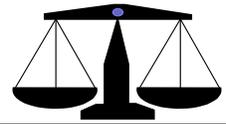


# OEDCA DIGEST



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Department of Veterans Affairs  
Office of Employment Discrimination  
Complaint Adjudication

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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 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 sexual harassment, electing between the EEO process and the MSPB appeal process, "constructive election" of the negotiated grievance procedure, discrimination involving trans-gender behavior, counseling employees for filing sexual harassment complaints, and accusing subordinate employees of making false statements in their EEO complaints.

Also included in this issue is an article on the delicate balancing act involved in effectively supervising employees who have filed EEO complaints.

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## I

### *MANAGEMENT'S FAILURE TO DEAL EFFECTIVELY WITH SEXUAL HARASSMENT CLAIMS RESULTS IN LIABILITY*

The complainant, a Program Support Clerk, was hired in March 2001, subject to a one-year probationary period.

In October 2001 a male coworker sexually assaulted her by pulling her pants down and penetrated her with his finger in a supply room. In November 2001, the coworker again physically assaulted her on an elevator when he tried to kiss her, groped her body, and bit her on her neck.

On both occasions, the complainant clearly and unambiguously communicated to the coworker that his conduct was unwelcome. However, she did not report the incidents immediately based on a reasonable fear that the coworker was capable of having her fired. She eventually reported the incidents and later resigned, fearing she was no longer safe at the facility because management failed to take adequate measures to protect her.

The co-worker had a history of sexual harassment, and his supervisors had previously received reports of his harassing behavior from several female employees. The reports included not only inappropriate verbal comments revolving around oral sex, but physical touching as well, such as thrusting his

pelvis into the backside of a female coworker. The only action taken against him was a paid three-day suspension spread out over non-duty days in May 2001; an action which the harasser readily acknowledged had no effect on him because he lost nothing

After reviewing the record evidence, OEDCA concluded that: (1) the assaults in October and November 2001 occurred as alleged, despite an inconclusive report by an Administrative Board of Investigation; (2) the conduct was unwelcome, and (3) the conduct was sufficiently egregious to constitute sexual harassment.

Moreover, OEDCA concluded that management was liable for the sexual harassment because supervisors failed to take appropriate and effective action when earlier reports about the harasser's conduct surfaced. Although the harasser was eventually removed in May 2003, his removal was for time and attendance issues, not his behavior towards women.

The lesson for management here is clear. Failing to take action upon receiving reports of sexual harassment, or, as in this case, failing to take appropriate and effective action designed to deter further harassment, may result in the Department being held liable. In this case, the three-day suspension, with pay, spread out over non-duty days, obviously sent the wrong message to the harasser and other employees, particularly given the seriousness of his misconduct.



## II

### *EEOC DENIES COMPLAINANT TWO BITES AT THE APPLE*

When an employee is fired, there are often a series of events preceding the removal that are closely related to and/or form the basis for the removal action. Some employees wishing to challenge their removal do so by filing an EEO complaint about the events leading up to the removal and an appeal with the Merit Systems Protection Board (MSPB) regarding the removal itself. As noted in the case below, EEOC's regulations generally prohibit such dual processing of what is essentially the same claim.

A VA employee filed an EEO complaint alleging racial and gender-based harassment in connection with a number of incidents that occurred prior to his removal. The incidents included being accused of sexually harassing other employees, being confined to a certain work area as a result of the accusation, being required to give testimony at an Administrative Board of Investigation (ABI) regarding the accusation, being accused of having lunch with subordinate employees and of shouting at employees, and being required to report to the service chief before leaving his office, including going to the bathroom.

As a result of the ABI, the complainant was removed from employment. He then immediately filed an appeal with the MSPB challenging his removal action.

At the hearing on his EEO complaint, the VA's attorney moved to dismiss the complaint in its entirety on the ground that the complainant had elected to challenge his removal action before the MSPB, and that the matters alleged in the EEO complaint that led up to the removal action were "inextricably intertwined" with the removal action itself and, hence, should not be adjudicated in the EEO process. In other words, in order for the MSPB to adjudicate the removal action, it would, of necessity, have to consider the matters leading up to the removal that were alleged in the EEO complaint.

The EEOC judge agreed with the VA's motion and issued a procedural decision dismissing the EEO complaint, and citing the applicable EEOC regulation requiring such a dismissal. OEDCA agreed with the EEOC judge and issued a Final Order implementing the judge's dismissal decision.

While many complainants find this result unfair, there are sound policy reasons for the regulation requiring it. If both the EEO complaint and the MSPB appeal were allowed to proceed more or less simultaneously, it is conceivable, though not likely, that the two agencies could reach different conclusions. Moreover, even if they reached the same conclusion, it would be a significant waste of the government's time and resources having two different agencies reviewing the same claim.



### III

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

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

EEOC's regulations provide that when a person is employed by an agency subject to certain provisions of Federal law relating to negotiated grievance procedures,<sup>1</sup> and the person is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or grievance on a matter must elect to raise the matter under either EEOC's regulations (i.e., in the EEO complaint process) or under the negoti-

ated grievance procedure, but not both. The obvious intent of this rule is to prevent costly and time-consuming dual processing of the same matter.

If an employee disregards this rule and files both an EEO complaint and a grievance on the same matter, EEOC's regulations provide that whichever is filed first shall constitute an election to proceed in that forum.

In this case, an employee filed both an EEO complaint and a grievance concerning the same matter. However, she filed her EEO complaint first, which normally would constitute an election to pursue the matter in the EEO forum and result in the dismissal of the grievance. For reasons that were unclear in the record, the agency continued to process the grievance through to a Step III decision (i.e., a final decision), despite the existence of a previously filed EEO complaint on the same matter, which it was also processing. The complainant did not withdraw the grievance; nor did she object to continuing with the grievance process.

The complainant eventually requested a hearing on her EEO complaint, but the judge denied her request. Moreover, the judge dismissed her complaint on the ground that she had elected to pursue the matter in the grievance process even though she had filed her EEO complaint first.

On appeal, the EEOC agreed with the judge, concluding that the complainant,

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<sup>1</sup> The VA is subject to such provisions.



by pursuing her grievance to final resolution, had “constructively elected” to pursue the matter in the grievance procedure rather than the EEO process.

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

## IV

### ***COMMENTS ABOUT EMPLOYEE'S TRANS-GENDER BEHAVIOR NOT GENDER DISCRIMINATION UNDER “GENDER STEREOTYPE” THEORY***

A VA employee [hereinafter “complainant”] alleged, among other things, that he was discriminatorily harassed on account of his gender because of demeaning comments made by co-workers and patients regarding his practice of occasionally reporting to work as a female.<sup>2</sup> He wore jewelry, used makeup, changed his name to a female name, dressed as a woman, and announced his intention to change his sex.

According to the record, this behavior

confused and upset both staff and patients. According to the complainant, he was called names such as “slut”, “whore”, and “bitch.” He also alleged that a coworker accused him of being incompetent, that his mailbox was vandalized, and that several individuals improperly accessed his medical records, resulting in gossip among employees about his medical information. Finally, he alleged that management officials denied his request for a reassignment.

The complainant claimed that these incidents and events constituted gender discrimination under the “gender stereotype” theory. In other words, he claimed that his treatment was based on conduct, which others perceived as not conforming to the stereotypical conduct normally attributed to males.

After reviewing the evidence, OEDCA concluded that the complainant failed to prove his claim under the above theory. The evidence did show that some employees and patients made negative comments about his appearance and behavior. However, by his own admission, these comments were isolated events occurring over an extended period of time, some of which were not made in his presence. Isolated comments, however demeaning and hurtful, are not sufficient to prove harassment under Title VII of The Civil Rights Act.

As for the other events complained of, they did not involve conduct that is denigrating or insulting (i.e., harassing)

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<sup>2</sup> The complainant has gender dysphoria, which means that he is unhappy being a male. Gender dysphoria is not a disability within the meaning of *The Americans with Disabilities Act*, and the complainant did not claim that his gender dysphoria constituted a disabling condition.



in nature. The evidence did indicate that a nurse may have accessed his medical information without appropriate authorization, but there was no evidence that the nurse in question divulged any such information to others.

Moreover, there was no evidence that the conduct in question was based on the complainant's gender. OEDCA concluded that the complainant's reliance on the "gender stereotype" theory was misplaced. That theory only applies where an employee's conduct or behavior does not conform to stereotypical conduct attributed to a member of his or her sex. In other words, a male is perceived as less masculine, or a female is perceived as not sufficiently feminine. For example, an employee might be discriminated against because she is perceived as being too aggressive "for a woman"; and a male might be discriminated against for being too sensitive or mild mannered.

In this case, however, the demeaning comments were based, not on gender stereotypes, but rather on the complainant's transgender or transsexual activity. While it might reasonably be argued that this is a distinction without much difference, Federal law does not currently protect employees against discrimination based on transsexual or trans-gender activity. The EEOC has decided in a number of cases that discrimination based on an individual's gender dysphoria or sexual identity disorder is not synonymous with "sex" discrimination under Title VII of the

Civil Rights Act of 1964.

The complainant in this case appealed OEDCA's decision to the EEOC's Office of Federal Operations in Washington, D.C. EEOC has not yet issued its appellate decision.

## V

### ***CONFRONTING EMPLOYEE ABOUT "FALSE ALLEGATIONS" IN HIS EEO COMPLAINT RESULTS IN FINDING OF REPRISAL "PER SE"***

Managers and supervisors find it surprising to learn that they may be "retaliating" against an employee, notwithstanding the fact that they have taken no adverse action against the employee.

In a recent case, an EEOC judge concluded that a management official did not retaliate against an employee because of that employee's prior EEO activity in connection with some adverse actions taken against the employee. Nevertheless, the judge did find that the same official violated the anti-retaliation provisions of EEO law and regulations when, after learning that the employee had gone to an EEO counselor to complain about the adverse actions, contacted the employee by phone to find out why the employee was making "false allegations" against him. The employee testified that he was intimidated by the conversation. The official admitted that the phone conversation took place, but did not recall accusing



the complainant of lying.

OEDCA agreed with the EEOC judge's conclusion that the supervisor violated the anti-retaliation provisions of EEOC's regulations. It is a *per se* (i.e., technical) violation of those regulations to take any action intended to or that might restrain or interfere with, or might otherwise have a "chilling effect" on potential utilization or participation in the EEO process by complainants or witnesses. Intent to retaliate is not a necessary element in a *per se* violation case. Indeed, supervisors and managers who violate the regulation sometimes do so unwittingly.

Moreover, a *per se* violation is possible even if the wrongdoer takes no adverse action against the complainant or other participants in the EEO process. Finally, it is not necessary to show that the wrongdoer actually succeeded in restraining or interfering with the process - only that he or she took actions that could have resulted in such restraint, interference, or intimidation.

The lesson here for supervisors and managers is obvious - avoid any actions, statements or discussions with complainants, witnesses, potential witnesses, or officials with EEO complaint processing responsibilities that could reasonably be interpreted as an attempt to restrain, intimidate, or influence the processing or outcome of an EEO complaint. As a practical matter, this generally means avoiding at all costs any and all conversations, statements, and dis-

cussions with an employee regarding his or her EEO activities.

It is entirely possible that the supervisor in this case may have intended simply to resolve misunderstandings or other problems, and not to intimidate the employee. If that was the intent, however, he could have better accomplished that goal by working with and through the EEO counselor rather than confronting the employee.

## VI

### ***COUNSELING AN EMPLOYEE FOR COMPLAINING ABOUT SEXUAL HARASSMENT RESULTS IN FINDING OF REPRISAL***

While it may seem unfair and just plain wrong, managers and supervisors may not, as a general rule, take adverse action against employees who make unfounded allegations of sexual harassment regarding co-workers.

In one recent case, a female employee (hereinafter "complainant"), who had a history of filing baseless claims of sexual harassment, approached her supervisor to complain that she overheard her former supervisor tell another employee that an envelope he was handing to the employee contained a pornographic object.

The supervisor immediately interviewed the two individuals involved in the incident, and both denied that any such comment was made. Moreover,



neither individual recalled any exchange of an envelope. The supervisor also interviewed an employee who the complainant claims may have overheard the comment or witnessed the passing of the envelope. The employee denied seeing anything or hearing any comment about pornographic objects.

The supervisor next met with the complainant to report his findings. During the meeting, he told her that she might incur disciplinary action if she did not leave her former supervisor alone, and that the former supervisor might actually file a complaint against her.

A few days later, the supervisor handed the complainant a letter of counseling. In the letter, the supervisor noted the complainant's "pattern of every six months complaining about someone sexually harassing her." The letter went on to warn her that her unfounded allegations are disruptive and unacceptable; and that any future behavior of this nature would not be condoned and would result in disciplinary action.

Upon receipt of the counseling letter, the complainant contacted an EEO Counselor, claiming that she was sexually harassed. Moreover, she claimed that the counseling letter amounted to a gag order prohibiting her from contacting a supervisor or the EEO office when she feels that her workplace rights are being violated. In addition, she claimed that the letter was an act of reprisal against her for having made a claim of sexual harassment and for having filed a

sexual harassment claim against the U.S. Border Patrol, her previous employer. After reviewing the record, OEDCA found no evidence that the complainant was sexually harassed. The alleged incident was not even sufficient to state a claim of harassment. In addition, there was no evidence to support her claim that the "envelope" incident occurred.

Having said that, however, OEDCA went on to find that the letter of counseling was an act of reprisal for exercising her rights under Title VII. It was undisputed in the record that the supervisor issued the letter because of the complainant's pattern of making unfounded allegations of sexual harassment, and for no other reason.

This result may seem unfair, especially given the disruptive – and sometimes destructive – impact that numerous, unfounded sexual harassment allegations can have on an organization. Nevertheless, Title VII and other applicable civil rights laws strictly prohibit any conduct that is reasonably likely to deter an employee from exercising rights granted by those laws.

The letter of counseling issued in this case is a classic example of such prohibited conduct. It warns in no uncertain terms that allegations of sexual harassment that the complainant cannot prove will result in discipline.

Title VII's anti-retaliation provision, while strict, does not afford an employee unlimited license to complain at



any and all times and place. Threats of violence to life or property, bypassing the chain of command in bringing complaints, and making an overwhelming number of complaints based on unsupported allegations are examples of situations where a complaint may be deemed unreasonable and, therefore, not protected by Title VII.

A note of caution, however; these exceptions are rare. A supervisor should always seek legal advice from the Office of the Regional Counsel if he or she believes that a complainant's EEO activity falls within the scope of these exceptions.

## VII

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### **MANAGING A BALANCING ACT: IS IT EFFECTIVE SUPERVISION - OR RETALIATION?**

A manager's job is a balancing act in many ways. Dealing with accusations of discrimination requires a delicate balance between effective supervision and sensitivity to the employee's concerns. Employees file EEO complaints for many reasons, and perceive discrimination based on many different circumstances. As a manager, however, you should not feel paralyzed in interacting with employees who have filed EEO

complaints. For instance, if an employee has filed such a complaint based on race, but is genuinely not performing well, you need not excuse bad performance or misconduct. However, everything you do after a complaint is filed naming you as the responsible management official (RMO) could be perceived as further discrimination or retaliation. It is difficult to know how to balance doing your job as a manager and not incur additional complaints of discrimination.

Your safest and most effective course of action is to deal with the employee as appropriate in consultation with Human Resources and General Counsel's office. It is not a good idea to ignore performance or misconduct out of concern that another EEO complaint will be filed. You must be scrupulous in documenting the problem and making sure you have a clear case for the action you are taking, whether it is a reprimand or a poor performance appraisal. You also must make sure never to make any mention of the fact that the employee has filed such a complaint. First, that information is confidential, and second, any mention of it to the employee or others could be perceived as an intention to retaliate.

However, it may also be a helpful exercise for you to try to see yourself as the employee sees you. If you are seen spending more time with employees of a certain race, or letting some employees come in late and penalizing others for the same behavior, you will be per-



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ceived as engaging in disparate treatment. Because you are a manager and your actions have an impact on the careers of your employees, you must treat all employees equally and fairly. This balancing act is part of a heightened standard for supervisors.

