EEO Deskbook
includes
Supervisor's Supplement

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Forward

The purpose of this deskbook is to provide both employees and supervisors with a useful reference guide on existing Equal Employment Opportunity (EEO) law and the rights and obligations of both management and employees relevant to that law. This reference guide is intended to provide a general overview of EEO law as it pertains to employment matters.

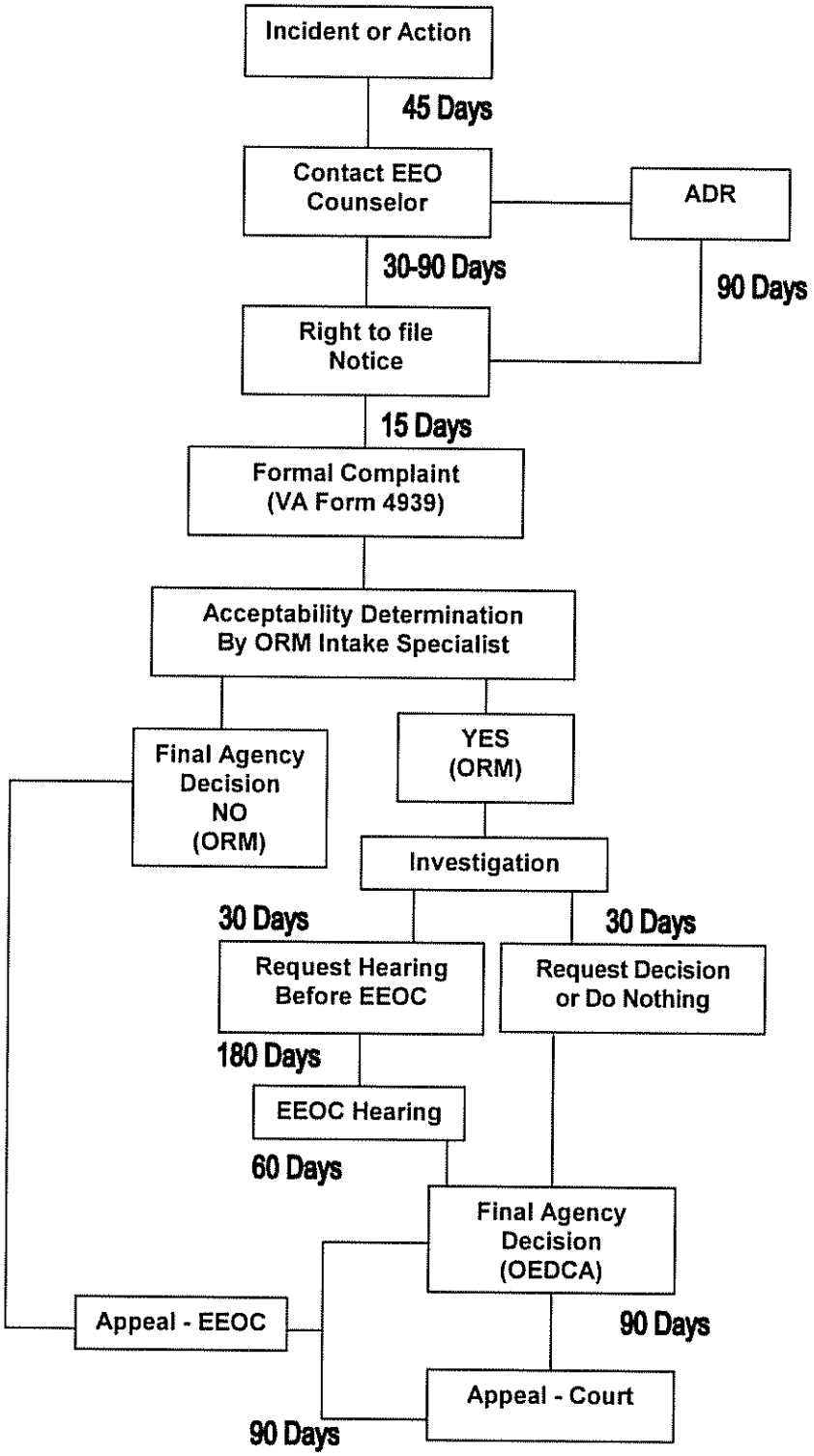
It is not intended to be an in-depth discussion or analysis of specific situations. We have attempted to provide you with a broad overview of the general law, however, please note that courts in separate jurisdictions have differed in analyzing comparable fact patterns and in interpreting EEO law, resulting in contrasting decisions. Each of the different areas of EEO law is covered in a separate section. The sections are broken down as follows:

Each section contains some or all of the following information:

- The definition of the particular type of discrimination;
- The elements the employee must prove to establish a prima facie case;
- The rights and obligations of the employee in pursuing such a complaint;
- The rights and obligations of management;
- Commonly asked questions;
- Common mistakes in dealing with a particular type of discrimination;
- Examples to help the reader understand the issues involved; and
- Sample forms or letters.

Hopefully, this deskbook will help to resolve EEO issues in an effective and fair manner, before they become full-blown complaints.

Discrimination Complaint Process Timeline



Glossary of Terms

Glossary of Terms

adverse action
A personal action taken by management against an employee in the form of one of the following: (1) removal; (2) suspension of more than 14 days; (3) reduction in grade; (4) reduction in pay; or (5) furlough of 30 days or less.

bona fide
Genuine.

burden of persuasion
The ultimate demand on the person bringing the claim to prove to the trier of fact that they're alleged fact or set of facts is true by the required degree of belief. In criminal cases, the evidence must prove the fact(s) beyond a reasonable doubt. In EEO matters the degree of persuasion is a preponderance of the evidence (51% of the evidence likely to be true). The burden of persuasion never shifts. It is always on the person bringing the matter before the trier of fact.

burden of production
The responsibility to go forward with evidence of a particular fact or claim. This burden may shift back and forth between the parties as a trial or hearing progresses.

collective bargaining agreement
Agreement between management and the union concerning certain terms and conditions of employment.

compensatory damages
A type of damage more commonly known as "pain and suffering." Compensates a complainant for the psychological or physical harm he/she suffered as a result of discrimination.

complainant
The party who files an EEO complaint.

disparate
Different or dissimilar; usually has a negative connotation.

explicit
Clearly defined.

front pay
A type of monetary compensation paid to victim of discrimination. Victim is paid the wages for the position he/she would have earned had there not been discrimination without actually placing the person into the position.

harassment
The act of repeatedly irritating or tormenting an individual.

incumbent
Person currently occupying a position.

null and void
No good; not enforceable; as if it had not occurred.

preponderance
Refers to one level of proof a person is required to meet in order to win at a trial or hearing. In order to prevail, the person must convince the trier of fact by a margin of at least 51% that he/she should win.

perceived disability
Regarded and treated as disabled regardless of whether there is an actual impairment.

pervasive
Widespread and persistent.

prima facie
Presumed to be true unless disproved by other evidence. If a complainant establishes a prima facie case and the Agency presents no evidence to contradict the facts initially asserted by the complainant, those facts will result in a finding of discrimination.

protected class
A group of persons covered by laws prohibiting discrimination.

quid pro quo (This for that)
Generally means one person giving something to another in exchange for something else (usually of equal "value"). In context of sexual harassment, quid pro quo sexual harassment occurs when a supervisor offers or threatens to withhold an employment benefit from a subordinate in exchange for subordinate engaging in sexual relations with the supervisor.

reasonable accommodation
Action(s) an employer may undertake to allow a disabled employee to perform the essential functions of his/her job.

retaliation
Negative action against someone as revenge for something you believe he/she has done to you.

selection criteria
Rules, tests, or standards used to choose a person for a job.

trier of fact
Neutral party who hears the evidence presented by both sides of a dispute and makes the determination as to which side should prevail with respect to each allegation.

Title VII
Discrimination

Title VII Discrimination

Overview:
The most well-known and common kinds of discrimination complaints are those involving claims of race, gender, national origin, color, and/or religion. The protections of these categories are created by the Civil Rights Act of 1964, as subsequently amended. The 1978 amendment made it unlawful to engage in sex discrimination based on pregnancy, childbirth, or related medical condition. The law requires an employer to give equal and fair treatment in employment situations to certain protected classes of people. Not every type of discrimination is covered by the above Acts, nor is every type of discrimination illegal. For purposes of discrimination law, an agency may act in a manner that is unfair, as long as such conduct is not based on discriminatory motivations prohibited by Federal law.

Example:
Suppose your first-line supervisor gets angry at you because you reported a work place problem directly to your second-line supervisor instead of going through the chain of command. In revenge against you for your action, the first-line supervisor assigns you only the most difficult work. While the supervisor's conduct is arguably unfair, it is not illegal discrimination. The supervisor did not take the particular action against you because of your race, gender, national origin, color, or religion. He/she took the action as a result of anger at you going over his/her head.

I. The Civil Rights Act of 1964 (Title VII)

Introduction:
As previously stated, The Civil Rights Act of 1964, more commonly referred to as Title VII, prohibits an employer from engaging in conduct that adversely affects a term or condition of an individual's employment because of that employee's race, gender, national origin, color, or religion. There are two theories of discrimination under Title VII: **disparate treatment** and **disparate impact.**

A. Disparate treatment

Cases not involving non-selection or failure to promote. To sustain a claim of disparate treatment in these situations, an individual must prove that:

- he/she is a member of a protected class that corresponds to the type of discrimination alleged (race, gender, etc.); *and*
- he/she has been treated less favorably in connection with a condition or term of employment than persons not in the particular protected class but similarly situated; *and*
- the difference in treatment was because the employee was a member of the particular protected class.

Cases involving non-selection or failure to promote - To sustain a claim of disparate treatment in these situations, an individual must prove that:

- he/she is a member of a protected class that corresponds to the type of discrimination alleged; *and*
- he/she applied for the position or promotion in dispute; *and*
- he/she was qualified for the position or promotion; *and*
- he/she was not selected for the position or promotion despite being qualified; *and*
- the selectee was not a member of the particular protected class; *and*
- the non-selection or non-promotion was because the individual was a member of the particular protected class.

Example:
Jim, who is a black employee, applies for promotion to shift supervisor. He possesses the necessary requirements for the position. In fact, Jim has served for years as acting supervisor of the particular division, always receiving top appraisals. However, the selecting official does not believe that blacks have the capacity to be good supervisors. Even though Jim is best qualified, the supervisor refuses to consider him for the job. This would constitute disparate treatment.

The Agency official taking the disputed action and the employee filing the complaint can be members of the same protected class. The focus of discrimination law is on eliminating discriminatory conduct towards an employee because of the **employee's** race, gender, national origin, color or religion. Whether the official is a member of the same protected class as the employee bringing the complaint will not, in and of itself, defeat a claim.

For a complainant to prove a claim of disparate treatment, he/she usually must be able to identify an employee outside of the complainant's protected class who received more favorable treatment. This "comparison employee" must be "similarly situated" to the complainant. In deciding whether the employee is "similarly situated," the Equal Employment Opportunity Commission (EEOC) considers the following factors:

- Are the complainant and the "comparison employee" in the same job category?
- Do the complainant and the "comparison employee" work in the same working unit? Actions of supervisors working at two different facilities or in two different organizations cannot be compared.
- Are the complainant and the "comparison employee" supervised by the same Responsible Management Official (RMO)?

- If an adverse action is involved, do the complainant and the "comparison employee" have a similar disciplinary and/or job-performance record?
- Are the complainant and the "comparison employee" in the same service category (i.e., are both probationary employees, career-conditional, etc.)?

Where a complainant cannot identify a similarly situated "comparison employee," the complainant will usually be unable to prove disparate treatment, unless there is direct evidence of discrimination (i.e., a statement by the RMO that he/she will not promote Hispanic employees).

B. Disparate impact

Disparate impact discrimination occurs far less frequently than disparate treatment discrimination and is much harder to prove. The basis of a disparate impact claim is that an employer has a rule or employment policy that appears to be neutral on its face, but which in practical application has a greater adverse effect upon a particular protected class of employees.

Example:
For the past 10 years, supervisory positions of a particular Agency have consisted of 20% black employees and 80% white employees. The black employees occupying supervisory positions have been with the company only 5 years. This Agency has a policy that states, "only employees who have held supervisory positions within the Agency for at least 10 years will be considered for the Director's position." Though the policy appears to be neutral on its face, the practical effect of the policy is that none of the black employees of the Agency would be eligible to apply for the Director's position.

In general, to prove disparate impact, a complaint must:

- Identify a neutral policy or employment practice that has an impact on his/her protected class; *and*
- Show statistical evidence that the policy or practice has a greater negative impact on the protected group than on persons outside of the protected class; *and*
- Show that the negative impact on the protected class is caused by the policy or practice.

In other words, the employee must show, through statistics, that members of a particular protected class are receiving less favorable treatment than non-members of the class as a direct result of the particular rule, regulation or policy at issue.

II. The Pregnancy Disability Act

As noted in the overview for this section, Congress amended the Civil Rights Act of 1964, creating the Pregnancy Disability Act. This Act made it unlawful to discriminate against an employee on the basis of pregnancy, childbirth, or related medical conditions. The Act

requires that an employer treat pregnancy the same as any other short-term disability. The most common areas in which such discrimination occurs are in the area of leave and promotional opportunities. An employer may not ask a female employee what her plans are concerning having a family if the employer does not make the same inquiry of male employees.

Likewise, an employer may not refuse to assign certain jobs to a female employee or refuse to promote her because of concerns that she is or may become pregnant. Finally, an employer must provide a female employee who takes time off as a result of a pregnancy with the same amount of leave or opportunity to resume her job position as a male employee who has a short-term disability.

Example:
Susan wants to take a 6-month leave of absence after her baby is born. Her supervisor informs her that she may take the 6-month leave of absence, but that he can't guarantee that she will be returned to her old job unless she comes back to work within 90 days of giving birth. Meanwhile, Harry wants to take a 6-month leave of absence to recover from surgery to repair a broken leg. The same supervisor informs Harry that his job will be waiting for him when he gets back. Such treatment of Susan by her supervisor would constitute a violation of The Pregnancy Disability Act (and may also be gender-based discrimination).

Age Discrimination

Age Discrimination

The Age Discrimination in Employment Act (ADEA) prohibits discrimination in all aspects of employment against persons 40 years of age or older.

- Both the selectee and the non-selected complainant can be over 40 in an age discrimination case. A court can still find age discrimination if the selected employee is in an age band sufficiently lower than that of the complainant.

- The Act removes mandatory retirement requirements for Federal workers. It does not, however, preclude otherwise lawful actions when age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."

- Unlike Title VII cases, an employee may file suit in Federal District Court for age discrimination without going through the administrative process. The suit must be filed within 180 days of the event that gave rise to the complaint, after giving EEOC and the Agency a 30-day notice of intent to file suit. However, it is the opinion of the EEOC that an employee who uses the administrative process is held to the normal time limits dictated by EEO law.

- Possible remedies include such things as reinstatement, promotion, and back pay. However, unlike other types of discrimination, a complainant filing an age discrimination action cannot be awarded compensatory damages at either the administrative phase of the proceeding or in District Court. Additionally, a complainant cannot be awarded attorney fees during the administrative phase of an age discrimination action, but can in connection with a civil action.

Settlement of cases involving age discrimination also requires special attention because the ADEA and the EEOC have mandated that **any settlement agreement must contain seven specific clauses in order to be valid:**

1. Complainant has thoroughly reviewed the entire Agreement and understands its provisions; *and*

2. Complainant has not waived any rights or claims that may arise after the date of the Agreement; *and*

3. Complainant has not waived any rights or benefits to which he/she is already entitled; *and*

4. Complainant has the right to consult with an attorney prior to signing the Agreement; *and*

5. Complainant has had a period of 21 days to consider the Agreement; *and*

6. Complainant will have seven days following the execution of the Agreement to revoke the Agreement, and the Agreement will not become effective or enforceable until the seven-day revocation period has passed; *and*

7. Complainant's relinquishment of his claims and rights is specifically conditioned upon the Agency's compliance with the terms of the Agreement.

Failure to include the above provisions in a settlement agreement involving age discrimination renders the agreement null and void.

Harassment

and

Sexual Harassment

Harassment in General

It is the policy of the VA that no employee shall be subjected to harassment based on race, color, gender, religion, national origin, age, disability, or sexual orientation, and that no employee will be subjected to retaliation because he or she has brought forth such an allegation. Harassment may take the form of verbal remarks, physical conduct, or displays of offensive material. If an employee is subjected to harassment, the employee may bring a claim.

Harassment that creates a hostile work environment is conduct that is so severe or pervasive that it alters the employee's conditions of employment. Any employee affected may bring a claim for hostile environment harassment.

If the conduct is incited or welcome, it is not harassment. Off-color or offensive jokes, even if made repeatedly, are not harassment if the employee bringing forth the allegation participates in the conduct. However, once an individual conveys that the conduct is not welcome, or that the jokes are no longer considered "jokes", any conduct of the same nature that occurs thereafter may be considered harassment.

Participation in the conduct does not always mean the conduct was welcomed. The victim may legitimately fear for his or her job, particularly in quid pro quo sexual harassment cases (see below), and believe that unless he or she acquiesces termination will occur or other employment benefits will be withheld.

Allegations of harassment must be dealt with promptly and effectively. An immediate inquiry, to the extent possible, should be undertaken. Such allegations should also be given the highest degree of confidentiality possible. Employees interviewed, including the alleged victim, should be assured that they will not be subject to retaliation for their participation in any investigation. Management must also take immediate appropriate corrective action against any employee who engages in harassing conduct. Because sexual harassment is the most prevalent form of harassment at this time, the following refers to sexual harassment, however, please be aware that most of that discussion, particularly the portions relevant to hostile environment liability, prevention and employee responsibility, are applicable to harassment based on the other prohibited bases listed above.

Sexual Harassment

Introduction:

Sexual harassment claims are some of the most difficult to process and handle. Part of the problem stems from confusion between the terms "sexual harassment" and "harassment based on sex." "Sexual harassment" means that an individual is being harassed on the basis of conduct that has sexual overtones. "Harassment based on sex," means that the individual is being harassed because of the person's gender.

Secondly, part of the reason sexual harassment has proven to be such a persistent problem is that people continue to believe a variety of myths about it. For example:

Myth: *Sexual harassment is primarily a "women's problem, and has been blown out of proportion by women's advocacy groups."*

Fact: Both men and women continue to be victimized by sexual harassment, and the number of sexual harassment complaints filed by men is growing.

Myth: *Sexual harassment exists primarily in the "eye of the beholder." Almost any word or deed, no matter how innocent, can be labeled sexual harassment.*

Fact: Both the courts and the EEOC have adopted the "reasonable person" standard for evaluating behavior. Sexual harassment complaints based on isolated incidents and actions or words that are unlikely to be found objectionable by a "reasonable person" are subject to dismissal.

Myth: *Most sexual harassment involves a manager or supervisor harassing a subordinate employee.*

Fact: The majority of sexual harassment complaints are based on the behavior of co-workers.

Myth: *Most sexual harassment is of the blatant, quid pro quo variety.*

Fact: The vast majority of sexual harassment in the workplace consists of subtle behavior.

Myth: *A person accused of sexual harassment faces a stacked deck and is essentially treated as guilty until proven innocent.*

Fact: Precisely because sexual harassment claims are so easy to make and so potentially damaging to the accused, such claims are subject to extremely careful investigation by the Agency. As with all other charges, those accused of harassment are assumed to be innocent unless and until facts prove otherwise.

Generally, the law defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Specifically, the law recognizes three types of sexual harassment - **quid pro quo, hostile work environment, and sexual favoritism.**

I. Defining Sexual Harassment

A. Quid Pro Quo - Quid pro quo harassment is the easiest to recognize. It occurs when an individual serving in a supervisory capacity seeks sexual favors from a subordinate employee for something of value. The "something of value" offered in return might consist of almost any form of favorable treatment, such as receiving a favorable performance evaluation, or being selected for promotion. Quid pro quo usually occurs when:

- Submission is made, either explicitly or implicitly, a term or condition of an individual's employment; or
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual.

Quid pro quo harassment does not require that a supervisor clearly state what specific favors are expected for what specific return. Demand for sexual favors can be explicit or implicit. Both the courts and the EEOC have recognized that quid pro quo harassment can be implied from the overall pattern of a supervisor's actions. A claim of quid pro quo sexual harassment can be raised regardless of whether or not the employee submitted to the request.

B. Hostile Work Environment - This type of harassment is often harder for employees and managers to recognize. Hostile environment harassment is usually found where a general pattern of workplace behavior exists that is **sexually-oriented** and **severe** or **pervasive.** It usually involves actions of co-workers that interfere with an individual's work performance or creates an intimidating, hostile or offensive work environment.

Here is how the highlighted terms have been defined in actual workplace situations:

Sexually-oriented behavior has been found to include:

- Letters, telephone calls, magazines, pictures and objects of a sexual nature or content;
- Deliberate touching, brushing, cornering, pinching or leaning over a person;
- Suggestive looks, comments, gestures or whistles;
- Unwelcome pressure for dates or sexual favors;

- Sexual jokes, teasing, remarks, and questions.

Pervasive behavior is that which is widespread, common, or repeated.

Severe behavior is that which would be found to be objectionable to a "reasonable person" under similar circumstances. Other rules that apply to analyzing claims of hostile work environment are as follows:

- Nothing tangible about the individual's job need be affected;
- Conduct can be verbal, physical or visual;
- Complainant does not have to be the person at whom the offensive conduct is directed. Anyone affected by the conduct can be a complainant;
- Conduct must be sufficiently severe or pervasive;
- One incident is generally not enough, unless extremely severe (such as physical assault);
- Employee need not establish that he/she has suffered severe psychological harm.

C. Sexual Favoritism - Supervisor passes over otherwise qualified persons in order to convey employment opportunities or benefits to employees who submit to a supervisor's sexual advances or requests for sexual favors.

- This claim can be raised by an employee even if the employee filing the claim was never asked to provide the supervisor with sexual favors;
- The isolated incident of favoritism towards a person with whom an individual is having a consensual romantic relationship (rather than a pattern of such conduct) is generally not enough; courts have held that the favoritism must be widespread;
- Favoritism based upon coerced sexual conduct with employees other than the complainant may constitute quid pro quo harassment by implying that only those employees who agree to have sexual relations with the supervisor will be rewarded;
- Widespread favoritism may constitute hostile environment harassment, even if sexual activity is consensual, because it may create an offensive environment for those not participating in the activity.

II. Examples

Quid Pro Quo Harassment

- When an employee tells her supervisor that, "Some people really don't like to have their necks and shoulders rubbed," he responds by saying, "Those who want to get ahead do."

- A manager pressures a subordinate employee to join her for dinner and dancing. When he declines, she tells him that he can't expect her to "mentor" him on the job if he's not willing to spend time together after hours.

- After an employee resists her team leader's repeated suggestion that she travel with him so they "can get to know each other better," he turns in a project evaluation rating her work "sub-standard."

Hostile Environment Harassment

- When an employee complains about the vulgar language and jokes that routinely fill the break room, her supervisor tells her to "lighten up and get used to it, because that's how boys behave."

- After learning that an employee has separated from her husband and may be getting a divorce soon, a co-worker has begun asking her out. After being repeatedly turned down, he has begun calling her at home to ask if she'd like him to "come over and help cure her loneliness."

Sexual Favoritism

- A male working under a particular supervisor notices that only females who socialize with and date his male supervisor get the choice travel assignments. When he approaches his supervisor about getting better travel assignments, the supervisor responds that the male employee "doesn't have the right kind of equipment" to warrant the choice assignments.

III. Liability in Sexual Harassment

Quid Pro Quo

- An employer is liable for quid pro quo harassment that results in tangible employment action, e.g., discharge, regardless of whether higher management knew or should have known of the conduct.

- An employee need not show that he/she suffered some kind of tangible loss as a result of refusing to submit.

Hostile Work Environment

By Supervisor

- An employer is liable if the employer knew or should have known of the conduct.

- If an employer did not know of conduct, but failed to establish and communicate an explicit policy against sexual harassment and establish an effective complaint procedure, the employer is still liable.

- If an employer has implemented an effective anti-harassment policy and complaint procedure, the employer may avoid or diminish liability.

By Co-workers

- An employer is liable only if the employer knew or should have known about the conduct and failed to take appropriate corrective action.

By Non-employees

- Depending on the amount of control an agency has over a non-employee (e.g., independent contractor vs. visitor), the same liability holds as for co-worker harassment.

Sexual Favoritism

If sexual favoritism rises to the level of quid pro quo or hostile work environment, the liability is the same as for those types of harassment.

IV. Preventing Sexual Harassment

Management's Responsibility

An agency must take effective measures to prevent sexual harassment including:

- Informing all employees that sexual harassment is prohibited; *and*

- Providing a mechanism for dealing with sexual harassment complaints; *and*

- Responding promptly to complaints of sexual harassment by conducting and/or asking for a thorough investigation.

When the investigation results in a finding of discrimination, the Agency should take corrective action promptly. The corrective action taken should be sufficient to send a clear and unequivocal message to the offender and others that such conduct will not be tolerated.

It should not include transferring or reassigning the victim, unless the employee specifically requests such a transfer or reassignment. Such action, particularly when it is not requested by the employee, is frequently viewed by the EEOC as retaliation against the sexual harassment victim for making a complaint of sexual harassment. Where the employee wants to be transferred, he/she should provide a written statement reflecting that he/she is voluntarily requesting to be transferred or reassigned. Otherwise, if transfer is appropriate, it should be the *harasser* and not the victim of the offensive behavior that is transferred.

In addition, management should be on the lookout for warning signs of sexual harassment, including:

- The display of sexually-oriented pictures, objects or written materials in office areas and on computers, both as search materials and screen savers;

- Frequent jokes or statements in the workplace of a sexual nature (remember, a claim can be brought by anyone affected by the conduct, not just the person at whom the conduct is directed);

- Open use of sexual innuendo or pressure for dates;

- Routine occurrences of sexually-oriented profanity.

Employee's Responsibility

Employees, as well as management, have an obligation to be involved in the prevention of sexual harassment. Employees can assist in the process by taking a few simple steps:

- Clearly inform those engaging in inappropriate sexually-oriented behavior that you find it objectionable and will not continue to tolerate it. Remember, sexual harassment involves unwelcome conduct. Don't expect a supervisor or co-worker to read your mind or your body language. *Tell him/her how their conduct offends you!*

- Seek assistance promptly if you are the target of or observe severe or repeated instances of behavior that you believe qualifies as sexual harassment.

- Document instances of alleged sexual harassment as carefully as possible, including identifying the alleged offender, the date and time of the act, any persons present when the alleged incident occurred and a description of the action involved or the comments made. This documentation will help anyone investigating such an allegation and will be absolutely essential if you wish to pursue a formal complaint.

V. Common Mistakes to Avoid

There are certain common mistakes that both management and employees make in dealing with sexual harassment issues that are not limited to but include:

- Failing to train all employees and supervisors in how to recognize and prevent sexual harassment.
- Assuming that because some employees do not complain about sexually-oriented behavior, others will not find it objectionable.
- Not objecting to sexually harassing behavior when it is observed or experienced.
- Failing to report incidents of sexual harassment in hopes that it will end without intervention.
- Ignoring warning signs of sexual harassment in your organization.
- Not responding to complaints of sexual harassment with a prompt and thorough investigation.
- Assuming an individual accused of sexual harassment is guilty before obtaining all of the relevant facts.
- Failing to take prompt, effective corrective action when and where necessary.

The hope is that bringing these common mistakes to the forefront will make both management and employees more aware of the issues and problems in dealing with this kind of discrimination and prompt both sides to take a more active role in eradicating sexual harassment from the workplace.

VI. Frequently Asked Questions

Question: *I know I'm supposed to take work-related issues to my immediate supervisor first. But what if my supervisor is part of the problem or refuses to take it seriously?*

Answer: Help may be obtained from a variety of other sources, including Human Resources, the ORM hotline, EEO counselors, union representatives, the Office of the Inspector General, or a higher level supervisor. However, please be aware that if you think you will file an EEO complaint, you must bring the incident to the attention of an EEO counselor or other ORM official within 45 days of its occurrence.

Question: *A contract employee who works at our site often makes objectionable remarks about the physical attributes of some of the women who work here. What, if anything, can be done about that?*

Answer: Federal employees are protected from sexual harassment on the job, regardless of whether the person(s) causing the harassment are federal employees. Notify your supervisor, who should take necessary steps to correct the contract employee's behavior.

Question: *In the past I've gone along with the sexually-oriented jokes in our workplace in an effort to fit in. But I feel it's getting out of hand and I'd like to see it stopped. Can I still raise a valid complaint?*

Answer: Neither a court nor the EEOC would likely consider your past exposure to the sexually-oriented joking as sexual harassment, since you've apparently participated in it willingly. However, if you find the conduct objectionable now, you are well within your rights in asking your co-worker to halt the objectionable conduct. If it continues after that, you might have a valid complaint.

Question: *In light of the high sensitivity to the issue of sexual harassment in the government now, would it be accurate to say that it's probably never a good idea to express a social interest in a co-worker?*

Answer: No. Remember the EEOC guidelines define sexual harassment as involving "unwelcome" activity. Asking a co-worker on a date, for example, is highly unlikely to be deemed harassment unless he/she has already made it clear that such invitations are unwelcome.

Question: *I'm not sure that I fully understand this "reasonable person" standard. "Reasonable" by whose estimation?*

Answer: Trying to pinpoint what a hypothetical "reasonable person" would find objectionable is not a scientifically precise process. What it really amounts to is an effort to identify behavior that most people in the community would likely consider to be inside or outside the bounds of proper behavior under the circumstances.

Question: *Is same-sex harassment also prohibited under the applicable laws and regulations affecting federal employees?*

Answer: Yes. For several years federal courts were split on the issue, with some saying that current laws prohibited sexual harassment of any type, while others generally concluded that it only addressed opposite-sex sexual harassment. But in 1998, the Supreme Court ruled that all employees are protected by existing laws against both the same and opposite-sex sexual harassment.

Question: *If an employee persists in calling a co-worker at home and/or going to his/her home after hours, but does not engage in harassing behavior toward that*

employee during work hours, can the agency do anything in response to a complaint from the targeted employee?

Answer: Yes, this can be handled the same as any other sexual harassment complaint. True, the objectionable activity occurred outside of work hours. However, if the conduct is rooted in the parties' work relationship, it may still be addressed as sexual harassment because the objectionable conduct has the potential for adversely affecting the targeted employee's ability to perform his/her duties.

Question: *If I were accused of sexual harassment, what rights would I have?*

Answer: The same rights that you would have in dealing with any other accusation that might arise, including the presumption that you are innocent unless and until facts indicate otherwise. In general, under most agencies' procedures you would have the right to be informed of specific charges against you, to present facts in rebuttal in your own defense, and the right to be represented in any investigative or adjudicative meeting or hearing. You should consult competent legal counsel, however, to determine your administrative and legal rights in the actual situation.

Supervisors should refer to Section 12, Handling Allegations of Harassment.

Disability Discrimination

Disability Discrimination

Introduction:
The Rehabilitation Act prohibits an agency from discriminating against an employee in certain areas of employment because of that employee's disability (as defined by the Act), or against an employee because of his/her association with a disabled individual. Only persons who meet the Act's definition of a "qualified individual with a disability" or associate with such persons are covered by the Act.

I. Employment Areas Covered by the Rehabilitation Act

- **Hiring and firing** - An employer cannot refuse to hire an employee or fire that employee merely on the basis of the employee's actual or perceived disability. An employer is also barred from asking an individual applying for a job if he/she has a disability. An employer cannot require an applicant to submit to a physical examination for a job unless there is a physical component to the job and all applicants for the position must undergo the same physical examination.

- **Promotions and promotional opportunities** - An employer may not refuse to promote an employee or deny an employee the opportunity to work in jobs that might lead to a promotion merely because of that employee's actual or perceived disability.

- **Assignment of duties** - An employer may not refuse to assign certain work duties or responsibilities to an employee merely because the employee has, or is perceived by the employer as having a disability.

- **Training opportunities** - An employer may not deny an employee training opportunities merely because the employee has, or is perceived by the employer as having a disabling condition.

The Act prohibits job selection criteria and standards that tend to screen out disabled persons, unless such procedures are essential for the job in question. An employer is also forbidden from engaging in any of the above conduct against any employee because of his/her association or relationship to someone who is a qualified individual with a disability.

II. Determining Whether an Employee is Covered by the Rehabilitation Act

As stated in the introduction to this section, the Rehabilitation Act only covers those employees who meet the Act's definition of a qualified individual with a disability. The Act defines a **"qualified individual with a disability"** as a person with a physical or mental disability that **substantially limits** one or more **major life activities,** who can perform the essential functions of his/her job, with or without a reasonable accommodation, **without endangering the health or safety of the individual or others.** This section explains what the various terms in that definition mean.

A. An **"individual with a disability"** is one who:

- has a physical or mental impairment or condition *that substantially limits one or more major life activities; or*
- has a record of having such an impairment; *or*
- the employer treats as if he/she has such an impairment.

"Substantially limits" means that an individual must be unable to perform, or be significantly limited in the ability to perform, an activity compared to an average person in the general population. Limitation must be more than a temporary, short-term, and/or minor condition.

"Major life activities" may include such things as:

- Walking, standing, or sitting
- Seeing or hearing
- Caring for one's self
- Interacting with others
- Speaking or breathing
- Cognitive thinking
- Performing manual tasks
- Working
- Learning

Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability. The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not others. Some impairments, however, such as HIV infection, are inherently substantially limiting.

Individuals engaged in the illegal use of drugs are specifically excluded as disabled under the Rehabilitation Act.

The Rehabilitation Act requires employers to treat pregnancy and related conditions as any other short-term disability.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he/she is unable, due to the impairment, to perform that major activity. Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner, or condition under which an individual can perform a particular major life activity as compared to the average person.

Example:
An individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. Likewise, an individual who uses artificial legs would be substantially limited in that major life activity because he/she is unable to walk without the aid of prosthetics devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because that individual cannot perform any major life activities without the aid of medication.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. Such things as advanced age, physical or personality traits, environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability.

Example:
An individual who is unable to read because he/she was never taught to read would not be an individual with a disability because lack of education is not an impairment under the Rehabilitation Act. However, an individual who is unable to read because of dyslexia (a learning disability) would be an individual with a disability because dyslexia is an impairment.

In terms of the major life activity of working, as with all disability cases, a determination as to whether the person is an individual with a disability must be made on a case-by-case basis. An individual is not substantially limited in working just because he/she is unable to perform a particular job for one employer, or because he/she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working.

Example:
An individual who cannot perform filing in one particular building because of allergies, but who can perform such task in any other location, is not substantially limited in the major life activity of work. However, if that individual is allergic to a substance found in all high rise buildings, but not others, and most of the office buildings in the geographic area are high rises, the individual would be impaired because he/she would be substantially limited in performing a broad range of jobs in various classes that are conducted in high rise office buildings.

An employee who is adjudged to be disabled by the VA for purposes of receiving veterans benefits, Worker's Compensation, Social Security or any other adjudicating body *does not automatically meet the definition of an "individual with a disability"* under the Rehabilitation Act! *The employee must still prove that his/her disability substantially limits the ability to perform a major life activity.*

B. A **"qualified"** individual with a disability is an individual:

1. who meets the necessary prerequisites of the job, such as:

    - education or work experience;
    - licenses or certificates;
    - training or skills;
    - other job related requirements;
    - other factors (such as good judgment, ability to work with others); *and*

2. who is able to perform the essential functions of a job with or without an accommodation.

The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. The determination should be based on the capabilities of the individual with a disability at the time of the employment decision and should not be based on speculation that the employee may become unable to perform the essential job functions in the future.

Deciding whether an employee meets this definition requires:

1. Identifying the "essential functions" of the job; and

2. Considering whether the person can perform the essential functions unaided or with a "reasonable accommodation."

The term "essential functions" means the fundamental duties of the job position the individual with the disability holds or desires. The term does not include the marginal functions of the position. A job function may also be considered "essential" for any of several reasons, including but not limited to:

- The number of employees available among whom the performance of that job function can be distributed.

Example:
The ability to perform a neurological examination may not be an essential function for a neurologist working at a VA Medical Center if Neurology has eight to ten physicians on staff who can perform such examinations. However, if the Neurology staff consists only of three or four physicians, the ability to perform such exams may be an essential function of the job.

- The function is so highly specialized that the incumbent in the position is hired for his/her expertise or ability to perform that particular function.

Example:
Suppose an individual is hired into a computer programmer position specifically because of the individual's ability to program in a particular computer language. The ability to program in that language would be an essential function of that particular job even though most computer programmer positions do not require such skill.

- The reason the position exists is to perform that function.

Factors that determine whether a particular function is essential include, but are not limited to:

- The employer's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time actually spent on the job performing the function;
- The consequences of not requiring the incumbent to perform the function;
- The terms of any collective bargaining agreement;
- The work experience of past incumbents in the job; and/or
- The current work experience of incumbents in similar jobs.

C. "Without endangering the health or safety of the individual or others."

A determination as to whether a mental impairment or physical disability poses a direct threat should be made on the basis of current medical knowledge and/or the best objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- the duration of the risk; *and*
- the nature and severity of the potential harm; *and*
- the likelihood that the potential harm will occur; *and*
- the immediacy of such harm; *and*
- the actual duties of the position; *and*
- where there is a significant risk of harm, can the level of risk be reduced by means of a reasonable accommodation.

An Agency can refuse to accommodate a disabled employee if doing so would create a direct threat, however:

- The threat of harm must be to the health or safety of that employee or of others; *and*
- The threat must be imminent or highly probable, not just possible or remote; *and*
- The threat posed must be of substantial harm; *and*
- The threat cannot be reduced to an acceptable level by way of a reasonable accommodation.

The determination of whether an individual poses a direct threat must be based on facts, not stereotypes or generalized fears about the potential harm. The appropriate question is whether employment in a particular job would pose a reasonable probability of substantial harm.

Example:
The Agency cannot refuse to hire or promote an individual with a history of disabling mental illness based on a generalized fear that the stress associated with the position may cause the applicant to have a relapse.

III. The Reasonable Accommodation Obligation

A. Raising the issue

1. Agency's Burden

The first issue the Agency must deal with in handling disability problems is determining when to begin dealing with the issue. The first rule is to deal only with performance and/or conduct, not the medical problem itself. Why? Well, there are two very good reasons:

a. Federal personnel law and applicable regulations are specifically designed to keep government managers from considering matters that don't affect conduct and/or performance; and

b. Supervisors can't be expected to make medical and psychiatric evaluations, or to determine an appropriate course of treatment for such problems.

That also means that, in the absence of a potential threat to the health or safety of the employee and others, it is inappropriate for a supervisor or manager to attempt to accommodate or otherwise deal with a perceived medical problem until the employee raises the issue.

Example:
Assume an employee has hypertension and heart problems. Ordinarily, there is no way for a supervisor to know if there is, in fact, a problem that needs to be accommodated until the employee raises it as an issue. However, what about the employee who obviously has a medical condition, but won't seek treatment, or ignores medical advice? There is nothing wrong with the supervisor simply mentioning the possibility of medical problems to an employee, or suggesting that he/she get medical attention. Furthermore, if the employee has a disability (such as a mental illness) that poses a risk to the health or safety of other employees, the supervisor would have the right to take whatever action is necessary to protect the health and safety of the other employees if the disabled individual refuses to seek treatment.

Except in the situation mentioned above, absent a performance or conduct problem, a supervisor who attempts to take an involuntary action to deal with a perceived medical issue, such as reassigning the employee or removing certain duties, may open him/herself to a valid EEO complaint alleging disability discrimination.

2. Employee's Burden

How does a medical problem ever get raised? The employee must do it. Every case addressing the subject has placed the burden of raising the presence of a disability squarely on the employee. The employee ordinarily must first raise the issue. This will often occur as a:

- defense to a potential or proposed action based on misconduct or sub-standard performance; or
- request for some type of accommodation or relief from a burdensome condition of employment (such as heavy lifting).

The employee need not make a written request or fill out a form. However, he/she must somehow specifically state that either:

- a medical problem is causing the performance or conduct problem the supervisor is concerned about; or
- he/she wants some sort of other agency action or modification because a medical problem is creating work-related problems.

The key point managers must keep in mind is that the employee must raise a medical issue before managers start forging any sort of accommodation.

B. Identifying the medical condition and the accommodation required

If an individual meets the Rehabilitation Act's definition of a "qualified individual with a disability," an agency would be required to provide that employee with a

reasonable accommodation for his/her disability to assist the person in performing the essential functions of his/her job.

The next step comes into play after an employee has raised the issue of an alleged disability in one of the above situations. Before the Agency can determine if the employee qualifies for an accommodation, the Agency must have the details of the medical problem. The Agency must find out exactly what the employee is suffering from and what effect it has on performance of the employee's job.

Here are some examples drawn from actual cases:

CASE 1. In dealing with the employee with a mental disorder who engages in outbursts on the job, among other things, the Agency would want to know:

- The name of the ailment;
- What triggers the outburst;
- How often the person suffers the attacks;
- What the employee does during the outburst (e.g. violence, threats, abuse);
- The potential for danger to himself and coworkers;
- Whether the condition is temporary or permanent; and
- Whether the condition is treatable.

CASE 2. Similarly, with a typist claiming carpal tunnel syndrome as the reason for typing errors, at a minimum the Agency would want to find out:

- Is the condition constant or recurring;
- Is the condition stable (can it worsen or get better);
- Can the condition be treated with any medication or exercise;
- Are there degrees of the ailment;
- Can the employee type at all, and if so, for how long;
- Does the problem occur only with certain types of assignments, or happen all the time;
- How this limits the employee's dexterity; and
- Can the effects be mitigated with any restructuring of duties.

CASE 3. In the situation of an employee with a vision problem, the Agency would want to know if:

- The condition is worsening or is stable;
- Anything on the job makes the condition worse;

- The problem is treatable; and
- Any devices could help the employee see better.

The Agency should not make the mistake of trying to move on to the next step of fashioning an accommodation until it has this information. If the Agency starts trying to fashion accommodations without this information, or refuses to accommodate based on limited information, it can lead to a valid claim of disability discrimination.

C. Acquiring information

The Agency can find out the level of detail needed in one of three ways: **Ask the employee, require detailed medical documentation, or offer a fitness for duty examination.**

1. Ask the Employee

The first and most obvious way is simply to ask the employee to tell you all about the problem. If there is no reason to disbelieve what the employee is saying (such as with an obvious disability), just ask the employee to explain the details of his/her disability. Then, in consultation with the individual, the parties can identify potential accommodations and assess how effective each would be in enabling the individual to perform the essential job functions.

2. Require Detailed Medical Documentation

The second option is to require medical documentation. Again, the rule is simple: The Agency can require as much detail as is needed to make an informed judgment. Such documentation can and should include:

- Statement(s) from an appropriate health care provider as to the existence of a physical or mental condition which requires an accommodation;
- The medical basis for such a determination;
- How long the condition is expected to last;
- The particular job duties and responsibilities which need to be modified by way of the accommodation and a specific description of the employee's limitations;
- Why the accommodation is necessary and how the accommodation is expected to assist the employee in adequately performing the particular job duty, or responsibility.

See sample letter, labeled ATTACHMENT A, found at end of this section.

It is important to keep in mind that the employee is obligated to give the agency the information it needs to decide if an accommodation is warranted - *even if this requires the production of extensive medical documentation.*

However, the agency needs to keep in mind that it is not requiring the documentation in order to make a medical decision. It is asking for the documentation so that the agency can determine if an accommodation is required and what duties the employee can and cannot do.

3. Offer a fitness for duty examination

The last option is to offer the employee an agency-paid fitness for duty examination. Except in rare circumstances, the agency cannot require the employee to submit to a fitness for duty exam. The Agency has internal policies for sending people to fitness for duty medical exams, so check with Human Resources to identify the exact documentation to use.

Remember, that the reason for offering the fitness for duty exam is that the employee himself or herself raised the disability issue. But if the employee doesn't wish to take the exam or submit documentation from his/her own physician, then management must make their judgment based on the evidence they have.

D. Deciding on an accommodation

The Agency is not required to give an employee the accommodation he/she *requests,* but rather is legally required to provide only as much of an accommodation as will allow the employee to adequately perform the essential functions of his/her job. The accommodation requested must be related to the disability and must be one that is necessary to assist the employee in performing the essential functions of their job.

Example:
A deaf individual who works in a medical center library filing books is experiencing problems filing the books in the proper location because of an inability to remember where the various books are located within the library. He is scheduled to be placed on a performance improvement plan. In response, the employee alleges that he is a qualified individual with a disability and requests as an accommodation that he be assigned a sign language interpreter. However, the employee can neither sign nor understand sign language. Although the employee would meet the definition of a qualified individual with a disability, the Medical Center is under no obligation to provide him with an interpreter since that would not assist him in performing the essential functions of his job.

Possible accommodations may include:

- Making facilities readily accessible to and usable by an individual;
- Restructuring a job to reallocate or redistribute non-essential functions;
- Altering the manner in which an essential function is performed;

- Allowing for part-time or a modified work schedule;
- Obtaining or modifying equipment or devices;
- Modifying examinations or training materials;
- Providing qualified readers and interpreters;
- Reassigning to a vacant position;
- Permitting the use of accrued paid leave or unpaid leave for necessary treatment;
- Providing reserved parking for a person with a mobility impairment.

The Agency is NOT required to provide an accommodation that:

- Removes the essential function of a job;
- Creates a job for the employee;
- Removes or reduces production requirements for the job;
- Excuses inappropriate or wrongful conduct by the employee.

The Rehabilitation Act permits an employer to hold disabled employees to the same qualification standards for employment, job performance, and conduct as those who are not disabled, *even if unsatisfactory performance or conduct is related to the employee's disability.*

The process of determining a reasonable accommodation is expected to be an interactive process between the employee and management. The employee is expected to suggest possible accommodations to management if management is unable to come up with any, or if the employee has eliminated the accommodations already offered by management. *Case law is very clear that an employee cannot simply refuse all accommodations offered by management, not suggest any alternatives, and later claim that the Agency failed to accommodate his/her disability.*

IV. The Undue Hardship Exemption

An Agency can refuse to provide an accommodation for an otherwise qualified disabled individual if the Agency can show that accommodating the employee would be an "undue hardship." "Undue hardship" means that the accommodation requested would cause significant difficulty or expense to the agency if implemented (as opposed to mere inconvenience). "Undue hardship" is determined on a case-by-case basis and can be raised in circumstances where the accommodation would be too costly to implement or the accommodation would substantially disrupt the operations of the particular subdivision or the Agency involved and would fundamentally alter the nature or operation of that subdivision.

Factors to consider in determining whether an accommodation would impose an "undue hardship" are the:

- Nature and net cost of the accommodation, taking into consideration the availability of tax credits and/or outside funding. However, the larger the agency, the more skeptical the EEOC is of claims that the accommodation will cost too much;

- Overall financial resources of the facility or facilities involved, the number of people employed at the facility and the effect of providing the accommodation upon the facility's expenses and resources;
- Type of operation involved, including the structure of the workforce;
- Impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to carry out its mission.

V. Frequently Asked Questions

Question: *Is an employer required to provide reasonable accommodation when I apply for a job?*

Answer: Yes. Applicants, as well as employees, are entitled to reasonable accommodation. For example, an employer may be required to provide a sign language interpreter during a job interview for an applicant who is deaf or hearing impaired, unless to do so would impose an undue hardship.

Question: *Should I tell my employer that I have a disability?*

Answer: If you think you will need a reasonable accommodation in order to perform the essential functions of your job, you should inform the employer that an accommodation is needed. Remember, employers are required to provide reasonable accommodation only for physical or mental limitations of a qualified individual with a disability of which they are aware. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed.

Question: *Do I have to pay for a needed reasonable accommodation?*

Answer: No. The Rehabilitation Act requires that the employer provide the accommodation unless to do so would impose an undue hardship on the operation of the employer's business. If the cost of providing the needed accommodation would cause an undue hardship, the employee must be given the choice of providing the accommodation or paying a portion of the accommodation that causes the undue hardship.

Question: *Can an employer lower my salary or pay me less that any other employee doing the same job because I need a reasonable accommodation?*

Answer: No. An employer cannot make up the cost of providing a reasonable accommodation by lowering your salary or paying you less than other employees in similar positions.

Question: *If an employer has several qualified applicants for a job or promotion, is the employer required to select a qualified applicant with a disability over other applicants without a disability?*

Answer: No. The Rehabilitation Act does not require that an employer hire an applicant with a disability over other applicants because the person has a disability. The law only prohibits discrimination on the basis of disability. The Act makes it unlawful to refuse to hire or promote a qualified applicant because he/she is disabled or because a reasonable accommodation is required to make it possible for the person to perform essential functions of the job.

Question: *I am a qualified individual with a disability who has asked my employer to reasonably accommodate my disability by reassigning me to another position. My employer has conducted a search of available positions within my facility and advised me that it can find no vacant position for reassignment for which I am qualified. Doesn't my employer have to create a position for me?*

Answer: No. The Rehabilitation Act does not require an employer to reasonably accommodate a qualified individual with a disability by creating a new position, placing the employee on permanent light duty, eliminating essential job function or reducing production or performance standards.

Supervisors should refer to Section 11, Handling Alcohol Disability in the Workplace.

ATTACHMENT A - Requesting Medical Documentation

SAMPLE LETTER TO BE SENT TO EMPLOYEE REQUESTING AN ACCOMMODATION DUE TO AN ALLEGED DISABILITY

(facility letterhead)

(Date)

(Name)
(Title)
(Mailing Address)

Subject: Certification of Need for a Reasonable Accommodation

1. You recently requested an accommodation for a physical (or mental) condition from which you claim to be suffering. However, you did not provide any medical documentation (or sufficient documentation) of this condition demonstrating a need for such an accommodation. Although some health problems may exist, the Agency is only required to make reasonable accommodation when an employee shows that he/she is a "qualified individual with a disability" as defined by 29 C.F.R 1614.203.

2. The information you (or your health care provider) have provided is insufficient for the Agency to determine if you are currently a qualified individual with a disability. Without the necessary medical documentation, the Agency cannot make an informed assessment of your request for an accommodation. The Agency is not allowed to provide accommodation based upon prospective harm.

3. Information needed to determine if you are a qualified individual with a disability should include the following:

    a. A detailed description of your exact medical condition(s) and the medical basis for such a finding;

    b. Clinical findings from the most recent medical evaluation, including any of the following which have been obtained: Findings of physical examination; results of laboratory tests; X-rays; EKG's and other special evaluation or diagnostic procedures, and, in the case of psychiatric evaluation/psycho logical assessment, the findings of a mental status examination and the results of psychological tests if appropriate;

    c. Prognosis, including plans for future treatment and an estimate of the expected date of full or partial recovery;

d. An explanation of the impact of the stated medical condition on overall health and activities; including the basis for any conclusion that restrictions or accommodations are or are not warranted; and where they are warranted, an explanation of their therapeutic or risk avoiding value;

e. A detailed explanation of the specific duties of your current position description that you are unable to perform as a result of your disability. For purposes of this explanation, we are providing you with a copy of your current position description that should be given to your health care provider so that he/she can specifically identify those duties you are unable to perform due to your disability.

f. A detailed description of the precise accommodation recommended by your health care provider, including the basis of the recommendation and an explanation of how the proposed accommodation will allow you to per form the particular job duty at issue.

4. Upon receipt of the above documentation, management will make a determination as to whether you are a qualified individual with a disability as defined by the Rehabilitation Act. If you are deemed to be a qualified individual with a disability, full consideration will be given to your request for reasonable accommodation. **However, no decision will be made on your request for an accommodation until the above information has been provided.**

5. Should you have any questions, please feel free to contact me.

Sincerely,

(Supervisor's name)

Enclosure
cc: (name of EEO manager)

Reprisal

Reprisal

Introduction:
One of the fastest growing categories of EEO complaints is in the area of reprisal or, as it is sometimes called, retaliation. Reprisal complaints generally arise after an employee has filed one or more EEO complaints against an agency. Laws prohibiting reprisal are designed to prevent agency managers from dissuading employees from exercising their legal right to file an EEO complaint by placing them in fear that some type of adverse action will be taken against them if they exercise those rights.

I. Elements of a Reprisal Action

In order to prevail in a reprisal action, an employee must prove that:

- he/she engaged in prior protected EEO activity; *and*
- the manager involved in the current activity being complained of by the employee knew of the prior protected EEO activity; *and*
- the employee is now suffering some employment-related harm after participating in the protected activity; *and*
- there appears to be a reasonable causal connection between the prior protected EEO activity and the subsequent employment harm the employee is now suffering.

Being named as a Responsible Management Official (RMO) in connection with another employee's EEO complaint IS NOT considered to be protected EEO activity. Consequently, if a complainant's only prior involvement was that he/she was named as a RMO in an EEO case, the individual has no basis for a reprisal action.

II. Points to Consider in Looking at a Reprisal Action

Employees who have filed an EEO complaint are still held to the same standards of conduct and performance as employees who have not engaged in such protected activity. Management is not prohibited from taking a conduct or performance-based action against an employee who has engaged in prior protected EEO activity, as long as the action is not being taken because the employee engaged in the activity.

Example:
Frank, an agency attorney, files an EEO complaint alleging that his supervisor refused to assign him certain high profile work assignments because of his religion. As his complaint moves through the administrative phase, Frank has to take time off to meet with the EEO counselor and investigator, meet with his attorney, attend EEO settlement conferences, all of which are allowed under EEO law. However, he also insists on doing considerable research concerning his case during work hours. He becomes so consumed with doing this research that he stops working on his assigned cases and

misses several key deadlines for filing pleadings. Frank's supervisor can put him on a Performance Improvement Plan for failing to keep up with his caseload without being guilty of reprisal. However, if the supervisor takes an adverse action disciplinary action against him for taking leave to meet with the EEO counselor, attending settlement conferences and meeting with his lawyer, that action would most likely be viewed as reprisal.

It is an essential threshold element of a reprisal claim that the manager taking the current action knew that the employee engaged in the prior protected EEO activity before the manager initiated the action(s) that form the basis of the employee's reprisal action. Unless the employee proves this threshold element, there can be no reprisal action.

Example:
Sue, a probationary employee, has been repeatedly AWOL from work. All efforts by Jane, her supervisor, to curtail her behavior have failed. Jane decides to initiate a removal action against Sue for excessive AWOL and sends a draft of the removal letter to Human Resources (HR) for their approval. Through a friend in HR, Sue learns of the proposed removal. In an effort to save her job, Sue files an EEO complaint against Jane, claiming that Jane has been harassing her because of her race. Three days after Sue files her EEO complaint, Jane terminates Sue from her position. The day after Jane terminates Sue, Jane is contacted by an EEO counselor and advised that Sue has filed an EEO complaint against her. Sue subsequently files a second EEO complaint against Jane alleging that she was terminated for filing her first EEO complaint. Sue's reprisal claim, however, is invalid because Sue has failed to meet the "prior knowledge" requirement. Although the actual termination occurred after Sue had filed her first EEO complaint, Jane was unaware of Sue's EEO complaint at the time she terminated her. Thus, Sue's protected activity of filing an EEO complaint could not possibly have been the basis for Jane's decision to terminate Sue.

The more time that passes between the protected EEO activity and the action that forms the basis of the reprisal action, the less likely it is that the employee can show that the current action is a result of the employee exercising his/her EEO rights. The difficulty for an employee to prove knowledge by a manager of prior protected activity increases where the current manager is in a different organization or division than the employee was in when he engaged in the prior activity, or where the manager was not employed by the Agency at the time the employee engaged in the prior protected activity.

All VA cases in which Office of Employment Discrimination Complaint Adjudication (OEDCA) issues a Final Agency Decision with a finding of reprisal are referred to the Office of the Secretary for possible disciplinary action against the offending employee.

Use of Alternative Dispute Resolution (ADR)

Use of Alternative Dispute Resolution (ADR)

Introduction:
An ever increasing number of employers and employees, in both the public and private sector are using alternate methods of resolving workplace disputes other than by way of a hearing. These alternate means of resolving disputes are called by many names, but are collectively referred to as Alternative Dispute Resolution (ADR). VA and the EEOC recommend ADR as a means of resolving EEO complaints without a hearing. Many EEOC District Offices have made it mandatory for the parties to an EEO dispute to participate in some type of ADR before they will schedule a case for a hearing.

I. What are the Various Types of Alternative Dispute Resolution?

Generally speaking, the term "Alternative Dispute Resolution" includes a number of different types of procedures, such as arbitration, mediation and mini-trials (sometimes referred to as fact-finding hearings). All of these kinds of ADR techniques have certain things in common. Such procedures are usually less costly than the average administrative hearing or trial and often resolve matters more quickly than going through an administrative hearing or trial. However, each of the following ADR methods works in a different way.

Arbitration is a process in which the parties present their case, in a more informal setting than a hearing or trial, to a neutral third party called an arbitrator. Once the arbitrator hears the presentation of both sides to a dispute, he/she makes a decision as to whom should prevail. That decision is binding on both parties to the dispute.

A **mini-trial** is a private, voluntary, informal form of ADR in which the representative for each side makes a brief presentation of his/her best case before officials from both sides who have the authority to settle the dispute. Once the representatives make their presentations, the officials for each side then attempt to resolve the dispute. A neutral third party may be present for the purpose of giving his/her opinion as to who would prevail if the matter went to a hearing; however the parties are not bound by the opinion of the neutral third party.

The third type of ADR, **mediation,** is the method favored by the EEOC and many others. Mediation is also a private, informal ADR technique, but unlike the arbitration and the mini-trial, the role of the mediator is to assist the parties in reaching their own resolution of the dispute. *The third-party neutral in a mediation has no power to impose a decision on the parties.* His/her role is to act as a sort of go-between for the parties to help them determine what the issues are in the dispute and how they should be resolved, allowing them to work out the details of the resolution on their own.

Because it is the method of choice for the EEOC, our discussion in this section will focus on the use of mediation as an ADR technique.

II. Why Should I Consider Participating in Mediation?

This question is often asked by both the Agency and employees, especially in the context of an EEO complaint. Agency officials frequently take the position that they have done nothing discriminatory (which may, in fact, be true) and that they see no reason to concede anything to the employee when they are innocent of discriminatory conduct. Conversely, employees often resist the idea of mediation for a number of reasons, including a desire to "have their day in court," a sometimes misguided expectation of large damages by going to a hearing, and/or a basic distrust of management.

In deciding whether to attempt mediation, both sides should take into consideration that trying the matter before a judge may not be the best way to resolve a workplace issue, regardless of who ultimately prevails. When the matter is resolved by a judge, resolution of the problem is taken out of the hands of the people most effected by the situation. Instead resolution is placed in the hands of someone who often times has no idea as to how the particular organization works, what the workplace dynamics between co-workers are, and whether a solution will actually work or make the situation worse. Sometimes a well-meaning judge comes up with a solution that is unworkable or which solves a short-term problem, but creates an even larger, long-term problem. Additionally, EEOC judges are restricted to ruling only on EEO matters, meaning that workplace problems that don't fit into an EEO category remain unresolved.

For instance, suppose an employee files an EEO complaint because he/she feels that he/she is being treated unfairly by a supervisor because the supervisor just does not like the employee. Unless the reason for the supervisor's actions and attitude are based on race, age, gender, religion, national origin, or disability, the EEOC has no power to hear the case and no power to address the problem. Under those circumstances the problem is still there, causing frustration and anger for the employee. The real reason for the supervisor's attitude could be a mistaken belief that the employee went to the supervisor's boss and falsely accused him/her of theft. If the supervisor learned that the employee had not done so, the whole matter might end there. But because the EEOC cannot provide a forum for such a problem, it continues to fester and cause workplace tension. These are particularly the kinds of situations in which mediation works the best.

III. When is Mediation Appropriate?

Mediation is not the best solution for all cases, even ones that properly fall into the EEO category. Certain factors make a particular case suitable to try mediation. Mediation is usually appropriate when:

- both parties are interested in remaining in control of the outcome;
- the dispute needs to be resolved very quickly;
- the parties want to preserve their working relationship;
- there is a need for confidentiality or privacy (some EEO records may be accessed by the public);
- the parties want to terminate their relationship in the least adversarial way;
- multiple issues are involved;
- there is a need to save money;

- miscommunication is apparent and a skilled neutral party is needed to facilitate communication.

Mediation usually works best when one or more of the above factors are present.

IV. When is Mediation not a Good Idea?

Some situations are simply not suitable for mediation. In these situations, one or more roadblocks to effective resolution are present that would most likely prevent the parties from coming to any successful agreement. Mediation may not be appropriate when:

- the person for one or both sides who has the final approval authority for the terms of the agreement is not available;
- the problem between the parties involves issues of law or public policy;
- there is a severe imbalance of power between the parties (i.e., one side holds all the cards);
- either party is unwilling or unable to work towards a settlement;
- one party wants to delay resolving the problem;
- the case is untimely (e.g., EEO complaint filed too late).

The VA encourages all of its facilities to consider the use of ADR as a mechanism that can reduce the number of EEO complaints filed. ADR can go a long way towards resolving work place problems and creating a workplace in which all employees feel valued and able to work in a productive manner to achieve the goals of the Agency.

Remedies

Remedies

I. Possible Remedies

A. Title VII

- Actual damages (lost wages, medical expenses, etc.)
- Reinstatement, order to hire, or retroactive promotion
- Restoration of leave
- Attorney fees (see "Restrictions on Remedies," Nos. A1 & A2)
- Compensatory damages (see "Restrictions," Nos. B1, B2 & B3)

B. Age Discrimination

- Actual damages (front pay, back pay, medical expenses, etc.)
- Reinstatement, order to hire, or retroactive promotion
- Restoration of leave
- Attorney fees (see "Restrictions," Nos. A1, A2 & A3)

C. Sexual Harassment

- Actual damages (medical expenses, lost wages, etc.)
- Reinstatement, order to hire, or retroactive promotion
- Restoration of leave
- Attorney fees (see "Restrictions," Nos. A1 & A2)
- Compensatory damages (see "Restrictions," Nos. B1, B2 & B3)

D. Disability Discrimination

- Actual damages (medical expenses, lost wages, etc.)
- Reinstatement, order to hire, or retroactive promotion
- Restoration of leave
- Attorney fees (see "Restrictions," Nos. A1 & A2)
- Compensatory damages (see "Restrictions," Nos. B1, B2, B3 & B5)

II. Restrictions on Remedies

A. Payment of attorney fees

1. A complainant is only entitled to attorney fees from the time he/she puts the Agency on notice that he/she is represented by counsel.

2. Attorney fees are payable only to a licensed attorney or for the services of a person operating under the direct supervision of a licensed attorney.

3. Attorney fees cannot be claimed during the administrative portion of an age discrimination action.

B. Payment of compensatory damages

1. Compensatory damages are only payable for acts of discrimination which arose after November 21, 1991.

2. Compensatory damages claims are limited to $300,000.

3. There is currently a dispute among the Federal Circuit Courts as to whether the EEOC has the authority to award compensatory damages at the administrative level (7th and 11th Circuits say, "no" 5th Circuit says, "yes"). The Supreme Court has agreed to hear a case that will resolve that matter. Until the matter is resolved by the Supreme Court, OEDCA is following the law of each circuit and is not awarding compensatory damages in cases arising in the 7th and 11th Circuits.

4. There is no entitlement to compensatory damages in an age discrimination case, or a retaliation case where the original basis of the complainant was age discrimination.

5. Under the Rehabilitation Act, if an agency makes a good faith effort to accommodate a disabled individual, the complainant is not entitled to compensatory damages, *even if the EEOC later finds that the accommodation offered was not sufficient.*

6. Although the EEOC has the right to order such remedies as training or recommend that disciplinary action be taken against an agency official found guilty of discrimination, *the EEOC has no authority to order the Agency to terminate, reassign or demote the official.* However, the Agency itself may decide to take disciplinary action against the offending employee in appropriate cases.

EEO Deskbook
Supervisor's
Supplement

Conducting an Effective Investigation

Conducting an Effective Investigation

Introduction:
Conducting investigations is probably not listed among the key duties included in your position description. But if you are a supervisor, it's highly likely you will have to conduct one - or perhaps - many informal inquiries, or investigations over the course of your career. The most common investigations are those of potential misconduct. How well - or poorly - such investigations are handled often determines whether the proper decision is made. In most cases, the quality of the investigation will also be a key factor in determining whether an adverse action will stand up to review by a third party, such as the EEOC.

Consequently, the person who conducts a "pre-action" investigation plays an essential role. It is his or her responsibility to gather the evidence necessary to establish the facts agency officials need to make an informed and correct decision, and defend their actions if necessary. You don't need to be Lieutenant Columbo to conduct a successful investigation. But doing the task well does require several things, including:

- A basic knowledge of what constitutes evidence, and how to gather it.
- The questioning and listening skills necessary to interview people.
- The ability to focus on details, since the discovery of an accurate picture of the facts often turns on them.
- Diligence in seeking out the facts necessary to determine just what happened.
- The ability to apply logic and judgment in evaluating conflicting statements or other evidence.
- The organizational skills necessary to properly document, store, and safeguard evidence gathered during the course of the investigation.
- The willingness and ability to conduct an objective inquiry; that is, to seek facts without a pre-conceived idea of what the conclusion will be.

The objectives of this section are to provide a solid understanding of the:

- types of evidence sought in investigations;
- key steps to follow in conducting an effective investigation;
- common pitfalls and mistakes to avoid during investigations.

Although the Agency cannot guarantee that this section will answer every question you might have, we are confident that it will provide a reasonably thorough, easy-to-access source of useful ideas you can use in conducting investigations.

I. Types of Evidence

Evidence is defined as testimony, writings, material objects, or other things that are offered to prove the existence or non-existence of a fact. Arguments often occur in hearings or trials on whether certain evidence is "admissible." However, arguments over admissibility are for advocates at a later time. Your job is to investigate. That means gathering all the evidence that might be useful in establishing important facts *now.*

Evidence is what we seek and use to help prove or disprove a material fact. For example, suppose we are investigating whether employee Jones wrote the word "BOZO" on his boss's picture in Day-Glo pink magic marker. In this example, any of several possible bits of evidence might help us in our quest to prove or disprove that Jones was the culprit:

- A Day-Glo pink magic marker lying on Jones' desk **(Physical evidence - the marker);**
- The statement of a co-worker who say he saw Jones entering the boss's office with a magic marker clutched in his hand **(Testimonial evidence - the co-worker's statement);**
- A note, written in Jones' handwriting containing the words, "I'm going to expose that clown for what he really is!" **(Documentary evidence - the note in Jones' handwriting);**
- A diagram of the building, showing where everyone was at the time of the incident **(Demonstrative evidence - the diagram);**
- A re-enactment of the incident, showing that only Jones would have had the time necessary to leave his workstation, enter the boss's office, deface his picture, and return to his work station before the boss returned from the men's room. **(Demonstrative evidence - the re-enactment).**

You may find it necessary to gather any, or all, of these types of evidence in seeking to establish the facts of an investigation. Here, in more detail, is what you need to know about each type of evidence.

A. Physical Evidence

This is just what it sounds like: objects of one type or another. Physical evidence that may be relevant to an investigation can include anything.

B. Testimonial Evidence

Testimonial evidence consists of words spoken by participants and witnesses with information to provide about an event or situation. Although we tend to think of "testimony" as consisting only of words spoken under oath in the context of a hearing, it is useful to broaden our working definition to include words spoken in other settings as well - such as investigative interviews.

There are two things to remember about testimonial evidence gathered *outside* a hearing room:

1. It must be captured in - or converted to - a permanent, reviewable form to be of any real use.

2. The form in which testimony is captured affects the persuasive weight it will carry in proving or disproving a fact.

A transcript of testimony delivered under oath in a court or administrative hearing has the most weight, followed closely by **depositions,** which consist of sworn testimony (subject to cross examination) - provided *outside* a hearing room. Less powerful, but still useful, are **sworn statements.** Least convincing **are unsworn statements** - which have little value other than as a tool that might help to hold a witness's later testimony reasonably on track.

C. Documentary Evidence

Documents are at the heart of many investigations. They are commonly used to:

- establish what rules are - or were - in effect;
- verify transactions;
- indicate comings and goings;
- note prior warnings or knowledge of existing rules; *and/or*
- capture the thoughts and words of individuals involved in the dispute.

The documents you are most likely to find yourself seeking can be classified into a few categories:

1. **Routine business records.** This includes internal documents, such as time cards, leave slips, training records, agency regulations, and the like.

2. **External documents.** This includes any document that originates outside the agency, such as orders, correspondence, lab reports, and receipts.

3. **Reference material.** This includes standardized information published by reputable parties, such as airline schedules, conference proceedings, and atlases.

In developing documentary evidence, however, it's important to bear in mind that although some documents will be accepted at face value (e.g., a published train schedule), more often it is necessary to have a witness ready to explain the contents of a document and to verify its authenticity if it is to be used in a hearing. Consequently, if, for example, a purportedly forged doctor's excuse is a key document in a discipline case, it will be necessary to have a witness who can testify that the employee actually handed that specific document to the supervisor in an effort to obtain sick leave.

D. Demonstrative Evidence

The least-used, but sometimes most effective, form of evidence is what is termed "demonstrative." Strictly speaking, this consists of the "demonstration" of a process, procedure or technique in order to establish a fact.

For example, suppose one wanted to determine whether a canteen cashier has been deliberately under-ringing purchases by way of a demonstration. Such a claim could be substantiated by simulating the actions of a cashier, using the exact items purchased, to show that the physical layout of the checkout station made the employee's claim implausible that "the items had simply slipped past."

Demonstrative evidence is a term that is also applied to evidence that does not necessarily involve an actual demonstration, however. It may also include:

- Scale drawings
- Models or mock-ups of a location or equipment; *and/or*
- Site visits to observe particular processes or techniques.

Demonstrative evidence is not usually part of most administrative investigations. However, as the above example illustrates, it can sometimes be extremely effective in developing - and demonstrating - key facts in a situation.

II. Converting Evidence

Unfortunately, while sometimes colorful and often very effective in establishing crucial facts, physical evidence usually won't fit into an evidence file - or sometimes even into the hearing room. Consequently it is usually a good idea to "convert" such evidence into another form. By all means, bring that blunt instrument to the hearing to show the Administrative Judge what the employee had in hand when he/she threatened to "brain" the supervisor. But also, "convert" it to a form that can be placed into the paper file on the matter.

Here are the primary methods of "converting" physical evidence into a more useful format:

- **Take a picture.** If, for example, you want to establish that an employee did substantial damage to a government vehicle by negligently letting it roll down a hill and into a wall, do what insurance adjusters do: take detailed pictures of the damage. To avoid the lost-film blues, use a Polaroid if at all possible.

- **Have evidence analyzed.** If you want to establish that the substance contained in those little packets in an employee's desk is cocaine, have it analyzed by a certified lab, and thereby "convert" it into an authoritative lab report.

- **Get evidence in writing.** If a witness tells you she was present and over heard a supervisor make a sexually suggestive remark to another female employee, convert the witness's words into a sworn statement.

- **Get evidence measured, described or weighed.** If an employee contends that he "merely tossed a harmless handful of snow" at a supervisor's head, have the "hand full of snow" weighed, measured and described before it melts. And don't forget to snap a picture of that lump on the supervisor's forehead.

III. Preserving Evidence

It does little good to find, evaluate, and use evidence in support of an adverse action, only to have the action later reversed because key portions of the evidence were either destroyed, misplaced or lost their value through mishandling. Consequently, it is essential that you be able to document the "chain of custody" of all evidence that may be subjected to attack based on authenticity - such as controlled substances.

"Chain of custody" is a term that refers to a record of the handling of evidence from the moment that it is obtained until it is presented in a hearing or trial. For example, from the moment a VA police officer removes an opened bottle of liquor from an employee's desk and puts it into an evidence bag, a careful paper trail is maintained so the police can later demonstrate that it was properly safeguarded and accounted for every minute from the time it was collected until it appears at a hearing.

Fortunately, "chain of custody" is rarely an issue in administrative hearings. But in those rare situations in which it is, you must be able to show that you or somebody else has properly secured the evidence in case there are any questions as to its authenticity.

The need to preserve evidence more frequently occurs in relation to documents needed as part of the Agency's defense to an EEO case. In far too many circumstances, key documents (such as performance evaluations, notes of employee counseling or promotion packages) are destroyed even though the employee has filed an EEO action against the Agency. The investigator must now determine the key facts of the case without being able to view all documents relevant to the matter being investigated, leaving gaps in the fact-finding process. More importantly, an EEOC

Administrative Judge may, and can, decide that the absence of certain key documents should be construed to mean that the missing documents would have been favorable to the employee's case.

It is, therefore, imperative that management contact Human Resources and their local EEO personnel before destroying any of the kind of documentation mentioned above to determine if they may be needed as part of an investigation related to a current or pending EEO case.

IV. Investigating Allegations of Harassment

Allegations of harassment, including sexual harassment, must be dealt with promptly and effectively. An immediate inquiry, to the extent possible, should be undertaken. Such allegations should also be given the highest degree of confidentiality possible. Employees interviewed, including the alleged victim, should be assured that they will not be subject to retaliation for their participation in any investigation. Management must also take immediate appropriate corrective action against any employee who engages in harassing conduct.

A. Questions to ask the complainant:

1. Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?

2. Has your job been affected in any way?

3. How did you react? What responses did you make when the incident(s) occurred or afterwards?

4. Are there any persons who have relevant information? Has this happened to others? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you visibly upset after episodes of alleged harassment?

5. Are there any notes, physical evidence, or other documentation regarding the incident(s)?

6. How would you like to see the situation resolved?

B. Questions to ask the alleged harasser:

1. What is your response to the allegations?

2. If he/she claims that the allegations are false, ask why the complainant might lie.

3. Are there any persons who have relevant information?

4. Are there any notes, physical evidence, or other documentation regarding the incident(s)?

C. Questions to ask third parties:

1. What did you see or hear? Where were you standing when you heard or saw what you claim to have heard or seen? Where were the complainant and alleged harasser standing?

2. Describe the alleged harasser's behavior toward the complainant. Describe the complainant's response to the alleged harasser's behavior.

3. Describe the alleged harasser's conduct towards others in the workplace.

4. What did the complainant tell you about the alleged harassment?

5. Are there other persons who have relevant information?

V. Evaluating Evidence

You gather all the evidence and interview witnesses. Now what do you do with what you have? Although the primary role of the investigator is to find evidence that establishes the facts on which someone else will ultimately make a decision, it is still important that you understand how to evaluate evidence.

Why? Because if you lack that critical ability, you are far less likely to ask the crucial follow-up questions, to look for the additional witness, or to dig for the extra bit of information that will eventually lead to an accurate picture of what happened.

For example, if you simply accept at face value a co-worker's assertion that another employee did not take an expensive tool from the premises, you might fail to discover that the co-worker is related to the suspected employee and therefore has a vested interest in protecting him/her.

Here are guidelines that have been recommended by the EEOC for use in evaluating the credibility of testimony. If you bear them in mind, they will help you in determining whether you need to dig a little further in order to find the facts:

A. The detail and consistency of the story - People who tell the truth usually recount their stories in great detail. They remember not only the big things, but the little things- colors, times, shapes, exact words, and all the other particulars of the incident.

B. **The inherent plausibility** - A story may be detailed and consistent, but still be implausible. For instance, a female employee may relate, in great detail, how a male employee sexually harassed her by coming to her home every night during his lunch break from work. The female employee lives 30 miles from the male employee's place of employment, the male employee does not drive but relies on public transportation to get around and only has a half-hour for lunch. Therefore, it is highly unlikely that he would or could travel to the female employee's home on a nightly basis during his lunch period to harass her.

C. **The character and record of the witness** - Much depends upon what type of person the employee is. Is he/she known for truthfulness or does he/she have a reputation for embellishing the truth?

D. **Is there any corroboration?** - If you can find something to corroborate even a small part of one person's story, it certainly helps.

E. **Is there no corroboration where there should have been?** - The absence of corroboration can be highly significant. A supervisor shouting at another employee in a crowded workplace should have been heard by someone. If he wasn't, the contention is certainly open to skepticism.

F. **The attitude of the witness** - How passive, aggressive, willing or unwilling is the witness? Is the witness just a bit too eager to make allegations? Or is the witness just too reluctant when there is no good reason why he/she should be?

G. **Demeanor and bearing** - This requires looking at the person to see if the body language and conviction match the story (which is why interviewing witnesses in person, where possible, is recommended). For example, a supervisor claiming to have been terrified by an alleged threat to inflict bodily harm upon her would not likely be seen laughing and joking with the alleged threatener upon showing him out of her office.

H. **Contemporaneous mention** - Did the victim or witness say something about the incident to somebody else at the time? The idea here is that, if something particularly nasty or bizarre happens to somebody, he/she will usually say something about it to another person right after it happens.

I. **Reasons for bias** - Does the person have a reason to fabricate or twist his/her story? Friendships, romantic entanglements, off-duty business relationships or fear of pending disciplinary action are just a few of the many reasons for bias.

VI. Common Mistakes Related to Conducting Investigations

Here, in no particular order, are the most common mistakes made in administrative investigations:

- Delaying the investigation, resulting in the loss of evidence and the blurring of witness recollections;
- Failing to obtain sworn statements or depositions from witnesses who may be unavailable or reluctant to testify at a later hearing;
- Losing or failing to prevent the destruction of documents or physical evidence;
- Failing to obtain both sides of the story;
- Interviewing witnesses in a group interview;
- Failing to interview witnesses early in the process or in the right order so that you can obtain their statements before they have had time to compare their story with other employees or the accused employee;
- Setting out to prove or disprove a pre-conceived outcome. When you have already reached a conclusion before conducting the investigation, you tend to interpret any evidence obtained in a manner most likely to support your pre-conceived notion;
- Failing to apply logic in evaluation of evidence. For example, if you fail to take into consideration that if Fact A were true and Jones did shout for help, persons nearby would likely have heard the shout.

VII. Frequently Asked Questions

Question: *Are federal employees required to answer questions during an investigation, even if doing so might put them at risk of disciplinary or adverse action?*

Answer: In most cases, yes. The only situation in which federal employees have the right to remain silent is when they are being asked about a matter that could potentially render them liable to criminal charges and penalties. Most administrative investigations, however, do not involve criminal issues, and employees have no protected right to remain silent.

Question: *Can federal employees be charged separately for lying to investigators?*

Answer: Yes. Although the Federal Circuit Courts had ruled that additional penalties were permissible only if it could be shown that an employee had "invented" facts meant to mislead investigators, the Supreme Court disagreed. Consequently, federal employees are subject to additional charges and penalties for lying to investigators.

Question: *When is an employee entitled to have a union representative present during an investigative interview?*

Answer: When the employee: a) is a member of a bargaining unit; b) is being questioned by a representative of Agency management; c) could reasonably fear disciplinary action might result against him/her; and d) asks for a representative.

Question: *When is an employee entitled to have an attorney present during questioning?*

Answer: Only when the matter involves potential criminal charges.

Question: *To what extent can a union representative participate in an investigative interview?*

Answer: He/she is entitled to take an "active" role. Under current case law, that generally means the representative can confer with the employee before and during questioning, and can also ask questions that may help to elicit relevant facts and information. **The representative is not entitled; however, to disrupt the interview or to answer questions for the employee.**

Question: *Is it necessary to obtain a search warrant to retrieve items from an employee's desk or work area?*

Answer: Usually not unless the employee has a "reasonable expectation of

privacy" in the area to be searched. Most agencies (including ours) have explicit policies, however, informing employees that desks, lockers, and the like are subject to search at any time. Consequently, in most cases the "expectation of privacy" does not exist. This may not be true for personal items such as, purses and/or wallets. When in doubt, get legal advice before searching.

Question: *How do I obtain records of an off-duty arrest or conviction?*

Answer: This is usually done by paying a visit to the appropriate courthouse records department and asking to the see the criminal index. When you locate the case, ask for the file. It will contain most, if not all, the information you need about the incident, including the names of witnesses and the arresting officer.

Proper Documentation of Workplace Problems

Proper Documentation of Workplace Problems

Introduction:
The principal reason why most Agency EEO cases are lost is lack of proper documentation to support the non-discriminatory reason offered by the Agency to rebut the complainant's claim of discrimination. This section will discuss the problems that occur when supervisors don't or won't take the time to properly document workplace performance or disciplinary problems. It will also offer the kind of documentation that the EEOC looks for in support of an agency's defense that it had a legitimate, non-discriminatory reason for taking an action with relation to an employee when the employee alleges discrimination.

I. Why is Proper Documentation Important?

Many supervisors view documentation of workplace problems as a time-consuming annoyance that takes them away from their regular supervisory duties and responsibilities. However, documenting workplace conduct and performance problems, and taking steps to try to correct those problems, is as much a part of the supervisor's duties as handing out work assignments. Failing to properly document and correct workplace conduct and/or performance problems negatively impacts on the overall productivity of the work unit, affects employee moral and can seriously compromise the supervisor's ability to effectively perform his/her job.

From the employee's standpoint, the failure of the supervisor to document such problems and make the employee aware of the need to correct their conduct or behavior is viewed as unfair, especially when those deficits are later used to discipline or terminate the employee. Likewise, the EEOC takes a dim view of the truthfulness of the Agency reason for taking action against an employee or non selecting that employee for promotion where those reasons involve claims of undocumented conduct or performance problems.

II. How Can the Lack of Proper Documentation Affect the Agency in an EEO Case?

An agency can take adverse action against an employee who is a member of a particular protected class, or refuse to select that person for a position or promotion (even when the employee has already filed an EEO case), as long as the Agency can document that it had a legitimate, non-discriminatory reason for its actions.

During an EEO hearing, a supervisor or other Agency official may be telling the truth when he/she testifies that a particular management action directed against a Complainant was not based on unlawful discrimination or that the failure to select the employee for a position was due to past or current conduct or performance problems. However, the fact that the Agency official is telling the truth will matter little if there is no documentation to back up that assertion. Failure to document the conduct and/or performance problems of an employee creates the impression in the

mind of a trier of fact that the reason being offered by the Agency is not worthy of belief and is being used to cover up for the Agency's discriminatory conduct.

Example:
A selecting official testifies that he did not select an employee for a particular supervisor position because the employee has a history of frequently turning in projects late and timeliness is a critical element of the employee's current performance standards. However, neither the selecting official nor the employee's supervisor can produce any examples of late projects turned in by the employee, documents noting the problem or documents indicating that the employee was informed of the problem. Furthermore, the employee produces copies of his last three performance appraisals, in which he was given a rating of fully successful for the element of Timeliness. It is unlikely that a trier of fact is going to believe the Agency's explanation that it did not promote the employee because he frequently failed to turn in his projects on time.

Except in the most egregious cases (e.g., theft, physical assault or other threats to employee safety) management is expected to advise an employee of any conduct or performance problems and give the employee the opportunity to correct the problem before taking any type of adverse action. When a supervisor fails to do so, and later offers those problems as the non-discriminatory reason for taking a particular action that is now the subject of an EEO complaint, the supervisor runs the risk that the trier of fact will view the explanation offered as a ruse to cover up an action really based on discriminatory intent.

Though the employee has the ultimate burden of proving that the real reason for the Agency's actions were discriminatory, the practical effect when a trier of fact discounts the non-discriminatory reason offered by the Agency for its action is that "the last explanation on the table" before the trier of fact for the Agency's actions is the reason offered by the complainant, i.e., the Agency took its action for discriminatory reasons. Remember, the trier of fact can only make a decision based on the evidence before him /her.

III. What Type of Documentation is Important?

As previously stipulated, documentation of an employee's job-related conduct or performance problems is an important part of a supervisor's duties and responsibilities. If an employee is not performing his or her job duties in a satisfactory manner, existing regulations prescribe a course of action a supervisor must take to correct the problem before an employee can be terminated for non-performance. Similarly, except in cases of certain egregious conduct, the EEOC looks to whether an employee has been properly advised of conduct problems and given an opportunity to correct those problems before the Agency proposes termination of the employee.

Supervisors frequently complain that they don't have time to properly document problems. However, it is far easier and less time consuming to document problems as they happen than to try to recall six-months or a year later what occurred and what the

employee was told. Unless the employee is placed on a Performance Improvement Plan, documentation of a workplace problem and the employee's knowledge of that problem need not be lengthy or require much time. If you meet with an employee about a performance or conduct problem, it takes only a few minutes to type up a one to two paragraph, dated memo to the employee outlining what was discussed at the meeting and the proposals for correcting the problem. The memo should contain a statement advising the employee that he/she should contact the supervisor within five days of receipt if he/she believes that the memo does not accurately represent the substance of the conversation between the employee and the supervisor.

Such a memo can be sent to the employee by e-mail, (if the employee has access to e-mail) or given to him/her in hard copy form. It does not matter if the employee acknowledges, in writing, receiving the memo. What matters is that there is a record that a particular matter was brought to the employee's attention and that the memo was given to him/her. If the memo is sent by e-mail, there will be an electronic record created when the employee opens the e-mail message. Even if the employee later claims that he/she did not read the memo, the EEOC will presume that the employee read any e-mail that he/she opened. Be sure to make a copy of the e-mail record showing that the e-mail was opened. If the memo is given to the employee in hard copy form and the employee will not sign any document indicating receipt of the memo, it is helpful to have a witness present who can provide verification that the memo was given to the employee.

Any uncorrected performance problems should also be documented in the employee's performance appraisal. It is virtually impossible to convince an EEOC judge that an employee was not selected for a promotion or position because of performance deficiencies when there is no indication of the alleged deficiencies in the employee's performance appraisal or, worse yet, where the performance appraisal paints the picture of a stellar employee. The purpose of the performance appraisal is to apprise the employee of his/her strengths and weaknesses.

Similarly, documentation evidencing progressive discipline of any employee for conduct-related work problems is an important factor in the Agency's ability to adequately defend an EEO complaint filed on the basis of an adverse action, especially where the action involves termination of the employee. Progressive discipline records can be used to show that the complaining employee was treated in the same manner as other employees who committed similar offenses. In the case of a termination action, such records can also help prove that the employee was on notice as to conduct problems and the efforts the Agency made to correct the conduct before terminating the employee.

IV. Conclusion

Proper documentation by a supervisor of employee conduct and/or performance problems is essential for effective management. Except in certain instances of egregious behavior, fairness mandates that an employee be advised of such problems

and given the opportunity to correct them. Additionally, most EEOC judges are skeptical when an Agency official testifies that certain poor conduct or performance was important enough to discipline an employee or block his/her advancement or selection for a job position, but not important enough to document.

In an EEO setting, where an employee claims that the reason why the Agency took a particular action was discriminatory, the Agency's inability to produce documentation of problems can lead to a finding that the reason the Agency offered should be discounted and that the action was based on discriminatory intent.

The most important points are that proper documentation allows the Agency to effectively defend itself should the employee file an EEO complaint, and it helps the supervisor maintain an effective workforce.

Handling Alcohol Disability in the Workplace

Handling Alcohol Disability in the Workplace

Supervisors should use in conjunction with Section 5, Disability Discrimination.

Introduction:

The EEOC and the Federal courts agree that alcoholism, with its debilitating effects upon individuals and their work lives, can qualify as a disability for the purposes of the Rehabilitation Act. Consequently, the Agency may be obligated, by law and regulation, to provide a "Reasonable Accommodation" for an employee suffering from the disability of alcoholism.

I. Previous Legal Requirement for "Reasonable Accommodation" of an Alcohol-Disabled Employee

Previously the courts and the EEOC agreed that agencies could - and in fact were required - to provide "Reasonable Accommodation" in the form of a "firm choice" before terminating an employee suffering from an alcohol disability.

What this meant was that before removing an alcohol-disabled employee for misconduct or unacceptable performance, the agency was first required to explicitly inform the employee that further misconduct or unacceptable performance would result in removal. Hence, the employee was given the "firm choice" between seeking treatment and correcting their misconduct and/or performance problems, or being terminated.

Practically speaking, this meant that supervisors were usually required to withhold disciplining any employee claiming an alcohol addiction if he/she agreed to participate in a rehabilitation program.

Although well-intentioned, this arrangement resulted in employees who blamed their misbehavior on alcohol, thereby escaping corrective action. However, other employees who had engaged in the same or similar conduct, but did not blame their misbehavior on alcohol, were required to face the consequences of their actions.

II. Present Legal Requirement for "Reasonable Accommodation" of an Alcohol-Disabled Employee

Amendments to the Rehabilitation Act and subsequent EEOC rulings changed the above situation. Specifically, agencies now:

a. can hold an employee who is alcohol-disabled to the same standard of job performance and behavior as other employees; *and*

b. are not required to provide a "firm choice" to employees who have engaged in misconduct or inadequate performance before taking corrective or disciplinary action.

In other words, if an employee who suffers from an alcohol disability engages in misconduct or poor performance for which other employees would receive a disciplinary or adverse action, the agency may apply the same corrective action without first offering a "firm choice."

What hasn't changed is that alcoholism may qualify as a disabling condition and agencies may still be required to provide appropriate "Reasonable Accommodation"- even though it may coincide with disciplinary or adverse action. Agencies still must provide a "firm choice" before removing an alcohol-disabled employee if such requirement is contained in:

- Internal agency regulations, *or*
- Labor agreement provisions.

In recent years other decisions by the EEOC and federal courts have also made it tougher for employees facing discipline to simply claim alcoholism as a way of avoiding or deferring the consequences of their behavior.

In summary, recent decisions have established that the following requirements must be met before an employee qualifies for "Reasonable Accommodation." The employee must:

- make his/her disability known to the Agency. The Agency has no duty to accommodate something it does not know about.
- provide medical or other suitable documentation proving that he/she is, in fact, an alcoholic - as opposed to an occasional drinker who misbehaves under the influence.
- be capable of performing the major duties of his/her position with the assistance of an accommodation that is "reasonable;" i.e., which does not impose an "undue burden" upon the Agency.

Consequently, employees are not entitled to "retroactive" accommodation when first raising a claim of alcohol disability after misconduct. Nor are they entitled to an accommodation that, in effect, keeps them on the job despite an inability to meet the performance and conduct standards other employees in their position must meet.

Example:
An employee claiming an alcohol disability would not be entitled to an accommodation that allows him to repeatedly report late for work or otherwise fail to follow proper leave procedures.

III. Supervisory Responsibilities

Supervisors usually must take the lead in dealing with alcohol-related problems in the workplace. Their responsibilities fall into four areas:

Recognizing the signs of alcohol abuse

This requires supervisors to be alert to the possibility of alcohol as an influencing factor in a variety of situations. For example, noting:

- A substantial change in an employee's appearance, attitude, performance, or conduct;
- A pattern of tardiness and absence that suggests difficulty overcoming the after-effects of alcohol consumption;
- The odor of alcohol, or the periodic use of strong-odored mouthwashes, perhaps to mask the smell of alcohol;
- Physical manifestations of alcohol influence, including drowsiness, slurred speech, flushed skin, or unsteady movements;
- Any information concerning off-duty arrests for DUI or drunk and disorderly behavior.

B. Counseling an employee who may be suffering from alcoholism

Supervisors cannot be expected to become professional substance abuse counselors. They can, however, be expected to respond to the signs of possible alcohol abuse by making an overt effort to help employees. This can involve:

- Contacting an Employee Assistance Program (EAP) counselor and seeking advice on how to deal with the apparent problem;
- Telling an employee whose performance or conduct is slipping about the Agency's EAP, and either setting up or offering to set up an appointment;
- Being direct with the employee, particularly if there is strong evidence of alcohol use. For example, telling an employee that you have smelled alcohol on his/her breath during duty hours and that coming to work under the influence will result in disciplinary action.

Supervisors carry a responsibility to act on the knowledge of an alcohol problem, to advise an employee of how and where to get help, as well as the consequences of continued poor performance or misconduct. They are not required or authorized to:

- Diagnose alcoholism;
- Persuade an employee to admit to an alcohol problem;

- Force an employee to meet with an EAP counselor or to enroll in a rehabilitation program.

C. Providing "Reasonable Accommodation"

When an employee or an authorized representative, such as a physician or EAP counselor, informs the supervisor that an employee is suffering from alcoholism and provides supporting documentation to the Agency, the Agency is obliged to provide "Reasonable Accommodation" in an effort to help the employee overcome his/her alcohol disability. In most cases, "Reasonable Accommodation" will involve such things as:

- Granting leave or LWOP so that an employee can participate in a residential rehabilitation program; or
- Adjusting the employee's work schedule to permit participation in an on-going rehabilitation.

Sometimes, employees may seek other adjustments from the agency to accommodate their alcohol-related disability. For example, they may request reassignment to a different shift or position. Each request for "Reasonable Accommodation" should be weighed on its own merits and in light of how "reasonable" it is. A request is not "reasonable" if complying with the employee's request would:

- Impose excessive costs on the Agency;
- Cause a severe disruption of operations;
- Require placement of an employee in a job for which he/she is not qualified;
- Require creation of a job that does not currently exist;
- Relieve the employee of one or more major duties of his/her position;
- Result in a non-competitive promotion;
- Relieve the employee of the obligation to come to work regularly.

Such "accommodations" would impose an "undue burden or hardship" upon the Agency. Consequently, the Agency is under no obligation to take such steps to "accommodate" an employee's alcohol-related disability.

IV. Taking Necessary Action

Helping people is always more personally rewarding than disciplining them. Unfortunately, however, disciplinary and adverse action - up to and including removal - is sometimes necessary to deal with an alcohol-driven performance or conduct problem. As a general matter, supervisors are responsible for:

- Recognizing and acknowledging (as opposed to ignoring) unacceptable performance or conduct; *and*
- Holding all employees, including those with an alcohol problem, to the same standards of performance and conduct; *and*
- Imposing disciplinary action in a fair and consistent manner.

This means that a disciplinary or performance-based adverse action need not be held in abeyance, even if the problem resulted directly from the employee's alcohol problem.

Sometimes alcohol-related problems reveal themselves quietly over an extended period of time. For example, an employee who had always been dependable and productive suddenly begins to have attendance and attitude problems with no clear, single indication of alcoholism.

But in other cases, a sudden, possibly shocking incident of misbehavior or performance failure may bring to light an alcohol problem that was previously unsuspected. For example, an employee under the influence may exhibit any of the following:

- erupt in anger at a co-worker or customer;
- become involved in a workplace accident;
- fall asleep at his/her desk;
- openly display an alcohol container; *and/or*
- return late from lunch, exhibiting signs of intoxication.

When such incidents occur, it is usually up to the supervisor to take appropriate action. In responding to the direct observation of such incidents, or a report of them from a subordinate or fellow supervisor, the supervisor should:

A. Immediately approach the individual - unless he/she is exhibiting physically threatening or otherwise dangerous behavior.

B. Assess the situation - if the person is waving a half-empty liquor bottle, slurring his/her speech and reeking of alcohol, it is apparent you're dealing with an employee under the influence. But in some cases, other physical ailments can mimic some of the signs associated with intoxication. If it is not clear what the employee's problem is, the supervisor should first ask the individual if he/she has been drinking

and pay close attention to the odor of his/her breath and to what is said. If needed, the supervisor should summon emergency medical help immediately. If alcohol does appear to be involved, the supervisor should move on to the next step, developing evidence.

C. Develop evidence - it's a good idea to ask a fellow supervisor, or a security person, or in the absence or availability of either, another employee to observe the individual and his/her demeanor; i.e., manner of walking, talking, etc. The supervisor and witness should document his/her observations, as well as the answers to questions he/she asks the individual. If blood or breathalyzer tests are available, the individual should be asked if he/she would be willing to take one. If the employee is not willing to do so, no attempt should be made to force the issue; however a note should be made of the refusal.

D. Provide necessary assistance - if the employee appears to be in physical distress, he/she should be sent-under escort-to the Agency's emergency care facility, or have assistance come from there, if available. If the person is not in physical distress but is impaired, a security guard or other sober individual should arrange to transport him/her home. *Never send an apparently intoxicated individual home alone if he/she is driving.*

E. Notify appropriate security and/or legal personnel - if the employee has committed acts that may result in additional administrative or criminal charges (assaulting someone, destroying property, etc.), the supervisor should notify law and/or security personnel promptly. They may wish to take the individual into custody.

V. Deciding Whether Discipline is Appropriate

As previously noted, before recent EEOC and court rulings and changes to the Rehab Act, deciding whether and when to impose discipline upon an employee claiming an alcohol-based disability was a tricky matter. Now, however, the decision is considerably easier to reach.

Here, in brief, is the analytical process for determining whether it is appropriate and legitimate to discipline or take an adverse action against an employee suffering from an alcohol-based disability:

- Determine whether the requisite amount of evidence establishes that the employee committed an offense for which discipline can, has been, or routinely would be imposed upon other employees not suffering from the disability; *and*
- If so, determine the penalty that would normally be applied within all relevant circumstances surrounding the misconduct, including applicable DOUGLAS Factors, (See ATTACHMENT A); *and*

- Impose the same penalty that would routinely be used if the employee involved were not suffering from an alcohol disability.

VI. Alternatives to Taking a Disciplinary or Adverse Action

Notwithstanding the fact that the Agency no longer needs to provide an employee with a firm choice before taking a disciplinary or adverse action, the Rehab Act still requires the agency to reasonably accommodate an employee with an alcohol-related disability. Two particular types of accommodation can serve as an alternative to taking a disciplinary or adverse action, but impress upon the employee the seriousness of the situation while giving him/her the opportunity for a second chance. The two alternatives are the **Firm Choice Letter** and **the Last Chance Agreement** (LCA).

A. Firm Choice Letter

Most supervisors are familiar with the firm choice letter, given to an employee prior to and in lieu of a proposed disciplinary or adverse action. The letter basically advises the employee that the supervisor believes that he/she has an alcohol problem and gives the employee the choice of seeking treatment for the condition or facing a disciplinary or adverse action. The letter also usually imposes certain conditions on the employee related to seeking treatment, such as:

- providing the supervisor with documentation of the employee's entry into, active participation in, and successful completion of a recognized alcohol rehabilitation program;
- refraining, indefinitely, from any future alcohol-related conduct or performance based problems;
- refraining from any future misconduct not related to alcohol abuse for a certain period of time.

The key element of a firm choice letter is that it is given to an employee before any disciplinary or adverse action is taken against the employee.

B. Last Chance Agreement (LCA)

Last chance agreements - or as they are sometimes called, LCA or abeyance agreements - are an outgrowth of the "firm choice" letter. Before the change in the law requiring issuance of a "firm choice" letter before an adverse action could be taken against an employee with an alcohol-related disability, agencies frequently used LCAs when an employee committed an offense normally justifying removal, but there was uncertainty as to whether a third party would later agree that the Agency had provided the employee with a bona fide "firm choice."

The primary difference between a "firm choice" letter and a LCA is that the LCA is issued to the employee after the Agency has already issued a proposed disciplinary or adverse action against the employee (usually a proposed

removal). The LCA is essentially a contract between the Agency and the employee in which the Agency agrees to hold the effective date of the proposed action in abeyance, in return for the employee agreeing to abide by certain terms. In the case of an employee claiming an alcohol-related disability, the employee usually is required to agree to:

- cease drinking alcohol;
- enroll in a specified rehabilitation program;
- successfully complete the program;
- refrain from drinking or alcohol-induced misconduct for a specified period of time.

Under an LCA, if the employee fails to meet the terms and conditions of the agreement, the Agency may take action to immediately effect the proposed disciplinary action without any further notice to the employee and with the employee having no further right of appeal to the MSPB. This waiver-of-appeal-right does not apply to EEOC complaints because the EEOC has held that an employee cannot be made to waive his/her future EEO rights. With the waiver of appeal rights, the only basis for appeal to the MSPB for an employee who has signed a LCA is that he/she did not violate the terms and/or conditions of the LCA. If the MSPB determines that the employee has violated the agreement, it will dismiss his/her appeal.

The abolishment of the requirement to provide the employee with a "firm choice" has diminished the use of LCAs. However, such agreements can still be used as an appropriate tool to impress upon the employee the seriousness of his/her situation and the need to take immediate corrective action. Often, issuing an employee a LCA will have enough of an impact upon the employee to bring about a career-saving rehabilitation.

ATTACHMENT A - DOUGLAS Factors Worksheet

FACTORS TO BE CONSIDERED IN DETERMINING EMPLOYEE DISCIPLINE
(Instructions: Please respond in space provided below each factor.)

1. The nature and seriousness of the offense;

2. The relationship to, and effect on, the employee's performance of his/her duties and the Agency's mission;

3. The employee's past work record;

4. The consistency of the penalty imposed on others under like circumstances;

5. The consistency of the penalty as compared to the applicable Agency table of penalties;

6. The extent to which the employee was on notice of any rules that were violated, including any prior warnings;

7. The employee's potential for rehabilitation;

8. Any mitigating circumstances (such as: unusual job tensions, mental impairment, bad faith or provocation on the part of others);

9. The adequacy and effectiveness of alternate sanctions to deter any such conduct by the employee in the future.

Handling Allegations of Harassment

Handling Allegations of Harassment

Introduction:

It is the policy of the VA that no employee will be subjected to harassment based on race, color, gender, religion, national origin, age, disability, or sexual orientation, and that no employee will be subjected to retaliation because he or she has brought forth such an allegation. Harassment based on one or more of these impermissible factors may be evidenced by unwelcome verbal or physical conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile or abusive working environment.

Handling allegations involving harassment is very often a difficult task. Frequently, there are no witnesses to the alleged harassment (especially when it is sexual in nature) and no clear guidelines as to what does and does not constitute harassment. Additionally, the potential for employer liability is greater where such allegations are not investigated and acted upon promptly. This section is designed to give management some clear guidelines as to its responsibility in preventing, investigating and correcting problems involving incidents of harassment.

I. Preventative Measures

An agency must take effective measures to prevent harassment, including:

- Watching for the potential for harassment in the work environment;
- Informing all employees that harassment is prohibited; *and*
- Providing a mechanism for dealing with harassment complaints; *and*
- Responding promptly to complaints of harassment by conducting and/or asking for a thorough investigation and minimizing the effect to the victim to the extent possible.

II. Investigating Allegations of Harassment

The investigation should be prompt, thorough, and impartial. Confidentiality should be protected to the extent possible. Information should be shared only with those who have a "need to know." All persons interviewed should be told that employees who complain of alleged harassment or participate in the investigation are protected against retaliation.

A. Questions to ask the complainant

1. Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?

2. Has your job been affected in any way?

3. How did you react? What responses did you make when the incident(s) occurred or afterwards?

4. Are there any persons who have relevant information? Has this happened to others? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you visibly upset after episodes of alleged harassment?

5. Are there any notes, physical evidence, or other documentation regarding the incident(s)?

6. How would you like to see the situation resolved?

B. Questions to ask the alleged harasser

1. What is your response to the allegations?

2. If he/she claims that the allegations are false, ask why the complainant might lie.

3. Are there any persons who have relevant information?

4. Are there any notes, physical evidence, or other documentation regarding the incident(s)?

C. Questions to ask third parties

1. What did you see or hear? Where were you standing when you heard or saw what you claim to have heard or seen? Where were the complainant and alleged harasser standing?

2. Describe the alleged harasser's behavior toward the complainant. Describe the complainant's response to the alleged harasser's behavior.

3. Describe the alleged harasser's conduct towards others in the workplace.

4. What did the complainant tell you about the alleged harassment?

5. Are there other persons who have relevant information?

III. Reaching a Determination

Credibility assessments can be critical in determining whether the alleged conduct in fact occurred. Factors to consider include:

A. Inherent plausibility: Is the testimony believable on its face?

B. **Demeanor:** Did the person seem to be telling the truth or lying?

C. **Motive to falsify:** Did the person have a reason to lie?

D. **Corroboration:** Is there witness testimony (such as testimony by eyewitnesses, people who saw the complainant soon after the alleged incident(s) or people who discussed the incidents with him/her at the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

E. **Past record:** Did the alleged harasser have a history of similar behavior in the past? Has the complainant filed previous unsubstantiated claims of harassment against others?

IV. Corrective Action

A. If it is determined that harassment occurred, corrective action should be undertaken immediately.

B. Corrective measures should be designed to end the harassment and ensure that it does not recur. The severity of disciplinary action should depend on the severity and frequency of the misconduct. The discipline should be proportionate to the seriousness of the offense.

C. If unwelcome sexual conduct occurred, but it was not sufficiently severe or pervasive to constitute unlawful harassment, steps should still be taken to ensure that no further such conduct occurs.

D. Corrective measures should not adversely affect the complainant (e.g., if the harasser and the complainant must be separated, the harasser should be moved).

V. Other Preventative Measures

A. Routinely educate all employees about what constitutes unlawful harassment and about the employer's anti-harassment policy and complaint procedure.

B. Train supervisors how to identify and respond to harassment.

C. Monitor enforcement of the anti-harassment policy.