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

FROM THE DIRECTOR

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

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include file retention, citizenship requirement, absenteeism due to a medical condition, continuing violation claims involving pay issues, reporting claims of sexual harassment, and unlawful disclosure of confidential medical information. Also in this issue is guidance from the Equal Employment Opportunity Commission on deafness and hearing impairments in the workplace.

The *OEDCA Digest* now contains a comprehensive cumulative index.

The *OEDCA DIGEST* 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.asp.

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I

FAILURE TO PRODUCE MERIT PROMOTION FILE AND OPF RESULTS IN FINDING OF DISCRIMINATION

The agency issued a vacancy announcement for a Health Physicist, GS-1306-9, in the Engineering Service. The position had been vacant for several months and special permission was sought to issue the vacancy announcement, apparently due to a hiring freeze. The complainant applied, was found qualified for the position, and referred to the selecting official on a Merit Promotion Certificate.

A few weeks later, the certificate was returned to Human Resources Management with no selection. The vacancy was later canceled because authority to fill the position had been withdrawn for budgetary reasons. A few months later, the vacancy was filled through a noncompetitive reassignment of another employee ("selectee") whose position was about to be abolished due to a reduction-in-force (RIF) and who had been detailed to the vacant position for several months prior to his reassignment. Upon learning what happened, the complainant filed a claim alleging race discrimination.

A HR specialist testified that the facility was allowed to fill the vacant position only because the selectee's position was being abolished. The SF 50 documenting the reassignment supported that assertion. Nevertheless, an EEOC administrative judge issued a decision in favor of the complainant. Why? Because the facility HR office had destroyed the Merit Promotion File (MPF) subsequent to the filing of the EEO complaint, which is contrary to EEOC's regulations, which require retention of such files and other relevant records while the complaint is pending. The judge also noted that the facility had destroyed the records prior to the VA's own two-year retention policy for such files. Moreover, the facility was unable to produce the selectee's OPF due to his retirement and the resulting transfer of his OPF to the U.S. Office of Personnel Management, which upon request, was not able to locate it.

In essence, the EEOC judge found that the failure to produce these files created "an adverse inference against the agency's articulated reason for the complainant's nonselection." The VA appealed the AJ's decision, arguing that the files were irrelevant to the reassignment action, and that the agency had sufficiently articulated the reasons for it through testimony that was supported by comments contained on an SF-50 document that was in the record. Nevertheless, the EEOC rejected the VA's appeal, finding that the failure to produce these files amounted to a failure on the part of the VA to articulate a legitimate, nondiscriminatory reason for what happened.

While the VA disagrees with the EEOC's decision in this case and believes that it presented sufficient evi-

dence to satisfy its legal burden of articulation, the EEOC's appellate decision was not unexpected – it rarely reverses the decisions of its judges. Judges have wide latitude under EEOC's regulations to sanction agencies that fail to comply with directives or EEOC's complaint and record retention regulations. Sanctions can include exclusion of evidence, adverse inferences, and even default judgment.

In recent years there have been several "technical" findings stemming from the VA's failure to retain evidence. The clear lesson to be learned from this case is that HR chiefs must establish procedures to ensure that MPFs and other personnel files are not destroyed or removed from the facility while an EEO complaint is pending in the administrative process. The Office of Resolution Management (ORM) notifies facilities as soon as informal and formal complaints are filed. When facility EEO managers receive such notice, they should take immediate steps to ensure that the HR chief and the appropriate HR specialists are informed of the nature of the claims and the types of documents and files that must be retained.

II

LACK OF CITIZENSHIP A PRETEXT FOR DISCRIMINATORY TERMINATION OF DENTIST

A dentist of Middle Eastern descent began working for the VA on a full-time basis in 2000. He was Board Certified in Prosthodontics. Although a permanent resident of the United States, he was not a U.S. citizen. For that reason, he was not legally eligible for a permanent appointment. Instead, he accepted a temporary appointment, not to exceed three years. The record indicates that such temporary appointments may be extended, but only if a qualified U.S. citizen is not available to fill the position. During his tenure, he consistently received outstanding ratings on all three of his annual performance evaluations.

Shortly before his term appointment was about to expire, he accepted another full-time, one-year temporary appointment at another VA medical center. At the end of his first year, he appointment was automatically renewed for an additional year. He enjoyed a good working relationship with his supervisor during that first year.

Subsequent to the renewal, his supervisor left and a new supervisor was appointed, first as Acting Chief of Dentistry, and eventually as Chief. Just prior to the expiration of complainant's second temporary appointment in July 2005, the new Chief terminated his employment. Among the reasons given was that the VA had found a qualified U.S. citizen to fill his position on a permanent, full-time basis. In response, he filed a complaint alleging that his termination was due to his Middle Eastern descent (Jordanian), not his lack of citizenship. The complainant was the only dentist of Middle Eastern descent at the facility.

An EEOC judge agreed with the complainant's assertions. The judge found that the reasons given by the Chief were unsupported or contradicted by the evidence of record.

Despite the Chief's claim that a qualified U.S. citizen was available, no such individual was hired to replace the complainant. In fact, the only individual subsequently hired on a permanent basis came on board almost a year later to fill the Assistant Chief vacancy. In short, there was no evidence to support the Chief's claim that a qualified citizen had been found.[1]

The Chief also cited another reason; the complainant had told him that he intended to have a part-time private practice on the side, which the Chief claimed would interfere with the complainant's full-time duties at the VA. Again, however, the evidence did not support this reason, as there was a full-time dentist at the facility known to have a private practice.

Finally, the Chief claimed that when he first came on board he had noticed some comments in the complainant's prior performance evaluations that "concerned" him. Those evaluations, however, contained no derogatory or negative comments. In fact, all of them were outstanding evaluations that contained nothing but positive comments that spoke exceptionally well of the complainant's performance, character, and professional relations with other residents.

Given the above evidence, the EEOC judge concluded that the Chief's articulated reasons for terminating the complainant's temporary appointment were a pretext to hide the real reason; *i.e.* -- unlawful discrimination due to the complainant's national origin.

III

ABSENTEEISM WAS DUE TO A MEDICAL CONDITION, BUT NOT DUE TO A DISABILITY

In the previous edition of the *OEDCA Digest* we reported on a case involving disability-related absenteeism wherein a federal district court found against the complainant because the disability involved could not be accommodated without an undue hardship on the medical center. The following case also involves absenteeism caused by a medical condition, and again a federal judge rules against the complainant, but this time for a different reason.

The complainant was a Nursing Assistant serving a one-year probationary period. Seven months after she began working, she developed pneumonia and was hospitalized. Later, she developed a complication – gastroenteritis – that prevented her from returning to work. One month prior to the expiration of her probationary period, and while she was still out of work, an HR specialist inquired as to whether

[1] The Chief also admitted under oath that the dental clinic was busy, that a full-time dentist was needed, and that there was adequate funding to hire another dentist.

her supervisor wished to retain her as a permanent employee. The supervisor said no because of problems with her performance prior to her hospitalization, and excessive absenteeism. Following her termination, the complainant filed a claim alleging, among other things, that her termination violated the *Americans with Disabilities Act*, as she was a "qualified individual with a disability" and her absences were due to that disability.

To qualify as an "individual with a disability", a person must show that he or she has a medical impairment that substantially limits a major life activity, and that the impairment is permanent rather than temporary. After reviewing the investigative file, an EEOC administrative judge issued a decision without a hearing, finding that the complainant's termination did not violate the *Act*. Specifically, the judge found that the complainant was not disabled – *i.e.*, she was not an "individual with a disability", as that term is defined in law and regulations.

The judge based this finding on the fact that the complainant's medical conditions, although substantially limiting during their acute stages, were only temporary in nature. Both were treated and cured. Although the complainant also had asthma, a permanent condition that can be substantially limiting, it was not limiting in the complainant's case. Aside from having to use an inhaler, she was unable to point to any life activity in which she was substantially limited.

Thus, although the complainant's absenteeism was a significant reason for her termination, and although her absenteeism was clearly due to her medical conditions, she was unable to show that her absenteeism was due to a permanent, substantially limiting impairment – in other words, she was unable to show that she was "an individual with a disability."

As we noted in the Spring 2008 edition of the *Digest,* absenteeism caused by a disability does not, by itself, render an individual "unqualified." If an individual with a disability is otherwise qualified to perform satisfactorily the duties of a position, and the disability causes excessive absenteeism, an employer must consider whether the disability can be accommodated without an undue hardship on its operation before commencing a termination action. In many cases, of course, excessive, disability-related absenteeism cannot be accommodated without such hardship and termination is the only course of action available – but that is not true in every case. Each case must be considered on its own unique facts.

In this case, however, the judge found that the complainant was not even an "individual with a disability"[2] because she had no permanent, substantially limiting impairment. Hence, there was no need for the agency to consider possible accommodations.

[2] The judge also found that she was not "qualified" because of performance issues prior to her hospitalization that were unrelated to her absenteeism.

IV

NO CONTINUING VIOLATION WHERE DECISION AS TO PAY GRADE AND STEP WAS MADE MANY YEARS EARLIER.

The type of claim raised in the following case is not uncommon. Neither is the result. The question posed is this: can an employer be held liable today for hiring and other personnel decisions impacting current pay if those decisions were made many years earlier?

This case, along with many others like it, involves a simple set of facts. The complainant was hired in 1993 at the Nurse I pay level, and was placed at Step 1 of the level. In 1998, she was promoted to the Nurse II level, and placed at the appropriate step in the Nurse II pay scale, taking into consideration the pay she was receiving as a Nurse I. She soon learned that her pay step was lower than that of her Nurse II-level colleagues, despite her longer tenure. She complained repeatedly to her supervisors about the pay difference, but stopped complaining in 2004 after failing to obtain satisfaction.

In July 2005, she contacted an EEO counselor to allege that race and national origin discrimination was the reason for the pay difference. When asked to explain her untimeliness in seeking the assistance of an EEO Counselor, she argued that she was not untimely because the alleged discrimination was a "continuing violation". In other words, she continues to be aggrieved each time she receives a paycheck that delivers less because of those prior pay decisions.

An EEOC judge disagreed. While conceding that those earlier pay decisions clearly have a present effect on her pay, he nevertheless ruled that the alleged violations are not "continuing" in nature. In other words, those earlier pay decisions are the alleged violations, and those violations were "discrete acts", meaning they occurred on, and only on, the day they happened. They constituted actionable claims on those dates, without the need for anything else to happen in the future. Hence, the 45-day time limit for seeking the assistance of an EEO Counselor[3] began to run on the date those pay decisions were made.

The judge also considered whether the complaint might be timely under the "reasonable suspicion" standard. In other words, in some cases it may not necessarily be the actual date of the personnel action that determines when the limitation period begins, but rather the date on which the individual becomes aware, or should have become aware, of the alleged discrimination. In this case, the complainant had known for a long time that she was receiving a lower salary than her colleagues were and had complained repeatedly about it to her supervisor. She had enough information to file a

[3] Subject to certain exceptions, EEOC regulations require individuals to contact an EEO Counselor within 45 days of the date the alleged discrimination occurred.

complaint soon after her promotion to Nurse II in 1998.

Recently, the U.S. Supreme Court reached the same result in a case involving a similar set of facts.

V

SEXUAL HARASSMENT CLAIM FILED BY OFFICE ROMEO NOT CONVINCING

A VA employee claimed that female co-workers who longed for his company were constantly harassing him. Shortly after being hired as a bio-medical engineer, he claims that his female co-workers repeatedly leered at him "with elevator eyes", their handshakes with him were unusually long, they complimented him on his looks, and would grab his arms and coo. Some referred to him as "fresh meat." They would frequently call him to check their bio-medical equipment, ask him to call them, and send him inappropriate, sexually suggestive e-mails.

One co-worker invited him on a "Love Boat" cruise, invited him to a Mardi Gras party, invited him to meet her in the library, told him she was a dancer and did "private shows upon request", invited him for coffee and to lunch, asked him to meet her at local clubs and bars, and e-mailed him about topics such as performance in the bedroom. She did not deny these claims, and further stated that the complainant never objected to her comments.

Another co-worker invited him to come visit her, and e-mailed him immediately afterwards to say how much she enjoyed the visit and inquire if he had any plans after work. She sent similar e-mails on subsequent dates, asking him to meet her after work or on the weekend, or to visit her in her office. She told him she was attracted to him and wanted to know if the attraction was mutual. The co-worker testified that the complainant never objected to her advances.

Another co-worker, a police officer, allegedly gave him her telephone number and days later looked at him as if to question why he did not call her. The police officer denied the claim, stating that she was engaged to be married and had no interest in the complainant.

On one occasion, the complainant sent a text message to a co-worker expressing his desire for her saying, "I can't wait to be in your arms." The text message inadvertently came to the attention of the co-worker's husband, who also worked at the facility. The angry husband reported it to management officials, who initiated an investigation into his claim that the affair was causing a hostile environment in the workplace.

The complainant claimed that all of this attention from female co-workers was unwelcome. He further claimed that he discussed the unwanted attention with his first level supervisor, who responded by stating "part of [complainant's] job is to build relation-

ships." The supervisor denied that such a discussion occurred.

The complainant also claims that he told an employee relations specialist in HR that several women had been approaching him and passing him telephone numbers and that the specialist responded by telling him that he was an attractive man and inviting him to call her. The HR specialist acknowledged being told about other women approaching the complainant, but denied telling him he was attractive and asking him to call her. She testified that the complainant did not seem upset about the attention he was receiving, especially since he also told her that he had taken several of the women up on their offers. It was therefore not her impression that he was complaining to her about sexual harassment. Hence, she did not refer him to anyone in the chain of command.

Throughout this time frame, the complainant was experiencing problems related to his conduct and job performance, including discipline for insubordination and AWOL, an official investigation into his misuse of government equipment and an affair that was creating a hostile environment at the facility, his relocation outside of the medical center and reassignment to nonsupervisory duties during that investigation, and other problems.

Pre-hearing discovery uncovered numerous e-mails between the complainant and female co-workers. The e-mails confirmed beyond doubt that the complainant was indeed the object of considerable attention from numerous female co-workers. However, they also confirmed that his claim of unwelcome attention was not credible. His responses to the e-mails were sometimes coy, sometimes positive, but never negative. None indicated that the attention and advances were unwelcome. Oh yes. Also obtained during discovery was an e-mail he received from an acquaintance employed at another Federal agency. It provided him with instructions on how to remove deleted e-mail messages from his computer.

Of course, the attention from complainant's coworkers, as described above, would certainly constitute sexual harassment if shown to be unwelcome, and the agency would be liable if management had been aware of it and failed to stop it.

Needless to say, the EEOC judge hearing this case did not find the attention unwelcome. Moreover, the judge found credible the supervisor's testimony that the complainant never complained to him about sexual harassment, especially since some of the e-mails that surfaced during discovery were received and sent after the date on which the complainant alleges he complained to his supervisor. The judge also found the HR specialist's testimony credible.

Although finding for the VA, the judge did suggest that management officials provide training to employees on how to report harassment, and what offi-

cials, including HR employees, should do with harassment claims once they are received, even if such claims are believed to be without merit. The HR specialist in this case assumed that the complainant was not actually complaining about harassment when he approached her and told her about women passing him telephone numbers. Considering the pass he made at her during the conversation, her perception of the situation was certainly reasonable. Nevertheless, she should have questioned him more carefully to determine if in fact he was complaining about harassment by any of these women. It is entirely possible, even in the case of an office Romeo, to be harassed by someone whose attention is unwelcome.

VI

SUPERVISOR'S DISCLOSURE OF EMPLOYEE'S MEDICAL CONDITION VIOLATED THE "REHABILITATION ACT".

The following case highlights the importance of keeping an employee's medical information confidential.

The complainant, a Registered Nurse, had successfully served in her position since 1989, despite a bipolar condition diagnosed prior to her employment with the VA.

Previously, no one at the medical center had been aware of her condition. However, after returning to work following a medical leave of absence, her supervisor learned of the condition and instructed a nursing assistant with a psychiatric background to observe the complainant to ensure that she was taking her medication.

The nursing assistant was uncomfortable with her assignment and told the complainant what the supervisor had ordered her to do. She also told a few other employees about her assignment. The complainant's condition soon became a topic of conversation at the facility.

An EEOC judge found that the Nurse Supervisor committed a *per se* violation of *The Rehabilitation Act* by her unlawful disclosure of the complainant's medical information. The judge rejected the supervisor's claim that she found out about the medical condition from conversations with other staff. Shortly before the disclosure, the complainant's physician sent a letter to the supervisor in connection with the complainant's return to work in which he explained in detail the complainant's medical condition. That letter also mentioned a telephone conversation between the physician and the supervisor. There was no evidence that the complainant had disclosed her condition to anyone other than the supervisor.

The judge also rejected the VA's legal argument that the physician's letter was a "voluntary" submission by the complainant and her physician and, therefore, not protected information. The evidence showed that the supervisor had contacted the complainant and

her physician prior to the complainant's return to work to inquire as to her condition, estimated date of return to work, and schedule upon return. The physician provided his letter in response to the employer's inquiry regarding the complainant's ability to return to work and perform her duties. As such, the information contained in that letter was subject to the confidentiality requirements of *The Rehabilitation Act,* as it was obtained pursuant to an employer medical examination or "inquiry." [4]

VII

QUESTIONS AND ANSWERS ABOUT DEAFNESS AND HEARING IMPAIRMENTS IN THE WORKPLACE AND THE "AMERICANS WITH DISABILITIES ACT"

INTRODUCTION

The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination against individuals with disabilities. Title I of the ADA covers employment by private employers with 15 or more employees and state and local government employers of the same size. Section 501 of the Rehabilitation Act provides the same protections for federal employees and applicants for federal employment. Most states also have their own laws prohibiting employment discrimination on the basis of disability. Some of these state laws may apply to smaller employers and provide protections in addition to those available under the ADA.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. This document is part of a question-and-answer series addressing particular disabilities in the workplace. It explains how the ADA might apply to job applicants and employees with hearing impairments, including:

- when a hearing impairment is a disability under the ADA;
- when an employer may ask an applicant or employee about a hearing impairment;
- how employers can ensure the confidentiality of applicants' and employees' medical information;
- what types of reasonable accommodations an individual with a hearing disability may need;
- to what extent an employer must provide a reasonable accommodation to an individual with a hearing disability;
- how an employer should handle safety concerns and harassment issues; and,
- how an individual with a hearing impairment can file a claim against an employer under the ADA or the Rehabilitation Act.

[4] See, 29 C.F.R. § 1630.14(c), which permits such examinations and inquiries , but protects the confidentiality of information obtained therefrom.

GENERAL INFORMATION ABOUT HEARING IMPAIRMENTS

Between 2000 and 2004, estimates of the number of people in the United States with a self-described "hearing difficulty" ranged from 28.6 million[1] to 31.5 million.[2] The number of individuals with hearing difficulty is expected to rise rapidly by the year 2010 when the baby-boomer generation reaches age 65. As compared to other age groups, the percentage of individuals with hearing difficulty is greatest among those individuals age 65 and above.[3] A "hearing difficulty" can refer to the effects of many different hearing impairments of varying degrees. The Centers for Disease Control and Prevention (CDC) refer to hearing impairments as conditions that affect the frequency and/or intensity of one's hearing.[4] Although the term "deaf" is often mistakenly used to refer to all individuals with hearing difficulties, it actually describes a more limited group. According to the CDC, "deaf" individuals do not hear well enough to rely on their hearing to process speech and language. Individuals with mild to moderate hearing impairments may be "hard of hearing," but are not "deaf." These individuals differ from deaf individuals in that they use their hearing to assist in communication with others. [5] As discussed below, people who are deaf and those who are hard of hearing can be individuals with disabilities within the meaning of the ADA.

A hearing impairment can be caused by many physical conditions (e.g., childhood illnesses, pregnancy-related illnesses, injury, heredity, age, excessive or prolonged exposure to noise), and result in varying degrees of hearing loss.[6] Generally, hearing impairments are categorized as mild, moderate, severe, or profound.[7] An individual with a moderate hearing impairment may be able to hear sound, but have difficulty distinguishing specific speech patterns in a conversation. Individuals with a profound hearing impairment may not be able to hear sounds at all. Hearing impairments that occur in both ears are described as "bilateral," and those that occur in one ear are referred to as "unilateral."[8]

The many different circumstances under which individuals develop hearing impairments can affect the way they experience sound, communicate with others, and view their hearing impairment.[9] For example, some individuals who develop hearing losses later in life find it difficult both to adjust to a world with limited sound, and to adopt new behaviors that compensate for their hearing loss. As a result, they may not use American Sign Language (ASL) or other communication methods at all, or as proficiently as individuals who experienced hearing loss at birth or at a very young age.

Individuals with hearing impairments can perform successfully on the job and should not be denied opportunities because of stereotypical assumptions about hearing loss. Some employers assume incorrectly that workers with hearing impairments will cause safety hazards, increase em-

ployment costs, or have difficulty communicating in fast-paced environments. In reality, with or without reasonable accommodation, individuals with hearing impairments can be effective and safe workers. (For information on Reasonable Accommodation, see Questions 9 – 15, below.)

1. When is a hearing impairment a disability under the ADA?

A hearing impairment is a disability under the ADA if: (1) it substantially limits a major life activity; (2) it substantially limited a major life activity in the past; or (3) the employer regarded (or treated) the individual as if his or her hearing impairment was substantially limiting. The determination of whether a hearing impairment is substantially limiting must be made on an individualized, case-by-case basis.

Example 1: A job applicant has a bilateral, moderate hearing impairment that affects the transmission of lower frequencies of sound to her brain. As a result, she has difficulty hearing in conversations because vowel sounds tend to occur at lower frequencies that she cannot distinguish. She often must ask others to speak slower or louder, or to repeat statements she did not initially hear or understand. This applicant is substantially limited in hearing.

If an individual uses mitigating measures, such as hearing aids, cochlear implants, or other devices that actually improve hearing, these measures must be considered in determining whether the individual has a disability under the ADA. Even someone who uses a mitigating measure may have a disability if the measure does not correct the condition completely and substantial limitations remain, or if the mitigating measure itself imposes substantial limitations.

Example 2: An individual with a hearing impairment uses a hearing aid to amplify sounds. With the hearing aid, he can detect sounds such as traffic, sirens, and loud conversations at a very low level. For this reason, he must be in close proximity to the origin of sound in order to hear in a meaningful way. This individual is substantially limited in hearing even with the mitigating measure (*i.e.,* the hearing aid). Measures that merely compensate for the fact that someone has a substantially limiting hearing loss but that do not actually improve hearing, such as sign language interpreters or lip-reading, are not mitigating measures. Furthermore, if an individual does not use mitigating measures, then the hearing impairment must be considered as it exists, without speculation about how a mitigating measure might lessen the hearing loss. Even if an individual's hearing impairment does not currently substantially limit a major life activity, the condition may still be a disability if it was substantially limiting in the past.

Example 3: Malcolm is a floor manager with a clothing manufacturer. He applies for a promotion to assistant factory manager. In his application

package, Malcolm chooses to inform the promotion committee that five years ago his hearing was permanently impaired in a workplace accident. Following the accident, Malcolm could barely hear and distinguish between floor-level conversations, public announcements, and warning alerts from moving machinery. Malcolm primarily communicated through writing and limited lip reading. Two years ago, Malcolm began using hearing aids in both ears. The hearing aids amplify sounds and help Malcolm to distinguish among them. As a result, Malcolm can now hear conversations sufficiently well to respond verbally. Malcolm's ability to hear was substantially limited prior to acquiring his hearing aids. Therefore, Malcolm is an individual with a disability under the ADA because he has a "record of" a substantially limiting impairment. Finally, an individual's hearing impairment may be a disability when it does not significantly restrict major life activities, but the employer treats the individual as if it does.

Example 4: An individual who uses a hearing aid to correct a mild hearing impairment in one ear applies for a position as a security guard at a state courthouse. The employer refuses to hire the applicant, pursuant to a policy of disqualifying anyone who uses a hearing aid from working as a court security guard. The employer believes that this applicant and anyone who wears a hearing aid will be unable to locate the source of sounds that may indicate the presence of a threat or hear someone who calls for assistance in an emergency. The employer's reason for excluding this particular applicant and other applicants who wear hearing aids would apply not only to this court security guard position, but to many federal, state, and local law enforcement jobs in which the ability to hear and respond to emergencies is critical. This employer has regarded the applicant as substantially limited in the ability to work in the class of law enforcement jobs.

OBTAINING, USING, AND DISCLOSING MEDICAL INFORMATION

Before an Offer of Employment Is Made[10]

The ADA limits the medical information an employer can obtain from an applicant. An employer may not ask questions about an applicant's medical condition or require the applicant to take a medical examination before it makes a conditional job offer. Accordingly, an employer cannot ask an applicant questions such as:

- whether he has ever taken a test that revealed a hearing loss;
- whether she uses any assistive devices for a hearing impairment (such as a hearing aid) or has done so in the past; or
- whether she has any hearing loss due to an on-the-job accident or injury.

However, an employer may ask all applicants whether they will need a rea-

sonable accommodation for the application process. For example, an employer may have a statement on its job announcement or its website directing applicants who need reasonable accommodations *(e.g.*, a sign language interpreter, additional test-taking time) for the application process to contact a designated person in the company's Human Resources Department.

2. May an employer request medical information about an applicant's hearing impairment that is obvious or that the applicant has disclosed?

No, the employer may not ask for an applicant's medical history, records, or other information about a hearing impairment that is obvious or that has been disclosed. However, if an employer reasonably believes that an applicant with a known hearing impairment will need a reasonable accommodation to do the job, it may ask if an accommodation is needed and, if so, what type. In addition, the employer may ask the applicant to describe or demonstrate how s/he could perform the job with or without an accommodation.

Example 5: Julie has a severe hearing impairment in her right ear and is applying to the telephone sales department of a large clothing company. Julie tells the employer of her hearing impairment during the interview. The employer's sales associates currently wear headsets with earpieces for the right ear. The employer may ask Julie during her interview if she would need a left-sided headset as an accommodation.

3. Does an applicant have to disclose his hearing impairment if it is not obvious?

No, the ADA does not require an applicant to disclose his hearing impairment to a potential employer. Nevertheless, if an applicant knows he needs a reasonable accommodation to complete the hiring process, he must disclose his hearing impairment. Under the ADA, an employer must keep confidential any medical information the applicant discloses. (See Question 8 below, on confidentiality of medical information.)

After An Offer Of Employment Is Made

After an offer of employment is made, but before an applicant begins work, an employer may ask questions about an applicant's health (including whether the applicant has a hearing impairment) and may require an applicant to take a medical examination, as long as the employer asks the same questions and requires the same examinations of all potential hires for the same type of position.

4. What can an employer do if it learns about an applicant's hearing impairment after offering a job, but before the individual begins working and it believes that the applicant's hearing impairment may affect job performance?

If an employer becomes aware of an applicant's hearing impairment after offering the applicant a job and reasonably believes that the impairment may affect her ability to perform the job's essential functions (*i.e.*, fundamental job duties) or to perform them safely, the employer may ask the applicant for information to determine whether she can perform the essential functions of the position with or without a reasonable accommodation and whether she would pose a "direct threat" (*i.e.* a significant risk of harm to herself or others that cannot be reduced through reasonable accommodation). (For more information about "direct threat," see Question 16, below.)

An employer may only withdraw a job offer made to an individual with a disability if it can demonstrate that the applicant is unable to perform the essential functions of the position with or without a reasonable accommodation or would pose a direct threat.

Example 6: Lydia applies for a position as an aircraft mechanic. After receiving a job offer, she is given a physical examination which includes a hearing test. The hearing test reveals that she has a hearing loss in her left ear. The employer is concerned that in a noisy environment, Lydia will be unable to hear sounds that might alert her to dangers in the work area such as the presence of moving aircraft or other moving vehicles. The employer may not withdraw the job offer simply because it believes Lydia's hearing impairment makes it impossible for her to work in a high-noise environment. It should determine whether Lydia's hearing impairment would result in a direct threat, and it may obtain information that is medically related to Lydia's hearing impairment to make this determination.Employees.[11]

5. When may an employer ask if a hearing impairment or other medical condition is causing performance problems?

The ADA severely restricts the circumstances under which an employer may obtain information about an employee's medical condition or require an employee to undergo a medical examination. If an employer has a reasonable belief, based on objective evidence, that an employee's medical condition is the cause of performance problems or may pose a direct threat to the employee or others, it may ask questions about the impairment or require a medical examination.

Example 7: Rupa wears a hearing aid to improve her bilateral, moderate hearing impairment. She was recently promoted from an administrative position to sales associate for a cable company. The new position requires significantly more time on the phone interacting with customers. Although Rupa has received excellent reviews in the past, her latest review was unsatisfactory citing many mistakes in the customer orders she records over the phone. The employer may lawfully ask Rupa if she has any difficulty hearing customers and, if so, whether she would benefit from an accommodation. A possible accommodation could be a

captioned telephone that would allow Rupa to communicate verbally while receiving an almost real-time text relay of the conversation.

An employer that does not have a reasonable belief that an employee's performance problems are related to a hearing impairment may not ask questions about the impairment, but instead should handle the situation in accordance with its policies generally applicable to poor performance.

Example 8: An employee with a profound hearing impairment has received below average evaluations for six months. The employee's poor performance began when she was not selected for a vacant supervisory position. Moreover, the kinds of performance problems the employee is having – a significant increase in the number of late arrivals and typographical errors in written reports the employee routinely produces – cannot reasonably be attributed to a problem with the employee's hearing. The employer may not ask for medical information about the employee's hearing impairment, but instead should counsel the employee about the performance problems or proceed as appropriate in accordance with its policies applicable to employee performance.

6. May an employer require a doctor's note from an employee who asks for sick leave for reasons related to a hearing impairment?

Yes, if the employer requires all employees to provide a doctor's note to support the use of sick leave or to verify that sick leave has been used appropriately. However, the employer may not ask for more information than is needed to verify that the leave was taken for appropriate reasons.

Example 9: An employer maintains a leave policy requiring all employees who use sick leave for a medical appointment to submit a doctor's note upon returning to work. Mark, an employee, uses sick leave to attend an audiologist appointment to adjust his hearing aids. In accordance with its policy, the employer can require Mark to submit a doctor's note for his absence; however, it may not require the note to include any information beyond that which is needed to verify that Mark used his sick leave properly (such as, the degree of Mark's hearing loss, the strength of his hearing aids, the results of the adjustment).

7. Are there other instances when an employer may ask an employee about his hearing impairment?

Yes. When an employee requests a reasonable accommodation for a hearing disability and the disability and/or need for accommodation is not obvious, an employer may ask for reasonable documentation showing that the condition is a disability and/or that accommodation is needed. Disability-related questions and medical examinations are also permitted as part of an employer's voluntary wellness program. (For more information

on the type of documentation an employer may obtain in support of a request for reasonable accommodation, see Question 11, below.)

CONFIDENTIALITY OF MEDICAL INFORMATION

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. The information must be kept in files separate from general personnel files and must be treated as a confidential medical record. Information about an applicant's or employee's hearing impairment or other medical information may be disclosed only:

- to supervisors or managers in order to meet an employee's need for reasonable accommodation(s) or in connection with an employee's work restrictions;
- to first aid or safety personnel where a condition might require emergency treatment or an employee would require assistance in the event of an emergency;
- to government officials investigating compliance with the ADA or similar state and local laws;
- as needed for workers' compensation purposes (for example, to process a claim); and
- for certain insurance purposes.

8. May an employer explain to co-workers that an employee is receiving a reasonable accommodation because of a hearing disability?

No. Telling co-workers that an employee is receiving a reasonable accommodation amounts to a disclosure of confidential medical information. An employer, however, may respond to co-workers' questions by explaining that it will not discuss the situation of any employee with co-workers. Additionally, an employer may be less likely to receive questions from co-workers if its employees are educated on the requirements of EEO laws, including the ADA.

ACCOMMODATING INDIVIDUALS WITH HEARING DISABILITIES

Employers are required to provide adjustments or modifications that enable ualified people with disabilities to enjoy equal employment opportunities unless dong so would result in undue hardship (*i.e.*, significant difficulty or expense). Employers should not assume that all persons with hearing impairments will require an accommodation or even the same accommodation.

9. What type of accommodations may an individual with a hearing disability need?[12]

Applicants or employees with hearing disabilities may need one or more of the following accommodations:

- a sign language interpreter

Example 10: Simon has a hearing disability and works as a project manager for a regional telephone company. Simon is usually able to use his lip reading ability to communicate individually with his co-workers. However, Simon occasionally requests a sign language interpreter for large-group conferences and meetings, because it is not possible for him to use lip-reading when people who are not in his line of sight are speaking. Absent undue hardship, Simon's employer would have to provide the sign language interpreter as a reasonable accommodation. (For more information about "undue hardship," see Question 13, below.)

- a TTY, text telephone, voice carry-over telephone, or captioned telephone[13]
- a telephone headset
- appropriate emergency notification systems (*e.g.,* strobe lighting on fire alarms or vibrating pagers)
- written memos and notes (especially used for brief, simple, or routine communications)
- work area adjustments (*e.g.*, a desk away from a noisy area or near an emergency alarm with strobe lighting)

Example 11: Ann works as an accountant in a large firm located in a high-rise building in the city. Ann has a large window in her office that faces the street-side of the building. She wears a hearing aid to mitigate her severe hearing impairment. Throughout the workday many exterior noises (e.g. police sirens, car horns, and street musicians) are amplified by Ann's hearing aid and interfere with her ability to hear people speaking in her office. Ann requests, and her employer agrees, that moving her to a vacant interior office is a reasonable accommodation.

- assistive computer software (*e.g.*, net meetings, voice recognition software)

Example 12: Allen, who has a hearing disability, works as an information technology (IT) specialist with a small, Internet-advertising firm. The IT specialist position requires frequent one-on-one meetings with the firm's president. The firm accommodates Allen by acquiring voice recognition software for him to use in his meetings with the president. The software is programmed to translate the president's spoken word into written electronic text. assistive listening devices (ALDs)

Example 13: An employer has an annual all-employee meeting for more than 200 employees. Thelma, who has a severe hearing impairment, requests the use of an ALD in the form of a personal FM system. Speakers would wear small microphones that would transmit amplified sounds directly to a receiver in Thelma's ear. The ALD is a reasonable accommodation that will allow Thelma to participate in the meeting.

- augmentative communication devices that allow users to

communicate orally by typing words that are then translated to sign language or a simulated voice
- communication access real-time translation (CART), which translates voice into text at real-time speeds

Example 14: Kendall works as an associate for an international consulting firm. Kendall has a hearing disability for which he uses a hearing aid and lip reading. His company sometimes conducts video-conferencing meetings with clients in other countries. During these meetings, Kendall finds it difficult to participate because some of the clients speak with foreign accents and the video feedback is not continuous. Kendall requests the use of remote CART services to accommodate his hearing disability during international client meetings. The requested accommodation would translate the client's spoken word on Kendall's notebook computer monitor at an almost real-time speed. This accommodation would allow Kendall to participate fully in the meetings.

- time off in the form of accrued paid leave or unpaid leave if paid leave has been exhausted or is unavailable.[14]

Example 15: Beth is deaf and requests leave as a reasonable accommodation to train a new hearing dog. Hearing dogs assist deaf and hard of hearing individuals by alerting them to a variety of household and workplace sounds such as a telephone ring, door knock or doorbell, alarm clock, buzzer, name call, speaker announcement, and smoke or fire alarm. A hearing dog is trained to make physical contact and direct a person to the source of the sound. Under her employer's leave policy, Beth does not have enough annual or sick leave to cover her requested absence. The employer must provide additional unpaid leave as a reasonable accommodation, absent undue hardship.

- altering an employee's marginal (*i.e.*, non-essential) job functions

Example 16: Maria, a librarian, is primarily responsible for cataloguing books, writing book summaries, and scheduling book tours. Recently, Maria has had to fill in as a desk librarian since the regular librarian is on vacation. Maria has a severe hearing disability and uses a hearing aid. She finds it difficult to hear patrons if there is any background noise. She asks to switch her front desk duties with another librarian who processes book orders transmitted over the phone or Internet. Since working at the front desk is a minor function of Maria's job, the employer should accommodate the change in job duties.

- reassignment to a vacant position

Example 17: Sonny, a stocking clerk on the floor of a large grocery store, develops Ménière's disease, which produces a loud roaring noise in his ears for long periods of time. It is diffi-

cult for him to hear customers and co-workers on the floor because of music and frequent announcements played over the store's public address system and background noise in the store, particularly during busy periods. The store manager tried several unsuccessful accommodations. Upon request, the employer should reassign the employee to a vacant position as a stocking clerk in the warehouse at the same location. The employee is qualified for the reassignment position and the warehouse is a quieter environment with fewer background sounds.

- other modifications or adjustments that allow a qualified applicant or employee with a hearing disability to enjoy equal employment opportunities.

Example 18: Manny is hired as a chemist for a pharmaceutical company. He has a hearing disability and communicates primarily through sign language and lip reading. Shortly after he is hired, he is required to attend a two-hour orientation meeting. The meeting includes a brief lecture session followed by a series of video vignettes to illustrate key concepts. To accommodate his hearing disability, Manny requests a seat near the trainer, closed captioning during the video segments, and adequate lighting to allow him to read lips throughout the meeting. The employer grants these reasonable accommodations to allow Manny to participate fully during the orientation session.

10. How should someone with a hearing disability request a reasonable accommodation?

No "magic words" (such as "ADA" or "reasonable accommodation") are required. An applicant or employee simply has to inform his employer (verbally or in writing) that he needs an adjustment or change in the workplace or in the way things are usually done because of a hearing impairment.

Example 19: Lionel has a hearing disability and is employed as an electrician. As a team leader, Lionel is responsible for receiving his team's list of daily work sites and any accompanying special instructions, traveling to the sites with his team, and directing the day's work at each site. Lionel receives the list of assignments and accompanying special instructions from the company owner during daily morning meetings attended by all of the team leaders. The special instructions are given verbally. One morning, at the conclusion of a team leader meeting, Lionel passes a note to the owner requesting that all special instructions for his team's assignments be written down, because he is having difficulty hearing the verbal instructions. Lionel has requested a reasonable accommodation.

A family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of the individual with a hearing impairment. For example, an

individual with a hearing disability may submit a note from her doctor requesting a change in the location of her work area due to excessive noise that interferes with her hearing aid.

An individual with a hearing disability is not required to request an accommodation needed for the job at a particular time (*e.g.*, during the application process), and an employer may not refuse to consider a request for accommodation because it believes the request should have been made earlier. However, it is a good idea for an individual with a hearing disability to request reasonable accommodation before performance or conduct problems occur. (See Question 14, below.)

11. May an employer request documentation when an individual with a hearing impairment requests a reasonable accommodation?

Sometimes. When a person's hearing impairment is not obvious, the employer may ask the person to provide reasonable documentation showing the existence of a disability and why a reasonable accommodation is needed. The request for documentation must be reasonable. An employer may not ask for information about conditions unrelated to the one for which the accommodation is requested or require more information than is necessary for the employer to determine whether an accommodation is needed.

Example 20: Luíz, who has a hearing disability and communicates primarily through lip reading and speech, works as a programmer for an Internet security firm. The firm acquires a new client and promotes Luíz to be the senior programmer responsible for all consultations regarding the Internet security system design for the new client. Luíz's new assignment requires frequent phone conversations and teleconference meetings that do not allow for the use of Luíz's lip reading skills to aid in his verbal comprehension. As a result, Luíz's audiologist recommends, and Luiz requests, the use of a voice carry-over phone, which would provide an almost real-time text relay of the client's speech and also allow the client to hear Luíz. Because Luiz's hearing impairment is not an obvious disability, his employer may lawfully request medical documentation to verify his disability.

12. Does an employer have to provide the reasonable accommodation that an individual with a disability wants?

No. An employer has a duty to provide a reasonable accommodation that is effective to remove the workplace barrier. An accommodation is effective if it will provide an individual with a disability with an equal employment opportunity to participate in the application process, attain the same level of performance as co-workers in the same position, and enjoy the benefits and privileges of employment available to all employees. Where two or more suggested accommodations are effective, primary consideration

should be given to the individual's preference, but the employer may choose the easier or less expensive one to provide.

Example 21: An employee with a bilateral hearing disability requests use of communication access real-time translation (CART) for an upcoming training. In place of the CART device, the employer suggests an assistive listening device (ALD) because it is less expensive than CART. Twelve managers and supervisors are scheduled to take the training in a conference room at the employer's offices. Much of the information will be presented in a lecture format, accompanied by slides with printed information. The size of the room, the number of participants in the training, and the format of the training make it possible for the employee to use a portable assistive listening system effectively. The employer may, therefore, provide an ALD instead of CART under these circumstances.

Example 22: A deaf employee requests a sign language interpreter for regular staff meetings. The employer suggests that a co-worker could take notes and share them with the deaf employee or that a summary of the meeting could be prepared. These alternatives are not effective, because they would not allow the deaf employee to ask questions and participate in discussions during the meetings as other employees do. Absent undue hardship, the employer must provide a sign language interpreter for the meetings.

13. Does an employer have to provide accommodations that would be too difficult or expensive?

An employer is not required to provide accommodations that would result in an undue hardship *(i.e.,* significant difficulty or expense). If an employer determines that the cost of a reasonable accommodation would cause an undue hardship, it should consider whether some or all of the accommodation's cost can be offset. For example, in some instances, state vocational rehabilitation agencies or disability organizations may be able to provide accommodations at little or no cost to the employer. There are also federal tax credits and deductions to help offset the cost of accommodations,[15] and some states may offer similar incentives. However, an employer may not claim undue hardship solely because it is unable to obtain an accommodation at little or no cost or because it is ineligible for a tax credit or deduction. Even if a particular accommodation would result in undue hardship, however, an employer should not assume that no accommodation is available. It must consider whether there is another accommodation that could be provided without undue hardship.

14. Are there actions an employer is not required to take as reasonable accommodations?

Yes. An employer does not have to remove an essential job function (*i.e.*, a fundamental job duty), lower production standards, or excuse violations of conduct rules that are job-related and

consistent with business necessity, even where an employee claims that the disability caused the misconduct. Additionally, employers are not required to provide employees with personal use items, such as hearing aids or similar devices that are needed both on and off the job.

15. Is it a reasonable accommodation for an employer to make sure that an employee wears a hearing aid or uses another mitigating measure?

No. The ADA does not require employers to monitor an employee to ensure that he uses an assistive hearing device. Nor may an employer deny an individual with a hearing disability a reasonable accommodation because the employer believes that the individual has failed to take some measure that would improve his hearing.

16. What kinds of reasonable accommodations are related to the "benefits and privileges" of employment?

Reasonable accommodations related to the "benefits and privileges" of employment include those accommodations that are necessary to provide an employee with a hearing disability equal access to information communicated in the workplace, the opportunity to participate in employer-sponsored events (*e.g.*, training, meetings, social events, award ceremonies), and the opportunity for professional advancement.

Example 23: Karrin, who is deaf, works as an associate in a large investment firm. Every December, the partner in charge of the team for which Karrin works holds a party at his residence for all of the team's members and a number of the firm's clients. Upon Karrin's request, her employer provides her a sign language interpreter to allow Karrin to fully participate in the social event
.
An employer will not be excused from providing an employee with a hearing disability with a necessary accommodation because the employer has contracted with another entity to conduct the event.

Example 24: An employer offers its employees a training course on organization and time management provided by a local company with which the employer has contracted. An employee who is deaf wants to take the course and asks for CART services or a sign language interpreter. The employer claims that the company conducting the training is responsible for providing what the deaf employee needs, but the company responds that the responsibility is the employer's. Even if the company conducting the training has an obligation, under Title III of the ADA,[16] to provide "auxiliary aids and services," which would include CART services and sign language interpreters, this fact does not alter the employer's obligation to provide the employee with a reasonable accommodation for the
training. [17]

CONCERNS ABOUT SAFETY

17. When may an employer prohibit an employee with a hearing disability from doing a job because of safety concerns?

If an employee would pose a "direct threat" (*i.e.* a significant risk of substantial harm to herself or others) when working in a particular position, even with a reasonable accommodation, then an employer can prohibit her from performing that job. Any potential harm must be substantial and likely to occur.An employer must consider the following to assess if an employee or applicant poses a direct threat:

- the duration of the risk involved;
- the nature and severity of the potential harm;
- the likelihood the potential harm will occur;
- the imminence of the potential harm; and
- the availability of any reasonable accommodation that might reduce or eliminate the risk.

Example 25: An employee with a hearing disability requests training to operate a forklift machine at a large hardware store. For safety reasons, the employer requires that forklift operators be able to communicate with a spotter employee while operating the machine. The employee suggests that he wear a vibrating bracelet to allow him to communicate with the spotter. The employer has attempted to use vibrating bracelets in the past without success because users cannot distinguish the vibrations between the forklift and the bracelet. The employee tries to use the vibrating bracelet, but experiences the same problem. Assuming no other accommodations are available, the employer may deny the employee training on a forklift.[18]

Example 26: A school district denies an applicant with a hearing disability a job as a school bus driver for elementary school students, believing that she will not be able to drive safely and will not be able to monitor students, especially in the event of a medical or other emergency. The applicant has a clean driving record and has previously performed jobs transporting elderly patients by van to doctor's appointments and social events. Based on past experiences with accommodations, the applicant could monitor students effectively – and without compromising her driving – if an additional mirror highlighting the rear of the bus were installed. The mirror, placed above the driver, would allow her to better monitor students whose conversations she may not be able to hear or understand as well as those students located in the front of the bus. This school district also typically assigns aides to ride with drivers on the busiest routes. Under these circumstances, the school district cannot demonstrate that this applicant would pose a direct threat to the safety of others, and its refusal to hire her would violate the ADA.[19]

18. What should an employer do when federal law prohibits it from hiring anyone with a certain level of hearing loss?

An employer has a defense to a failure-to-hire claim under the ADA if another federal law actually prohibits it from hiring someone with a hearing impairment for a particular position. However, the employer should ensure that the federal law requires, rather than permits, exclusion of the individual with a disability and that there are no applicable exceptions.

Example 27: Terry has a severe hearing impairment that is slightly improved by her cochlear implant. She applies for a position driving large trucks. These positions are subject to hearing requirements and other standards enforced by the Department of Transportation (DOT). The employer may rely on DOT's hearing requirement in denying Terry employment. However, the employer may not rely on the DOT hearing requirement to exclude Terry from a position driving smaller trucks which are not subject to DOT's standards. Instead, the employer would have to establish that Terry would pose a direct threat, within the meaning of the ADA, if it denied her a position driving smaller trucks because of her hearing disability.

HARASSMENT

Employers are prohibited from harassing or allowing employees with disabilities to be harassed in the workplace. When harassment is brought to an employer's attention, management and/or the supervisor must take steps to stop it.

19. What constitutes illegal harassment under the ADA?

The ADA prohibits unwelcome conduct based on disability that is sufficiently severe or pervasive to create a hostile or abusive work environment. Acts of harassment may include verbal abuse, such as name-calling, and behavior, such as offensive graphic and written statements or physically threatening, harmful or humiliating actions. The law does not protect workers with disabilities (or any workers) from merely rude or uncivil conduct. To be actionable, conduct related to an employee's hearing disability must be perceived by the affected individual as abusive and must be sufficiently severe or pervasive that a reasonable person would perceive it as hostile and abusive.

Example 28: Leonard works as a stocker at a local electronics store. Leonard lost his hearing two years ago as the result of a rare and debilitating illness. Since Leonard's recovery and return to work, his co-workers have constantly taunted him about his hearing impairment and recklessly driven the forklift near him while yelling for him to move. The employees know that Leonard cannot hear their warnings and often laugh at Leonard's startled reaction when he sees the forklift approaching him. Leonard complains to his supervisor in accordance with his employer's anti-harassment policy. The employer must promptly

investigate and address the harassing behavior.

20. What should employers do to prevent and correct harassment?

Employers should make clear that they will not tolerate harassment based on a disability or on any other basis (i.e., race, color, sex, religion, national origin, or age). This can be done in a number of ways, including a written policy, employee handbooks, staff meetings, and periodic training. The employer should emphasize that harassment is prohibited and that employees should promptly report harassment to a manager or other designated official. Finally, employers should immediately conduct a thorough investigation of any report of harassment and take swift and appropriate corrective action. For more information on the standards governing harassment under federal EEO laws, see the EEOC's Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, available at http://www.eeoc.gov/policy/docs/harassment.html.

RETALIATION

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or participates in any way in an employment discrimination investigation, proceeding, or litigation. Federal employees who believe that they have been retaliated against may file a complaint of retaliation as described below.

LEGAL ENFORCEMENT

21. What should a Federal employee do who believes that his or her rights under the ADA may have been violated?

An applicant or employee who believes that her employment rights have been violated on the basis of a hearing disability and wants to make a claim against a federal agency must file a complaint with that agency. The first step is to contact an EEO Counselor at the agency within 45 days of the alleged discriminatory action. The individual may choose to participate in either counseling or in Alternative Dispute Resolution (ADR) if the agency offers this alternative. Ordinarily, counseling must be completed within 30 days and ADR within 90 days. At the end of counseling, or if ADR is unsuccessful, the individual may file a complaint with the agency. The agency must conduct an investigation unless the complaint is dismissed. If a complaint contains one or more issues that must be appealed to the Merit Systems Protection Board (MSPB), the complaint is processed under the MSPB's procedures. For all other EEO complaints, once the agency finishes its investigation the complainant may request a hearing before an EEOC administrative judge or an immediate final decision from the agency.

In cases where a hearing is requested, the administrative judge issues a decision within 180 days and sends the

decision to both parties. If the agency does not issue a final order within 40 days after receiving the administrative judge's decision, the decision becomes the final action of the agency. A complainant may appeal to EEOC an agency's final action within 30 days of receipt. The agency may appeal a decision by an EEOC administrative judge within 40 days of receiving the administrative judge's decision.

For more information concerning enforcement procedures for federal applicants and employees, visit the EEOC website at http://www.eeoc.gov/facts/fs-fed.html.

Endnotes

1 Sergei Kochkin, Ph.D., Better Hearing Institute, The Prevalence of Hearing Loss, http://www.betterhearing.org/hearing_loss/prevalence.cfm .

2 Sergei Kochkin, Ph.D., MarkeTrak VII: Hearing Loss Population Tops 31 Million People, The Hearing Review, 2005, Vol. 12, No. 7, at 16.

3 Chart is based on data derived from A Nation Online, Economic and Statistics Administration/National Telecommunications and Information Administration, U.S. Department of Commerce, February 2002, based on Current Population Survey (CPS) of September 2001.

4 Centers for Disease Control and Prevention, Developmental Disabilities, http://www.cdc.gov/ncbddd/dd/ddhi.htm .

5 Id.

6 National Association of the Deaf, The Difference between Deaf and Hard of Hearing, http://www.nad.org/site .

7 Centers for Disease Control and Prevention, Developmental Disabilities, http://www.cdc.gov/ncbddd/dd/ddhi.htm .

8 In addition, there are four types of hearing loss that generally describe the origin of the hearing loss within the ear. Sensorineural hearing losses are the most common and primarily involve damage to the nerve fibers in the inner ear. These nerve fibers transmit the signals that the brain interprets as patterns of sound. Some types of sensorineural hearing loss can be improved through hearing aids or cochlear implants. Conductive hearing loss is often a treatable disorder involving a blockage in the outer or middle ear that impedes the transmission of sound energy to the brain. Mixed hearing loss is any combination of sensorineural or conductive hearing loss caused by related or isolated conditions. Finally, some sources recognize a fourth type of hearing loss. Central hearing loss primarily involves a permanent condition where the pathway from the inner ear to the brain is damaged. See Id.

9 National Association of the Deaf, The Difference between Deaf and Hard of Hearing, http://www.nad.org/site.

10 For more information about what constitutes a disability-related inquiry and medical examination and the circumstances under which an employer may ask questions about disability or require medical examinations before someone begins work, see Enforcement Guidance: Preemployment Disability-Related questions and Medical Examinations (October 10, 1995), http://www.eeoc.gov/policy/docs/preemp.html.

11 For more information about when an employer may ask disability-related questions or conduct medical examinations of employees, see Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 27, 2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

12 See also, Job Accommodation Network's Searchable Online Accommodation Resource (SOAR), http://www.jan.wvu.edu/soar/hear.html .

13 A text telephone or teletypewriter (TTY) allows a telephone user to send typed messages to another caller and to receive typewritten messages from the caller either directly (if the caller is also using a TTY) or through a telephone relay service (TRS) operator. A voice carry-over telephone allows someone with a hearing impairment to communicate orally

over the telephone and to receive text communications from the other caller that are transcribed by a TRS operator. A captioned telephone allows users with hearing impairments to receive communications over the telephone orally while receiving an almost simultaneous text translation.

14 For more information regarding an employer's responsibility to provide leave for covered individuals, see the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (November 1995), http://www.eeoc.gov/policy/docs/fmlaada.html and Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at Questions 22 and 23 (October 17, 2002), http://www.eeoc.gov/policy/docs/accommodation.html.

15 See Know the Rules Regarding Tax Incentives for Improving Accessibility for the Disabled (2003), http://www.irs.gov/businesses/small/article/0,,id=113382,00.html. For additional information on tax benefits, contact the U.S. Internal Revenue Service at 800-829-3676 (voice) or 800-829-4059 (TDD).

16 In an effort to eliminate discrimination against individuals with disabilities, Title III of the Americans with Disability Act requires businesses and non-profit organizations that are public accommodations to comply with basic nondiscrimination and building accessibility requirements, provide reasonable modifications to policies and practices, and supply auxiliary aids (e.g., assistive listening devices, note takers, written materials, taped texts, and qualified readers) to ensure effective communication with persons with disabilities. For more information on the requirements of Title III of the ADA, visit the website for the U.S. Department of Justice, Civil Rights Division, Disability Rights Section available at http://www.usdoj.gov/crt/drs/drshome.htm.

17 An employer should include, as part of any contract with an entity that conducts training, provisions that allocate responsibility for providing reasonable accommodations. This can help to avoid conflicts or confusion that could arise and result in an employee being denied a training opportunity. An employer should also remember, however, that it remains responsible for providing a reasonable accommodation that an employee needs to take advantage of a training opportunity, regardless of how that responsibility has been allocated in the contract.

18 See Nix v. Home Depot USA, Inc., No. 1:02-CV2292MHS, 2003 WL 22477865 (N.D. Ga. Oct. 16, 2003).

19 See Rizzo v. Children's World Learning Center, 213 F.3d 209 (5th Cir. 2000).

20 Many states and localities have disability anti-discrimination laws and agencies responsible for enforcing those laws. The EEOC refers to these agencies as "Fair Employment Practices Agencies (FEPAs)." Individuals may file a charge with either the EEOC or a FEPA. If a charge filed with a FEPA is also covered under the ADA, the FEPA will "dual file" the charge with the EEOC but usually will retain the charge for investigation. If an ADA charge filed with the EEOC is also covered by a state or local disability discrimination law, the EEOC will "dual file" the charge with the FEPA but usually will retain the charge for investigation.

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Health Records (*See: Disability: Medical Records)*
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I
Illegal Drug Use (*See: Disability: Type of : Drug Use*)
Impairment: (*See: Disability: Type of)*
"Individual with a Disability": (*See: Disability: Type of)*
Information (medical): (*See: Disability: Medical Records)*
Injuries: (*See: Disability: Accommodation)*
Intellectual Disabilities: (*See: Disability: Type of)*
Interact with Others: *(See: Disability: Type of)*
Interim Earnings (offsetting): (*See: Back Pay)*
Intimidation: (*See: Reprisal: "Per Se" Reprisal)*
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J
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K
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L
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M
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Mediation: (*See: ADR)*
Medical Condition/Impairment: (*See: Disability)*
Medical Examinations/Inquiries: (*See: Disability: Medical Examinations/Inquiries)*
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Mental Impairment: (*See: Disability: Type of)*
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N
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O
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"Observably Superior": (*See: "Plainly Superior")*
Offensive Remarks: (*See: Comments)*
Office of the General Counsel: X, 3, p. 9-10
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"Opposition" (activity opposing discrimination): (*See: Reprisal: Protected EEO Activity)*
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P
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Not Found: XI, 2, p. 3-4
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Burden of articulation not met (no reason or nonspecific reason given) I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 2, p. 3-4
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Found True (see Pretext Not Found)
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Performance Problems (need to document): V, 3, pp. 8-10 and 10-12; VI, 4, pp. 2-3 and 5-6
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Pregnancy (discrimination because of): VII, 4, p. 8; IX, 2, p. 6-7
Pre-Selection: (*See: Promotions/Selections/Hiring: Pre-Selections)*
Priority Consideration: (*See: Promotions/Selections/Hiring: Priority Consideration)*
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Promotions/Selections/Hiring:
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Knowledge (of applicant's race, gender, etc.): X, 2, p. 7
Manipulation of the Process: V, 1, pp. 4-5 and 5-6 and 12; VIII, 4, p. 10-11
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Panels (interview and rating): V, 3, p. 8-10; VII, 3, p. 10-11; IX, 4, p. 4-5
Performance Appraisals (use of): II, 3, p. 3
Position Descriptions: V, 4, p. 8-9
Pre-Selections: III, 4, p. 7-8; V, 3, p. 13-16; V, 4, p. 4-5; VIII, 4, p. 10-11 (article)
Pretext:
Evidence or Not Evidence of:
Affirnative Employment Plans (use of): II, 1, p. 7-8
Derogatory Comments: II, 2, p. 3
Education: (*See: Qualifications: Education)*
Experience: II, 1, p. 7; III, 1, p. 13; VI, 3, p. 4-5
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Opinion (of complainant as to his/her qualifications as): (*See: Qualifications: Opinion)*
Mistakes: V, 1, p. 5-6; X, 1, p. 8-9
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Priority Consideration (use of as): (*See:* Promotions/Selections/Hiring: Priority Consideration)
Prior Nonselections as: II, 1, p. 7
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Found: I, 1, p. 15; II, 2, p. 2-3; II, 4, p. 9-11; IV, 3, p. 9-11; IV, 4, pp. 2-3 and 8-9; V, 1, p. 4-5 and 5-6; V, 3, p. 8-10 ; IX, 4, p. 4-5
Not Found: I, 1, p. 16; II, 1, p. 7; II, 2, p. 7; II, 3, p. 3; III, 3, p. 4-5; IV, 3, p. 9-11; IV, 4, p. 5-6; V, 3, 13-16: V, 4, p. 4-5; V, 4, p. 8-9; V, 3, p. 13-16; VI, 2, p. 10-12; IX, 1, p. 6-7; IX, 3, p. 6; X, 1, p. 8-9
Priority Consideration: III, 3, p. 4-5
Procedures/Policies (failure to follow): V, 3, p. 8-10; X, 1, p. 8-9
Proficiency Reports (nurses):
If issue involves use in noncompetitive promotions: (*See: Nurses: Promotions)*
If issue relates solely to the rating: (*See: Performance Appraisals)*
Promotion Files: (*see: Promotions/Merit Promotion Files)*
Rating Panels: V, 1, p. 5-6
Reason(s) articulated --
Burden of Articulation Met (specific reason given for nonpromotion or nonselection)
Burden of Articulation <u>not</u> Met (no reason or nonspecific reason given)
I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 4, p. 2-3 and 4-5; X, 3, p. 3-4
Found not True (see Pretext Found)
Found True (see Pretext Not Found)
Inability to Accommodate: (*See: Disability: Accommodation or Religion: Accommodation)*
Risk of Harm or Injury (as reason cited): (*See: Disability: Direct Threat)*
Proof: (*See: Evidence)*
Proposed (*vs*. Completed) Actions (dismissal because of): VIII, 4, p. 5-7
Protected Activity: (*See: Reprisal: Protected EEO Activity*)
Punitive (damages): (*See: Compensatory Damages)*

Q
Qualifications
Applications (…not noted in): (*See: Promotions/Selections/Hiring)*
Disqualification (by HR specialist): (*See: Promotions/Selections/Hiring)*
Education (as evidence of): IV, 4, p. 6-7; V, 3, p. 13-16
Experience (as evidence of): (*See: Promotions/Selections/Hiring: Pretext: Evidence)*
Nurses (*See: Nurses: Promotions/:Qualifications*)
"Observably Superior": (*See: Qualifications: Plainly Superior)*
Opinion (of complainant as to his or her own): IV, 3, p. 9-11
Position Descriptions: (evidence of): V, 4, p. 8-9
"Plainly Superior": IV, 3, p. 9-11; IV, 4, pp. 2-3, 6-7, and 8-9; V, 3, p. 8-10; VI, 1, p. 5-6
Seniority (use of): (*See:* Promotions/Selections/Hiring: Pretext: Seniority)
Supplemental Qualification Statements: II, 2, p. 3

R
Race/Color Discrimination: XI, 2, p. 12-18 **(**article*)*
Race (knowledge of applicant's): X, 2, p. 7
Racial Harassment: (*See: Harassment: Racial*)

Racial Profiling: V, 1, p. 8-9
Reannouncing Position Vacancies (to manipulate the process): (*See: Promotions/Selections/Hiring: Manipulation of the Process)*
Reasonable Accommodation (*See: Disability: Accommodation **or** Religion: Accommodation)*
"Reasonable Suspicion" Standard (as relates to untimeliness of complaint): VII, 4, p. 11-12
Reassignment (as a reasonable accommodation): (*See: Disability: Accommodation)*
Reassignment (of harassment victim): *(See: Reprisal: Reassignment of Harassment Victim)*
Recency (of experience): (*See: Promotions/Selections/Hiring: Pretext Evidence)*
Records (destruction of): **XI, 3, p. 2-3**
Records (retention of): (*see: Records(destruction of))*
Records (medical): (*See: Disability: Medical Records)*
Reductions in Force (involving Title 38 Employees): V, 2, p. 12-13
References (*see: Negative Employment References)*
Regulations (*See: EEOC Regulations)*
Relief: (*See: Remedies)*
Religion:
- Accommodation: IV, 1, p. 4-5; V, 4, p. 5-7; X, 4, p. 11-16 (Article); XI, 2, p. 6-7
  - Interactive Process**:** XI, 2, p. 6-7
- Beliefs (nature or sincerity of): III, 4, p. 10-11
- Inquiries (about): IX, 1, p. 6-7
- Seasonal Displays/Activities: III, 1, p. 5
- Diversity Training (as allegedly violating beliefs): III, 4, p. 10-11
- Undue Hardship: V, 4, p. 5-7

Remarks (inappropriate or offensive): (*See: Comments)*
Remedies:
- Inappropriate: IV, 4, p. 8-9
- Limited: V, 2, p. 2-4

Removal Actions:
- Conduct (because of):
  - Pretext:
    - Evidence or Not Evidence of:
      - Found: IX, 1, p. 2-3
      - Not found: VI, 4, p. 3-4
  - Reason(s) Articulated --
    - Burden of articulation met (specific reason given for removal)
    - Burden of articulation not met (no reason or nonspecific reason given)
    - Found Not True (*See Pretext: Found*)
    - Found True (*See Pretext: Not Found*)
- Job Performance (because of):
  - Pretext:
    - Evidence or Not Evidence of:
      - Found: I, 1, p. 18; VI, 4, p. 2-3; IX, 1, p. 2-3
      - Not found: VII, 4, p. 2-3; X, 3, p. 2-3
  - Reason(s) Articulated --
    - Burden of articulation met (specific reason given for removal)
    - Burden of articulation not met (no reason or nonspecific reason given)
    - Found Not True (*See Pretext: Found*)
    - Found True (*See Pretext: Not Found*)
- Other Reasons (because of):
  - Pretext:
    - Evidence or Not Evidence of:
      - Found:
      - Not found: II, 3, p. 5-6; IV, 4, p. 9-10
  - Reason(s) Articulated --
    - Burden of articulation met (specific reason given for removal)
    - Burden of articulation not met (no reason or nonspecific reason given)
    - Found Not True (*See Pretext: Found*)
    - Found True (*See Pretext: Not Found*)

Representation:
- Adequacy of: *(See: Adequacy of Representation)*
- Right to:

Reprisal (Retaliation):
- Adverse Action Requirement: (*See: Reprisal: Per Se and Materially Adverse Action)*
- Against Spouses or Close Relatives: XI, 1, p. 2-3
- Article about: I, 1, p. 19; IX, 1, p. 10-11; IX, 3, p. 10-11

"Chilling Effect": (*See: Reprisal: "Per Se" Reprisal)*
Discipline/Negative Action (taken against harassment victim): II, 1, p. 5-6; III, 1, p. 9-10; VII, 1, p. 7-9; VIII, 1, p. 2-3; IX, 2, p. 5-6; IX, 3, p. 2-3; *(See also: Harassment: Corrective Action: Reassignment of Victim)*
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Frivolous Complaints (because of): IX, 3, p. 10-11 (article about)
Intimidation: (*See: Reprisal: "Per Se" Reprisal)*
Interference (with EEO process): (*See: Reprisal: "Per Se" Reprisal)*
"Materially Adverse" Action: I, 1, p. 20; X, 3, p. 5-6; XI, 2, p. 10
"*Per Se*" Reprisal: I, 1, pp. 12; and 20; II, 1, p. 8; II, 2, p. 3; III, 4, p. 2; VII, 1, pp. 6-7 and 7-9; VII, 3, p. 5-6 and 10-11; VIII, 2, pp. 5-7 and 9-10; IX, 2, p. 6-7; XI, 2, p. 10
Pretext:
Evidence or Not Evidence of:
Found: I, 1, p. 18; II, 4, p. 8-9; IV, 1, p. 8-9; IV, 3, p. 5-6; V, 2, p. 8-10; VI, 4, p. 5-6; VII, 2, p. 3-4; VIII, 3, p. 5-6; IX, 1, p. 2-3; IX, 4, p. 4-5
Not found: III, 1, p. 7-8; III, 3, p. 6-7; IX, 3, p. 2-3; X, 2, p. 8-9; X, 3, p. 5-6
Reason(s) articulated --
Burden of Articulation Met (specific reason given for nonpromotion or nonselection)
Burden of Articulation not Met (no reason or nonspecific reason given)
I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 4, p. 2-3 and 4-5
Found not True (see Pretext Found)
Found True (see Pretext Not Found)
Problem Employees: (*See: Problem Employees)*
Protected EEO Activity:
Grievances: X, 4, p. 5-6
Knowledge by Management of: III, 4, p. 3-4; IV, 3, p. 5-6; IV, 4, p. 5-6; VIII, 3, p. 3-5; X, 2, pp. 2 and 8
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Discussions with Supervisors about Discrimination**:** : X, 4, p. 6-8
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OSHA Complaints (not protected activity): X, 4, p. 5-6
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Threat to File EEO Complaint (*See: Reprisal: Protected EEO Activity: Opposition Activity*)
Time Span Between EEO Activity and Adverse Action: III, 4, p. 3-4; IV, 4, p. 5-6**;** V, 2, p. 8-10; V, 4, p. 3-4; VI, 2, p. 5-6; VIII, 3, p. 3-5; IX, 1, p. 2-3; X, 2, p. 2-3
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Restraint: (*See: Reprisal: "Per Se" Reprisal)*
Retaliation: (*See: Reprisal)*
Reverse Discrimination:
Age: (*See: Age Discrimination)*
RIFs (*See: Reductions in Force)*
Risk of Future Harm or Injury: (*See: Disability: Direct Threat)*
RMO: *(See: Responsible Management Official)*

S
Same-Sex Requirement or Policy: *(See: "BFOQ")*
Same-Sex Urine Screens: *(See: Urine Screens)*
Sanctions (imposed by EEOC judges): VI, 1, p. 5-6; **XI, 3, p. 2-3**
Sex-Based Requirement or Policy: (*See: "BFOQ")*
Sexual Harassment (*See: Harassment*)
Sexual Identity: (*See: Trans-Gender Behavior)*
Sexual Orientation: IV, 3, p. 13-14
Selection Actions (S*ee: Promotions/Selections/Hiring*)
Service-Connected Disability: (*See: Disability: Benefit Statutes: Veterans Compensation)*

Settlement Agreements:
Breach of: VIII, 2, p. 3-4
Consideration (absence of): V, 2, p. 4-5
"Meeting of the Minds" (absence of): V, 2, p. 5-6
Mistake of Fact: (*See: Settlement Agreements: Meeting of the Minds)*
Oral Agreements: VIII, 2, p. 3-4
Shortness of Breath: (*See: Disability: Type of)*
Skin Conditions: (*See: Disability: Type of)*
"Similarly Situated": (*See: Employees)*
"Speak English Only" Rules: (*See: National Origin)*
Stating a Claim: (*See: Failure to State a Claim)*
Statistical Evidence: (*See: Evidence*)
Stress: (*See: Disability: Type of)*
Subjective Factors (use of): (S*ee: Promotions/Selections/Hiring: Pretext)*

T
Tangible Employment Action: (*See: Harassment: Automatic Liability; See Also: Harassment: Coerced Sex)*
Tangible Harm: (*See: Aggrieved)*
Telework (as a reasonable accommodation for disabilities): (*See: Disability: Accommodation)*
Temporal Proximity (in reprisal cases): (*See: Reprisal: Protected EEO Activity: Time between…..)*
Temporary Disability: (*See: Disability: Temporary*)
Terminations (*See: Removal Actions*)
Threats ((*See: Reprisal "Per Se")*
Timeliness (of complaints): (*See: Untimeliness)*
Title 38 Employees (right of appeal to MSPB): (*See: Reductions in Force)*
Trans-Gender (Trans-Sexual) Behavior (discrimination due to): VII, 1, p. 5-6
Touching (of employees): (*See: Harassment: Touching Employees)*
Typicality: (*See: Class Action Complaints)*

U
Under-Representation: (*See: Evidence: Statistical)*
Undue Hardship: *(See: Disability: Accommodation)*
Unfairness (as evidence of discrimination): (*See: Evidence: Unfairness)*
Union Officials (complaints filed by): V, 3, p. 12-13
Untimeliness (dismissal of complaint due to): VI, 1, p. 9-10; VI, 4, p. 6-8; VII, 4, p. 11-12; **XI, 3, p. 6-7**
Urine Screens: X, 1, p. 9-11

V
VA Disability Ratings: (*See: Disability: Benefit Statutes: Veterans' Compensation)*
Veterans' Compensation: (*See: Disability: Benefit Statutes: Veterans' Compensation)*
Veterans' Preference or Status (cited as a basis of discrimination): IV, 4, p. 9-10; VI, 1, p. 15
Vision Impairments: *(See: Disability: Type of)*
Voidance (of settlement agreements): (*See: Settlement Agreements: Consideration and Meeting of the Minds)*

W
"Whistle Blower" Complaints: (*See: Reprisal: Protected EEO Activity: Whistle Blowing Activities)*
Witness Credibility: (*See: Credibility)*
"WOC" Employees/Employment (without compensation): (*See: Employees)*