OEDCA DIGEST

Vol. XI, No. 2 | **Department of Veterans Affairs Washington, DC** | **Spring 2008**

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

FROM THE DIRECTOR

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

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include the unpleasant consequences of failing to cooperate with ORM investigators, performance appraisals, delays in accommodating disabilities, accommodating religious practices, disability-related absenteeism, *per se* retaliation, and negative employment references. Also in this issue is guidance issued by the Equal Employment Opportunity Commission on race and color discrimination in employment.

The *OEDCA Digest* now contains a comprehensive cumulative index, and may be accessed both on the internet at: http://www.va.gov/orm/oedca.asp and on the Department of Veterans Affairs Intranet at http://vaww.va.gov/orm/oedca.htm.

CHARLES R. DELOBE

I

EEO MANAGERS BEWARE! CONSEQUENCES OF FAILING TO COOPERATE WITH ORM INVESTIGATORS

The following case is a perfect example of what can happen when a facility EEO manager fails to respond to a request from an Office of Resolution Management investigator for information.

In a recent decision handed down by the EEOC's Office of Federal Operations (EEOC's appellate division), the EEOC found against the VA based not on the evidence that what was in the record but, rather, on evidence that was not in the record! The complainant in this case had applied unsuccessfully for a Budget Analyst position. The selecting official testified that current budget experience was the main factor in making his decision. In this regard, he noted that the person he selected had current budget analyst experience, while the complainant lacked such experience. The complainant challenged that testimony and eventually prevailed before the EEOC. Here's why.

The complainant had failed to present any evidence that she was the superior candidate, aside from her own opinion on the matter. Nevertheless, the EEOC considered the fact that the facility EEO Manager had failed, despite two requests from ORM's investigator, to provide copies of documents relating to the selection action, such as applications, resumes, rating and ranking sheets, *etc*.

Because of the EEO manager's failure to provide the requested documents, the EEOC elected to exercise its authority to draw an adverse inference that the requested information would have reflected unfavorably on the party failing or refusing to provide the information. The Commission stated that the information, had it been provided, might have supported the complainant's contention that she was better qualified. Therefore, the Commission drew the adverse inference that the requested documents would have supported that contention and concluded that the selecting official's reason for not selecting the complainant was, therefore, a pretext for discrimination.

There are two lessons to be learned from this case. The first, obviously, is for EEO managers to respond quickly and fully to an ORM investigator's request for documents. It was not clear why the manager did not provide the requested documents — *i.e*., whether it was because the documents were no longer available, or whether the EEO Manager simply failed or refused to respond to the request. If the requested documents were not available, the EEO Manager should explain the reason why, and the ORM investigator should note that reason in the record. If the documents are available, the Manager must provide the documents even though he/she believes that the documents are not relevant to the case. That is a question for the ORM

investigator and, ultimately, the adjudicator to decide.

The second lesson is that EEO Managers should remind the HR office that it must preserve all relevant documents when an EEO complaint has been filed. The Manager needs to ensure that the HR office is aware of, and complies with, this requirement. Many HR records are routinely destroyed after a certain period of time in accordance with federal records disposition regulations. EEOC will not consider that a valid excuse for not providing relevant evidence.

II

REDUCED RATINGS ON SPECIFIC ELEMENTS OF PERFORMANCE APPRAISAL NOT DUE TO PHYSICIAN'S AGE, GENDER, RACE, OR RELIGION

This case demonstrates that it takes more than just a mere allegation of discrimination to prevail in an EEO complaint.

A VA physician filed an EEO complaint alleging discriminatory treatment in connection with his 2005 proficiency report (performance appraisal). Specifically, he claimed that while his overall rating of "satisfactory" was unchanged from the previous year, his supervisor gave him lower ratings in four of the five rated elements.

In 2004, a different supervisor had rated him "high satisfactory" on three elements ("clinical competence", "education competence", and "personal qualities") and "satisfactory" on the element of "administrative competence". He received no rating (n/a) on one element ("research and development"). In the narrative section of the appraisal, however, the supervisor did hint of present and possible future problems with the complainant's performance. He noted that while the number of surgeries was increasing, the complainant's operating room cases was decreasing. The supervisor concluded the appraisal by stating that he looked forward to the complainant's support and active participation in improving services at the clinic.

In 2005, a new supervisor gave him no rating (n/a) for the education and research elements, a "satisfactory" for "clinical competence" and "personal qualities", and a "low satisfactory" for "administrative competence.

She noted in the narrative section of his appraisal that he displayed little interest in expanding his skills or learning how to use new equipment, refused to perform even basic procedures and exams, and exhibited practice methods described as "archaic", by which she meant extremely inefficient. The supervisor also testified that upper management had mandated a new direction at the clinic and, in response, she imposed major changes designed to improve operations and efficiency. The complainant was unreceptive to these changes, and the number of pa-

tients he saw on a daily basis decreased.

Remarkably, the complainant admitted that he was not cooperating with his supervisor. He justified his actions by stating that he disagreed with her opinion as to how the clinic should be run and how best to utilize his expertise. To support his claim of discrimination, however, he was unable to offer much in the way of evidence. He said the use of the word "archaic" demonstrated age bias, the comment about showing little interest in expanding his skills was racist, and his supervisor's use of the word "sir" when addressing him betrayed a gender bias. As for his religious discrimination claim, it was unclear what he based it on, although the record shows that management had granted his request for religious accommodation by allowing him administrative time off during work hours to attend Muslim prayer services.

An EEOC judge concluded that the above "evidence" was insufficient to prove the complainant's claims of race, gender, age, and religious discrimination. Indeed, he was unable to present even *prima facie* proof of such discrimination. That is, he could not identify any other employee who was better treated under similar circumstances –i.e., who received higher performance ratings despite inefficient medical practices. Moreover, while his 2005 ratings were lower than those received in 2004, the circumstances were different. There were different supervisors and a changed direction at the clinic.

In the final analysis, the complainant was unable to point to any persuasive evidence that discrimination rather than inefficient practices caused the lower ratings.

III

MISTAKES TO AVOID WHEN RESPONDING TO A REASONABLE ACCOMMODATION REQUEST

The following case is a good example of the problems that can arise when management fails to remain focused on a disabled employee's request for accommodation.

The complainant, who lost his vision as a result of glaucoma while in law school, but who eventually graduated first in his class, was hired under a special hiring authority to work as a Veterans Benefits Counselor (VBC) in the Telephone Unit. This unit handles incoming calls from veterans and their dependents regarding benefits eligibility, claim status, and other information. To perform this job, the VBC must refer to various written reference materials, *e.g.*, desk guides, manuals, *etc*.

As the complainant was unable to use the written reference materials without some form of electronic assistance, management sought guidance from the Sensory Access Foundation (SAF), an organization that assists individuals with vision impairments overcome

employment barriers through the use of technology. The California Department of Rehabilitation paid the SAF's fees for this service. The SAF analyzed the complainant's job and recommended three options for making the written reference materials accessible electronically: hire an outside organization to scan all materials into computer format, contract for a word processor or use an employee to input the material, or contact the government publisher of the materials who would probably have the materials already in an electronic format.

The assistant IRM manager at the facility contacted VA Central Office about one of those options, but received no response and failed to follow-up on it. He also determined that hiring a firm to scan the material was "too expensive" and dismissed that option.

Apparently not wishing to consider the other suggested option, he instead, ordered a system consisting of a scanner, software, and a personal computer that was capable of scanning the materials, storing them in the computer's memory, and allowing for later retrieval using a vocalized system that enabled the computer to read the material aloud. The State paid for this equipment. When the system arrived, IT discovered that the PC lacked sufficient speed and memory. When the Department refused to pay for the necessary upgrade to the PC, the complainant paid for the $1000 upgrade out of his own pocket. By this time, five months had already elapsed from the date the complainant entered on duty to the date the system arrived.

At this point things should have improved, but instead they worsened. The IT unit never managed to place the system into operation before the complainant left the VA for another job some sixteen months after he was hired. Thus, throughout the entire period of his employment, he was unable to perform the essential duties of the job. The reasons given for this failure included the absence of the IT Assistant Chief for over a month, not realizing that the "full" version of the vocalization software had not been ordered when the system was purchased, a subsequent five-month delay in ordering that software, and the facility's move to a new city that caused distractions.

The record showed that no one in the IT shop accepted responsibility for reading the instruction manuals and setting up the system after it arrived. An expert witness testified that the instruction manuals for set up and use were easy to understand, that a person familiar with computers could set up the system in 2-3 hours, the necessary software could be installed in a few minutes, and that technical support from the manufacturer was available by phone using an "800" number. He stated that it normally took only 3 months to purchase the system, install it, and train the user. If necessary, the facility could have contracted with someone for the set up and training.

At some point, because of all of these

delays, management decided to provide the complainant with a reader, believing this would adequately accommodate his needs. The reader, however, was essentially doing the complainant's job. When the reader was unavailable and calls came in, the complainant had to ask coworkers for the information, which took time and frustrated the callers.

From the above facts it is easy to see why this case resulted in a finding of discrimination for failure to accommodate the complainant's disability. Rather than utilize one of the methods suggested by the state rehabilitation specialist, management chose a different method, in part due to the lower cost involved. Having chosen that route, it then failed to focus on the problems associated with setting the system up and training the complainant to use it. Although management argued that the reader was an effective accommodation, it clearly was not because it did not permit the complainant to do the job and have a meaningful work experience. It simply required someone else to do his job, and when that person was not available, he was unable to do the job.

As for cost, management presented no evidence that providing a reasonable accommodation would entail an undue hardship, financial or otherwise. Also, with regard to the PC upgrade, it should be obvious that an employee is not required to pay for an accommodation out of his or her own pocket. Finally, whatever cost might have been involved in providing a prompt and effective accommodation was far less than the $80,000 in compensatory damages awarded to the complainant by the EEOC!

IV

LACK OF INTERACTIVE PROCESS RESULTS IN AGENCY LIABILITY FOR FAILURE TO ACCOMMODATE RELIGIOUS PRACTICES

The case illustrates the fact that if an employee asks for a specific religious accommodation that is not possible, that does not relieve the employer from the duty to engage in a dialogue with the employee to determine if some other accommodation might be possible.

The complainant, who had previously worked an 8:00 am to 4:30 pm shift, Monday through Friday, received notice from her supervisor that she would now have to work a rotating shift, which would include rotating weekend work. She objected, claiming that the change would prevent her from fully participating in or attending a Catholic mass on the weekends she had to work. Although she had the option to attend the religious service on either Saturday evening or Sunday morning, she claimed that both options were effectively foreclosed by her work schedule, which required her to be present from 9:00 am to 5:30 pm. The Saturday evening option was impossible because the service at her parish begins at 4:15 pm

and the latest Saturday service at any other Catholic church in the area begins at 5:15 pm. The Sunday morning option was not feasible, as the earliest Sunday morning service in her area begins at 8:00 am. This option would require her to leave mass early in order to arrive at work on Sunday morning at 9:00 am.

Because of the conflict, the complainant, through her union representative, requested that she be allowed to retain her Monday through Friday schedule, explaining that the change would make it impossible for her to attend mass on either Saturday or Sunday. Her supervisor refused. The complainant complied with the shift change, but filed a discrimination complaint alleging that the agency failed or refused to accommodate her religious beliefs and practices.

An EEOC judge, following a hearing, agreed with the complainant that the agency failed in its duty to provide an effective accommodation. At the hearing, the agency advanced two arguments: (1) that the weekend schedule did not prevent the complainant from attending mass on Saturday evening; and (2) that accommodation was not required because the complainant merely asked to be relieved of weekend duty rather than specifically asking for some other form of accommodation, such as modifying her hours.

The EEOC judge rejected both arguments. As for the first argument, the judge found no evidence to support the agency's claim regarding Saturday evening services. The complainant's evidence persuasively showed that she could not attend mass anywhere on Saturday evening because all of them began prior to the end of her shift.

As for the second argument, the judge correctly noted that once an employee notifies an employer of the need for religious accommodation, the employer is obligated to engage in good faith in a dialogue – an "interactive process" – to determine if an effective accommodation is possible – *i.e.,* an accommodation that would satisfy the employee's religious beliefs or practices without causing undue hardship.

In this case, the supervisor rejected the requested accommodation – remaining on a Monday to Friday schedule – because of the hardship involved, but then failed to inquire into the possibility of some other solution. At the hearing, the complainant argued that a slight modification to her starting time – from 9:00 am to 9:30 am – would have permitted her to attend a Sunday morning service in its entirety without having to leave early in order to get to work on time. Although she did not present this specific option to her supervisor when she asked for accommodation, it is an option that would have been apparent if the supervisor had been willing to discuss the matter and explore other options. By not doing so, the supervisor failed to accommodate the complainant's religious practice.

V

IS AN INDIVIDUAL "UNQUALIFIED" TO PERFORM THE ESSENTIAL DUTIES OF A JOB BECAUSE OF EXCESSIVE DISABILITY-RELATED ABSENTEEISM?

As seen below, a U.S. district court said yes! But the EEOC would not agree.

The complainant, an environmental technician, suffered from pulmonary obstructive disease. Because of his condition he had an excessive number of absences. In ten months, he missed 213 hours of work, most of it unscheduled, and some of it not approved. His absenteeism made it difficult for the short-staffed Environmental Management Service to accomplish its housekeeping mission and ensure proper sanitation at the hospital. Based on his leave record, the hospital terminated the complainant during his probationary period for unsatisfactory job performance. The complainant claimed that his termination was due to his disability and, hence, in violation of the *Rehabilitation Act*. After failing to convince both an EEOC administrative judge and OEDCA that such a violation occurred, he filed a civil action in a U.S. district court.

The district court also ruled in favor of the Department, finding, among other things, that coming to work on a regular basis is an essential function of any job, and that the complainant was unable to perform that function.[1] The court cited other court decisions holding that "employees cannot perform their jobs successfully without meeting some threshold of both attendance and regularity" and that an employee with sporadic, unpredictable absences is not "otherwise qualified." Thus, the court reasoned that while the complainant was clearly an individual with a disability, he was not a "qualified" individual with a disability. Hence, he was unable to establish a *prima facie* case of disability discrimination and hence, no violation of the *Rehabilitation Act.*

While the Equal Employment Opportunity Commission (EEOC) would most likely have reached the same ultimate result as the court did in this case, *i.e.*, no violation, it would have done so for a very different and important reason – a reason that managers and HR specialists must consider if confronted with a similar situation.

The EEOC, unlike some courts, takes the position that regular and predictable attendance is not an essential function of any job, and if an employee can show a nexus, or connection, between absences (or tardiness) and a disability, the burden then shifts to the employer to prove that an accommodation would pose an undue hardship on the agency.

[1] The court also found that the complainant was unable to perform the actual duties of his position, as his disability made it impossible for him to handle his strenuous housekeeping duties and to use and be around the chemicals and dust associated with those duties.

While this might, on its face, appear unreasonable, EEOC would maintain that to hold otherwise is to ignore the legal definition of the term "qualified individual with a disability", *i.e.,* one who can perform the essential functions of the position, *with or without reasonable accommodation*. By arguing that excessive absenteeism, by itself, renders an individual "unqualified", the court ignored the possibility that the individual might be qualified under the above definition if the absenteeism could be accommodated.

Thus, the court's logic creates a circular argument, a kind of "catch 22", by which all disabled individuals with an absenteeism problem are automatically deemed "unqualified" and, hence not legally entitled to an accommodation, even if there exists a reasonable accommodation that would render them able (*i.e.*, "qualified.") to perform essential job tasks.

No doubt recognizing its dilemma, the court, after finding the complainant "unqualified" (and hence not legally entitled to an accommodation), nevertheless felt compelled to continue its analysis by inquiring as to whether an accommodation was possible. It concluded, correctly, that any accommodation would have created an undue hardship on the understaffed Service and no accommodation would have enabled the complainant to perform satisfactorily all of the essential functions of his position.

The EEOC's approach in this case would simply have been to determine if the absences were related to the individual's disability, and if so, to determine if the absenteeism could have been accommodated without an undue hardship on the agency.

There is a lesson here for managers and HR specialists. In cases involving disability-related absenteeism, avoid the assumption that excessive absenteeism (or tardiness) automatically renders an individual "unqualified" for a job. Before reaching a conclusion, you must consider whether an accommodation is possible that does not unduly burden the agency. For example, in some cases, absenteeism and the problems caused by it might be alleviated or eliminated by allowing a flexible work schedule or allowing the employee to telework. Reassignment – "the accommodation of last resort" – might also be a possibility in certain cases.

The point is this. Terminating an employee as "unqualified" due to disability-related absenteeism could result in a finding of discrimination if management fails to consider the accommodation issue.

As always, seek the advice of the Regional Counsel before taking any action that would have a negative impact on an individual with a disability. Based on OEDCA's experience, failure to seek such counsel appears to be the primary reason why there have been so many findings of discrimination due to disability.

VI

SOLICITING "AMMUNITION" AGAISNT A COMPLAINANT HELD TO BE RETALIATORY

Most supervisors and managers think they understand what reprisal, or retaliation, means – taking an adverse personnel action against some one because that person accused them of discrimination. This is the most common type of reprisal – but not the only type. Consider the supervisor's actions in following case. He probably had no idea that what he was doing is also unlawful reprisal.

A complainant filed a claim against her supervisor alleging discriminatory harassment. She cited 15 separate incidents or events in support of her claim. When her supervisor became aware of her allegations, he sent an e-mail to all employees in his section soliciting statements in his defense. As soon as the complainant learned of the e-mail solicitation, she amended her complaint to add a reprisal claim. Although she eventually did not succeed in her discriminatory harassment claim, she did succeed in her reprisal claim! But why?

To most managers, the supervisor's e-mail in this case appears harmless – a common sense precaution intended not to retaliate against the complainant, but to defend himself against claims he no doubt considered frivolous and unwarranted. Besides, the complainant suffered no tangible harm. The supervisor took no "action" against her because of her complaint. So why is it reprisal?

The EEOC and the courts now take the position that the prohibition against reprisal is not limited simply to adverse employment actions that affect the terms and conditions of employment. Instead, it also covers any action or statement by an employer that might dissuade a complainant or others from engaging in protected activity. In this case, the supervisor's e-mail solicitation conveyed the impression to all who received it that he was displeased with the complainant's allegations and that he wanted other employees to cooperate in his defense. Such a tactic might have a "chilling effect", *i.e.*, it might dissuade a reasonable employee from engaging in protected activity. For that reason, it violates the anti-retaliation provisions of Title VII of the *Civil Rights Act.*
Similarly, the EEOC has often found it to be retaliation *per se* when supervisors make negative comments about individuals who file EEO complaints, or even about the EEO complaint process itself. Such negative comments send a subtle message to complainants and other employees that EEO complaints are frowned upon and should be avoided. It obviously goes without saying that unsubtle messages along those same lines are equally prohibited under EEOC's *per se* retaliation rule.

VII

NEGATIVE EMPLOYMENT REF-

ERENCE NOT RETALIATION DESPITE AGREEMENT ALLOWING EMPLOYEE TO RESIGN RATHER THAN BE FIRED

An employee (hereinafter "complainant") at a VA medical center received a termination notice during his probationary period because of unsatisfactory job performance as a Housekeeping Officer. He immediately filed an EEO complaint challenging his termination. In response to the complaint, an agreement was reached by which the facility withdrew and destroyed the termination notice and all documents related to the notice, in return for which the complainant was allowed to submit a letter of resignation. The agreement contained no other promises.

Subsequent to his resignation, the complainant applied for a similar position in at another VA facility. The selecting official at that facility was puzzled by the complainant's application, as he did not claim a right to priority consideration available to many former employees at the facility from which he resigned.[2] He contacted the complainant's former supervisor to question this and to obtain a job reference. The former supervisor advised the selecting official that complainant's job performance had been unsatisfactory in every respect and that the resignation was in lieu of termination.

Upon hearing this, the selecting official questioned how that was possible, given that the complainant had, along with his application, submitted a glowing performance appraisal with the former supervisor's signature on it as the rating official. After inspecting the "performance appraisal", the former supervisor stated that the document was not genuine, and that the signature on it purporting to be his was a forgery. At no point during this conversation did the former supervisor mention anything about the complainant's prior EEO complaint or the agreement settling it.

The selecting official thereafter chose another applicant, one who had received the top score from the rating and ranking panel. In response, the complaint filed a retaliation complaint, claiming that his nonselection was due to the prior EEO complaint. In a separate complaint, he also alleged that the VA had breached the settlement agreement that allowed him to resign from his former job in lieu of termination.

The complainant did not prevail on either complaint. There was no evidence that retaliation motivated the selecting official. Neither he nor anyone on the rating and ranking panel was aware of the prior complaint or the agreement settling it and, in any event, he chose the top ranked candidate who significantly outscored the complainant. Moreover, there was no evidence that the negative reference was motivated by unlawful retaliation. The supervisor never mentioned it in the conversation with the selecting official, and the statements made re-

[2] The right to priority consideration stemmed from the effects of Hurricane Katrina.

garding the complainant's performance and the termination notice were true. Clearly, it would have been unethical for the supervisor to lie about the circumstances surrounding the complainant's resignation.

As for his claim about breaching the settlement agreement, he was unable to show that any provision in the agreement had been violated. Nothing in the agreement precluded a negative job reference.

VIII

QUESTIONS AND ANSWERS ABOUT RACE AND COLOR DISCRIMINATION IN EMPLOYMENT

(The Equal Employment Opportunity Commission has published the following guidance on race and color discrimination in the workplace. The guidance is also available at: http://www.eeoc.gov/policy/docs/race-color.html.)

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits employers with at least 15 employees from discriminating in employment based on race, color, religion, sex, and national origin. It also prohibits retaliation against persons who complain of discrimination or participate in an EEOC investigation. Everyone is protected from race and color discrimination Whites, Blacks, Asians, Latinos, Arabs, American Indians, Alaska Natives, Native Hawaiians, Pacific Islanders, persons of more than one race, and all other persons, whatever their race, color, or ethnicity.

These questions and answers are adapted from the EEOC's Compliance Manual Section on Race and Color Discrimination. For more detailed information about race and color discrimination, you may review the *Race and Color Section* on the EEOC's website or call 1-800-669-3362 to request a free copy of the Race and Color Section of the web site.

What is "Race"?

Title VII does not contain a definition of "race." Race discrimination includes discrimination on the basis of ancestry or physical or cultural characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features.

Note that forms used for collecting federal data on race and ethnicity in the workforce use five racial categories: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White; and one ethnicity category, Hispanic or Latino.

What is "Color"?

Color discrimination occurs when a person is discriminated against based on his/her skin pigmentation (lightness or darkness of the skin), complexion, shade, or tone. Color discrimination can occur between persons of different races or ethnicities, or even between persons of the same race or

ethnicity. For example, an African American employer violates Title VII if he refuses to hire other African Americans whose skin is either darker or lighter than his own.

EMPLOYMENT DECISIONS

What employment actions are prohibited by Title VII?

Title VII prohibits race and color discrimination in every aspect of employment, including recruitment, hiring, promotion, wages, benefits, work assignments, performance evaluations, training, transfer, leave, discipline, layoffs, discharge, and any other term, condition, or privilege of employment. Title VII prohibits not only intentional discrimination, but also practices that appear to be neutral, but that limit employment opportunities for some racial groups and are not based on business need.

What is intentional discrimination?

Intentional discrimination occurs when an employment decision is affected by the person's race. It includes not only racial animosity, but also conscious or unconscious stereotypes about the abilities, traits, or performance of individuals of certain racial groups.

Example: An upscale retail establishment with a sophisticated clientele rejects an African American male applicant. The hiring manager stereotypically believes that African American males do not convey a clean-cut image and that they lack the soft skills needed to service customers well. A finding of discrimination would be warranted.

What if clients, customers, or employees prefer working with people of their own race?

Basing employment decisions on the racial preferences of clients, customers, or coworkers constitutes intentional race discrimination. Employment decisions that are based on the discriminatory preferences of customers or coworkers are just as unlawful as decisions based on an employer's own discriminatory preferences.

Can neutral policies be discriminatory?

Yes, in some instances. Some neutral employment policies or practices may exclude certain racial groups in significantly greater percentages than other racial groups. If there is a business necessity for the practice and there is no equally effective alternative, the practice will be lawful despite its impact.

However, if there is not a business necessity for the practice or the business need could readily be met in a way that has less impact, the practice will be unlawful.

Example: An employer has a "no-beard" rule, which disproportionately excludes African American men because they have a higher incidence of

pseudofolliculitis barbae, an inflammatory skin condition caused by shaving. The employer must be able to demonstrate that beards affect job performance or safety. Also, there must be no alternatives to a strict "no-beard" rule that would meet the employer's business or safety needs.

Additional examples of neutral employment policies that may be discriminatory are included in the following sections.

RECRUITMENT AND HIRING PRACTICES

Can an employer ask about an applicant's race on an application form?

Asking pre-employment questions about race can suggest that race will be used as a basis for making selection decisions. Therefore, if members of minority groups are excluded from employment, the pre-employment request for the information would likely constitute evidence of discrimination.

However, employers may legitimately need information about their employees' or applicants' race for affirmative action purposes and/or to track applicant flow. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use "tear-off sheets" or separate forms for the identification of an applicant's race. In that way, the employer can capture the information it needs but can separate the information from the application and thereby avoid using it in the selection process.

How can employers avoid racial discrimination when recruiting?

Job advertisements - Generally, employers should not express a racial preference in job advertisements. Employers can indicate that they are "equal opportunity employers."

Employment Agencies - Employment agencies may not honor employer requests to avoid referring applicants of a particular race. If they do so, both the employer and the employment agency that honored the request will be liable for discrimination.

Word-of-mouth employee referrals- Word-of-mouth recruitment is the practice of using current employees to spread information concerning job vacancies to their family, friends, and acquaintances. Unless the workforce is racially and ethnically diverse, exclusive reliance on word-of-mouth should be avoided because it is likely to create a barrier to equal employment opportunity for racial or ethnic groups that are not already represented in the employer's workforce.

Homogeneous recruitment sources - Employers should attempt to recruit from racially diverse sources in order to obtain a racially diverse applicant pool. For example, if the employer's primary recruitment source is a college that has few African American students, the employer should adopt other recruitment strategies, such as

also recruiting at predominantly African American colleges, to ensure that its applicant pool reflects the diversity of the qualified labor force.

How can employers avoid racial discrimination in hiring and promotions?

Race or color should not be a factor or consideration in making employment decisions except in appropriate circumstances as set forth at Section 15-VI-C of the Compliance Manual section on Race and Color Discrimination. Reasons for selection decisions should be well supported and based on a person's qualifications for the position. Also, an employer should not use selection criteria that disproportionately exclude certain racial groups unless the criteria are valid predictors of successful job performance and meet the employer's business needs.

Educational Requirements - Certain educational requirements are obviously necessary for some jobs. However, if the educational requirement exceeds what is needed to successfully perform the job and if it disproportionately excludes certain racial groups, it may violate Title VII.

Arrest & Conviction Records - Using arrest or conviction records as an absolute bar to employment disproportionately excludes certain racial groups. Therefore, such records should not be used in this manner unless there is a business need for their use.

Whether there is a business need to exclude persons with conviction records from particular jobs depends on the nature of the job, the nature and seriousness of the offense, and the length of time since the conviction and/or incarceration. Unlike a conviction, an arrest is not reliable evidence that an applicant has committed a crime. Thus, an exclusion based on an arrest record is only justified if it appears not only that the conduct is job-related and relatively recent but also that the applicant or employee actually engaged in the conduct for which (s)he was arrested.

Can employers base hiring or promotion decisions on employment tests?

Yes, professionally developed tests may be used to make employment decisions if they do not discriminate on the basis of race. Employment tests that disproportionately exclude applicants/employees of a certain race must be validated. For example, if an employer uses a personality test to assess which employees are "management material" and the test disproportionately excludes people of a certain race, the employer must have the test professionally validated to ensure that the test accurately predicts or correlates with successful job performance. Employers should also consider whether there is an alternative to the test that serves the employers' needs with less discriminatory impact.

How can employers avoid racial discrimination on the job?

Employers should not only strive to recruit and hire in a way that provides equal opportunity for workers of all backgrounds to obtain jobs, but should also ensure that race and color discrimination are not barriers to employees' success once they are in the job. Race or color should not affect work assignments, performance evaluations, training opportunities, discipline, or any other term or condition of employment, except in appropriate circumstances as set forth at Section 15-VI-C of the Compliance Manual section on Race and Color Discrimination.

Example: An employer terminates a new Asian employee on the ground that she performs her work too slowly and makes too many mistakes. The investigation reveals that although White employees who perform at a substandard level are coached toward increasingly good performance, new employees of color get less constructive feedback and training. Therefore, they tend to repeat mistakes and make new ones that could have been avoided. A finding of discrimination would be warranted.

HARASSMENT

What is racial harassment?

Racial harassment is unwelcome conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Examples of harassing conduct include offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. An employer may be held liable for the harassing conduct of supervisors, coworkers, or non-employees (such as customers or business associates) over whom the employer has control.

An isolated incident would not normally create a hostile work environment, unless it is extremely serious (e.g., a racially motivated physical assault or a credible threat of one, or use of a derogatory term, such as the N-word, etc.). On the other hand, an incident of harassment that is not severe standing alone may create a hostile environment when frequently repeated.

Example: A day after a racially charged dispute with a White coworker, an African American employee finds a hangman's noose hanging above his locker, reminiscent of those historically used for racially motivated lynchings. Given the violently threatening racial nature of this symbol and the context, this incident would be severe enough to constitute harassment.

Example: An African American librarian presents an idea to his supervisor to create a section devoted to African American authors and history, similar to those in major bookstore chains. The supervisor rejects the idea, stating that he does not want to create a "ghetto corner" in the library. This

statement alone, while racially offensive, does not constitute severe or pervasive racial harassment in the absence of additional incidents.

How can employers prevent racial harassment?

The most important step for an employer in preventing harassment is clearly communicating to employees that harassment based on race will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. Other important steps include adopting effective and clearly communicated policies and procedures for addressing complaints of racial harassment, and training managers on how to identify and respond effectively to harassment. By encouraging employees and managers to report harassing conduct at an early stage, employers generally will be able to prevent the conduct from escalating to the point that it violates Title VII.

An employer is liable for harassment by a supervisor if the employer failed to take reasonable care to prevent and promptly correct the harassment or if the harassment resulted in a tangible job action (termination, demotion, less pay, etc.). For more information, see EEOC's *Questions & Answers for Small Employers on Employer Liability for Harassment by Supervisors. (http://www.eeoc.gov/policy/docs/harassment-facts.html)* An employer is liable for harassment by co-workers or non-employees if it knew or should have known of the harassment and failed to take prompt corrective action.

COMPLAINTS OF DISCRIMINATION

What should an employer do when someone has complained about race/color discrimination?

Employers should investigate and seek to resolve any complaint of discrimination by an applicant or employee. Employers should remember that, in all cases, it is unlawful to retaliate against a worker who complains of discrimination or participates in an investigation of discrimination.

Example: In the months following a charge of discrimination, a Native American employee begins receiving less and less overtime work. He files another charge alleging that the denial of overtime is retaliatory. The employer states that the employee was not assigned overtime because there is less work. However, the investigation reveals no significant change in the amount of overtime available before and after the employee's original charge. Other employees with similar qualifications have continued to be assigned overtime at approximately the same rate. These facts establish that the employee has been retaliated against for filing a charge.

What should an employee do if he or she experiences or witnesses race/color discrimination?

Employees or job applicants should attempt to address concerns with the

offender and, if that does not work, report any unfair or harassing treatment to the company. They should keep records documenting what they experienced or witnessed, as well as other witness names, telephone numbers, and addresses.

Federal employees and applicants may file a complaint in accordance with the EEOC's governing regulations. They must begin the process by contacting the EEO office of the Federal agency responsible for the alleged discrimination to initiate EEO counseling. For more details, see *Facts about Federal Sector EEO Complaint Processing* at *http://www.eeoc.gov/facts/fs-fed.html*

Cumulative Index

(*References are to Volume #, Quarterly Issue #, and Page #)*
***(Bold cite indicates current issue*)**

Q

R