

The day after receiving the informal notice of reassignment, the employee went to the Employee Health Unit, where his blood pressure was found to be 175 over 100 (very high). He shortly thereafter went on sick leave for 30 days at the recommendation of his personal physician because of the stress and anxiety he was experiencing over the reassignment notice. Although the employee had a history of high blood pressure, his medical records indicated that it had been "very controlled" up to that point with medication.

Two days after he received the informal notice, Canteen Service Officials provided him with a written order directing him to report in 30 days for permanent duty at the facility in State Y. The order contained an election form requiring him to accept or decline the reassignment within a stated time period. The employee understood that declining the reassignment would result in the termination of his employment with the Canteen Service[2]. Notwithstanding that fact, he failed to make the required election, even though management had subsequently granted him an extension to respond. Management officials thereafter sent him written Notice of Proposed Removal for failing to accept the directed reassignment.

The complainant responded to the proposed removal notice by stating that management had to delay any decision on his removal until his physician had more time to evaluate his health. In the meantime, he sought the advice of a psychiatrist who provided a letter to Canteen Service officials stating that the employee was under his care and being treated for "mixed anxiety and depressed mood"; that the sole cause of this condition was the directed reassignment; that the employee had no history of psychological problems prior to the reassignment notice; that his psychological condition made it impossible for him to accept the reassignment; and that elimination of the psychological problem, which the psychiatrist described as "disabling", was contingent on resolving the reassignment issue.

Management did not accept the psychiatrist's recommendation and, instead, issued the employee a Notice of Removal, whereupon the employee filed the instant complaint.

The EEOC judge concluded, and OEDCA agreed, that the VA did not discriminate against the employee based on disability status, as the employee failed to prove that he had a disability, as that term is defined in EEO law and regulations. Notwithstanding his psy-

[2] The Canteen Service is a non-appropriated fund instrumentality that operates retail stores and cafeterias at VA facilities.

chiatrist's conclusion that the psychological condition was "disabling", it was clear from the employee's own testimony, as well as the statement from his medical provider, that the employee's psychological condition related solely to the reassignment decision and his anxiety about having to move and disrupt his wife's life and career.

Moreover, he was unable to identify any major life activity that was substantially limited by his psychological condition, including the major life activity of working. The medical evidence indicated that the employee's inability to work was temporary at best and due solely to the anxiety and stress caused by the directed reassignment. Otherwise, the employee was fully capable of performing all of the duties of an Assistant Canteen Chief, or for that matter any other job for which he might be qualified *(e.g.*, a similar position involving retail or food service management in the private sector).

Where, as here, an employee claims disability status based solely on an alleged limitation on the ability to work, the employee must prove that the medical condition disqualifies him or her from employment in a class of jobs or in a broad range of jobs in various classes. A physical or mental condition that limits an individual's ability to work only because of certain circumstances pertaining to a particular job (*e.g.*, stress or anxiety caused by problems with one's supervisor or job location, or problems performing duties unique to a specific job) is not considered "substantially limiting", and hence not a "disability" under applicable civil rights laws.

In this case, the employee was physically and mentally capable of performing the duties of his management job with the VA or of any other type of retail or food service management job in the private sector. His medical condition was solely the result of one particular aspect of his job – the requirement that he relocate. If that requirement were to disappear, so to would his "disabling" psychological condition.

Disability discrimination claims based on job-related "stress" and "anxiety" conditions rarely meet with success before the EEOC, OEDCA, or the courts. This is because such claims, like the one above, fail to prove the existence of a disability, as they almost always involve little more than an alleged inability to work at one particular job, for one particular employer, or for one particular supervisor. For a complainant to have any chance at all of proving the existence of a disability involving stress or anxiety, he or she must generally be prepared to prove that the condition is permanent and substantially limits some major life activity other than working (*e.g.,* eating, sleeping, breathing, learning, *etc.*).

If the employee is able to prove the existence of such a limitation, and is further able to prove that he or she is otherwise qualified, that there is a plausible accommodation for the disability, and that

accommodation has been requested, the burden will then fall on the employer to prove that it reasonably accommodated the employee, or that there is no reasonable accommodation, or that the accommodation requested would cause undue hardship on the employer's operation.

VIII

EEO COMPLAINT BASED ON DENIAL OF VETERANS PREFERENCE DISMISSED FOR FAILURE TO STATE A CLAIM

It is not uncommon for an employee or applicant for employment, who is also a veteran, to claim discrimination in connection with an employment-related matter due to an alleged failure on the part of management to comply with one or more veterans' preference laws.

In this case a veteran who worked at a VA medical center filed an EEO complaint alleging, among other things, that the VA had improperly denied him training and promotion opportunities. According to the EEO counselor's report, the complainant was not alleging that he had applied for, but was denied, training or a promotion. Rather, he was claiming that he was entitled to training opportunities and an upward mobility position by virtue of his status as a veteran under the *Veterans Readjustment Act,* Title 38, United States Code, Chapter 42, and the *Disabled Veterans Affirmative Action Plan*, Title 5, Code of Federal Regulations, Chapter 1, Subpart C.

An EEOC judge, after reviewing this complaint, denied the complainant's request for a hearing and instead issued a decision dismissing the complaint for failure to state a claim under applicable EEO laws and regulations. The judge's decision, which OEDCA accepted, correctly concluded that the EEOC has no jurisdiction to entertain claims relating to veterans benefits or preferences.

In order to state a claim of employment discrimination under Title VII of the Civil Rights Act of 1964 and other similar civil rights statutes that prohibit workplace discrimination, the employee or applicant for employment must allege that the employment matter in dispute was influenced by or otherwise due to race, color, religion, gender, national origin, disability, age, or prior EEO activity. Most individuals who file EEO complaints allege one or more (and sometimes all) of the above bases of discrimination in their complaint. EEO complaints that fail to allege one or more of the bases noted above must be dismissed for failure to state a claim. This is true even if the complaint concerns an alleged denial of rights accorded to veterans by statute. Such claims must be brought to the attention of the Office of Personnel Management or the Department of Labor, depending on the type of claim the veteran is raising.

IX

QUESTIONS AND ANSWERS ON BACK PAY AWARDS

The following article, in Question and Answer format, has been designed to help the reader understand the equitable remedy of Back Pay, under the statutes enforced by the Commission. The article is reprinted from EEOC's *Digest of EEO Law*, Vol. XIII, No. 3 (Summer 2002).

1. When the Commission orders an award of Back Pay, what does it mean?

Back Pay is an equitable remedy that includes monetary benefits and all forms of compensation, reflecting fluctuations in working time, overtime, rates, penalty overtime, Sunday premium and night work, changing rates of pay, transfers, promotions, and privileges of employment. *See Cass v. Department of Veterans Affairs,* EEOC Petition No. 04A10014 (March 14, 2002).

2. What is meant by an equitable remedy?

An equitable remedy is "make whole relief" designed to restore the complainant as much as possible to the position he/she would have been in absent discrimination. *See Finlay v. United States Postal Service*, EEOC Appeal No. 01942985 (April 29, 1997) (citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975)). The burden of limiting the remedy rests on the agency. *Finlay supra.*

3. Where does the Commission get its authority to award back pay?

EEOC's authority to award back pay is derived from the remedial provisions of Title VII of the Civil Rights Act of 1964, as amended, and, by analogy, the Rehabilitation Act of 1973, as amended. *See Ferguson v. United States Postal Service,* EEOC Request No. 05880848 (May 8, 1990).

4. How is back pay computed?

Back pay is computed under the regulations of the Office of Personnel Management (OPM), set forth at 5 C.F.R. 550.805; and cited in the EEOC's regulations in Subpart E of 29 C.F.R. Part 1614 "Remedies and Enforcement" (revised November 9, 1999). *See* 29 C.F.R. Section 1614.501 "Remedies and Relief." *See also* the Commission's Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110, as revised November 9, 1999), at Ch. 9, Section VIII ("Remedies").

5. May back pay be awarded under all the statutes enforced by the Commission?

Yes. Back pay can be awarded under Title VII, the Age Discrimination in

Employment Act (ADEA), the Rehabilitation Act, and the Equal Pay Act (EPA). *See* the Commission's Enforcement Guidance on After-Acquired evidence and *McKennon v. Nashville Banner Publishing Co,* 115 S. Ct. 879 (1995), at III (A), EEOC Notice 915.002 (December 14, 1995). Prejudgment interest on back pay is not available under the ADEA. *See Gross, et al. v. Department of Veterans Affairs,* EEOC Petition No. 04A10034 (August 8, 2001). With regard to the EPA, a violation of the EPA is also a violation of Title VII, for which back pay with interest may be awarded. An additional award of liquidated damages may also be available in EPA cases. *See* the Commission's Enforcement Guidance *supra,* and *Telford v. Department of the Army,* EEOC Appeal No 01973892 (November 2, 1999), Request to Reconsider granted in part, and denied in part, EEOC Request No. 05A00233 (June 11, 2002). However, an individual may not receive duplicative relief for the same wrong. *See* 29 C.F.R. Section 1620.27.

6. What are liquidated damages?

Liquidated damages are an additional dollar award, generally equal to the amount of back pay. With regard to the Equal Pay Act, an employer who violates the EPA may be liable for the "payment of wages lost and an additional equal amount as liquidated damages." *See* 29 U.S.C. Section 206(d). *See also* the Commission's regulations at 29 C.F.R. Section 1620.33. *And see Telford v. Department of the Army supra.* Liquidated damages are also available under the ADEA, but not in the federal sector. *See, e.g., Smith v. Office of Personnel Management,* 778 F.2d 258, 263-64 (5th Cir. 1985) (court refused to award liquidated damages against the federal government because Congress did not expressly provide for it), *cert. denied,* 476 U.S. 1105 (1986); *Duffy v. Halter,* 2001 WL 253828, *7 (E.D. Pa. 2001) ("liquidated damages are not available in an ADEA action against the federal government").

7. Are there any limitations on back pay awards?

Yes. Back pay generally ends on the date the agency's offer of reemployment becomes effective, or on the date the offer is rejected. *See McNeil v. United States Postal Service,* EEOC Petition 04990007 (December 9, 1999). In addition, an award of back pay is limited to two years prior to the date on which the complaint was originally filed, in accordance with Title VII. *See Stone v. Department of the Treasury (Bureau of Public Debt),* EEOC Request No. 05A11013 (January 10, 2002). *See also* 29 C.F.R. Section 1614.501 with regard to the two-year limitation under the Rehabilitation Act. Back pay may also be limited by the concept of mitigation of damages, discussed below.

8. What does it mean to mitigate dam-

ages?

A complainant has an obligation to mitigate, or limit, potential damages. The complainant must be "ready, willing, and able" to work during the applicable time period. *See Paris v. United States Postal Service*, EEOC Request No. 05921068 (December 7, 1992), and 5 C.F.R. 550.805. Otherwise, complainant is not entitled to back pay for the period he was not ready, willing and able to work. *See Schnaidt v. Department of Veterans Affairs,* EEOC Petition No. 04960022 (November 15, 1996). The agency has the burden to show that complainant failed to mitigate damages. *See Simmons v. United States Postal Service,* EEOC Petition 04930005 (December 10, 1993); and EEOC regulations set forth at 29 C.F.R. § 1614.501(d).

9. How can it be shown that complainant failed to mitigate damages?

Generally a two-prong test is employed: An agency must show that: (1) complainant failed to use reasonable care and diligence in seeking a suitable position, and (2) there were suitable positions available which complainant could have discovered and for which he/she was qualified. *See Simmons v. United States Postal Service supra.*

10. Is back pay subject to deductions?

Yes. OPM's regulations require that offsets and deductions from the gross back pay award be made in a specified order, beginning with the earnings from the job from which the employee was unjustifiably separated. 5 C.F.R. Section 550.805 (e).

11. Can workers' compensation awards affect back pay?

Yes. Under the Federal Employees Compensation Act (FECA), compensation from the Office of Workers' Compensation Programs (OWCP) is deductible from back pay if it is in the form of a wage-replacement benefit. This is to avoid double wage recovery. However, the portion of the OWCP award that is paid as reparation for physical injuries is not subject to deduction because such compensation is not related to wages earned. *See Sands v. Department of Defense,* EEOC Petition No. 04990001 (February 25, 2000).

12. What if there is a dispute between complainant and the agency over the amount of back pay?

A complainant who feels that he or she has not been awarded the correct amount of back pay may petition the Commission for clarification or enforcement of a decision issued under the Commission's appellate jurisdiction. 29 C.F.R. § 1614.503(a).

13. May a complainant receive back

pay as part of a settlement agreement, even without an agency admission of discrimination?

Yes. *See Barrington v. Department of Transportation (FAA)*, EEOC Appeal No. 01990183 (May 21, 2002); see also EEO MD-110, Chapter 12 "Settlement Authority."