# OEDCA DIGEST

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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 constructive discharge ("resign or be fired"), constructive discharge ("intolerable conditions"), reasonable accommodation, liability for sexual harassment, age discrimination, religious accommodation, and retaliation. Also in this issue is an article about reference checking as a hiring tool and a brief overview of the recently enacted *ADA Amendments Act of 2008,* which becomes effective for actions arising on or after January 1, 2009.

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**

***EMPLOYEE CONSTRUCTIVELY DISCHARGED, BUT NOT BECAUSE OF DISCRIMINATION***

As the following case illustrates, even if a complainant is able to show that he or she was constructively discharged, that fact, by itself, it not sufficient to prove discrimination.

The complainant began employment as a full-time Health Aid, GS-3, in July 2004. During his probationary period, he resigned in lieu of termination for misconduct in July 2005. Shortly after his resignation, he requested another chance at employment. The Chief, Environmental Management Service (EMS), granted his request and rehired him as a part-time Housekeeping Aid, WG-1, in August 2005, a job that paid less than his previous job. Shortly after resuming his employment, he contacted an EEO counselor to complain about the pay reduction.

Shortly after contacting the counselor, he became involved in an incident involving a patient. The patient gave him $10.00 and asked him to buy coffee for both of them. He bought the coffee, but when he tried to give the patient his change ($5.25), he claimed the patient refused to take it. Shortly after this incident, the nursing staff reported to the complainant's supervisor that the complainant had been seen in the company of a patient and that the patient's wallet containing $180.00 had disappeared.

The complainant's immediate supervisor confronted him about his dealings with the patient. The complainant admitted accepting money from the patient to buy the coffee and keeping the change. As for the lost wallet, he claimed that after he had helped the patient go to the bathroom, he learned about the patient's lost wallet and was in the process of helping him locate it. The supervisor testified that the wallet then miraculously turned up on the patient's wheel chair.

The supervisor notified the EMS Chief of the incident. The Chief, in turn, notified the complainant that his employment was being terminated due to misconduct. Prior to the effective date of the termination, the complainant resigned from his position. He subsequently filed a formal discrimination complaint alleging, among other things, that he was constructively discharged (*i.e.*, forced to resign) because of his national origin and because he had contacted an EEO counselor concerning his pay grade.

After reviewing the evidence, OEDCA concluded that the complainant had failed to present sufficient evidence to prove his claims of national origin discrimination and reprisal. OEDCA noted that where a complainant is forced to choose between resignation and termination, a complainant's resignation is considered to be involuntary and, hence, a constructive discharge. For purposes of analysis, however, this type of constructive discharge claim is treated as if it were a claim involving an actual termination

action. Thus, to establish a *prima facie* case, the complainant must show, among other things, that he was meeting the legitimate expectations of his employer.

The mere fact that an employee is presented or confronted with an unpleasant choice does not, by itself, establish unlawful discrimination under federal EEO law. OEDCA found that the complainant failed to establish even a *prima facie* case of discrimination because he failed to prove that he was doing his job well enough during the probationary period to meet the agency's legitimate expectations. He violated agency policies by accepting money from a patient and by providing coffee to a patient, which could have conflicted with the patient's dietary restrictions. The complainant was aware of these policies, as employees are reminded of them at monthly meetings.

**II**

***NO CONSTRUCTIVE DISCHARGE WHERE CONDITIONS WERE NOT INTOLERABLE***

In the preceding case, we discussed one type of constructive discharge claim – the "resign or be fired" type. Such claims are analyzed in the same manner as termination claims. Another type of constructive discharge claim -- far more common -- is the "hostile environment" or "intolerable conditions" claim. In this type of claim, the employee alleges that discriminatory behavior in the workplace has resulted in conditions that are so intolerable that a reasonable person in the employee's shoes would feel compelled to resign or retire. The following case illustrates this type of claim.

The complainant, a Psychiatrist serving a probationary period, filed a complaint alleging that her supervisor, the Associate Chief of Staff for Mental Health and Behavioral Science, harassed her on account of her gender and in retaliation for having reported sexually harassing behavior by a coworker. She also alleged constructive discharge – *i.e.*, her supervisor's harassing behavior created working conditions so intolerable that she felt compelled to resign.

The behavior in question involved four incidents that occurred between April and July of 2005. The first occurred when the supervisor told the complainant and three other female psychiatrists that their probationary periods would not be extended. The second involved a verbal counseling relating to a medication order and a suggestion that she start looking for another job. The third incident involved her supervisor's failure to respond to her request to borrow his personal copy of training materials to prepare for her medical board examination. Finally, in response to her request for advance leave, her supervisor told her that it might be a problem due to staffing needs. The complainant resigned prior to a decision being made on her leave request.

In order to prove a constructive discharge claim of the type presented here (*i.e.*, intolerable conditions), a complainant must prove the following: (1) a reasonable person in the complainant's position would have found working conditions intolerable, (2) discriminatory treatment created those intolerable conditions, and (3) complainant's involuntary resignation resulted from those intolerable conditions. The standard for "intolerable working conditions" in a constructive discharge claim is higher than the standard for a "hostile work environment" in a claim of harassment.

An EEOC judge examined the evidence surrounding these four incidents and found legitimate, nondiscriminatory reasons for them, or otherwise found no evidence of discrimination. Moreover, the judge found that the four incidents did not amount to "intolerable conditions." Absent an egregious act, it takes more than a few incidents to create intolerable conditions or a hostile work environment.

**III**

***ACCOMMODATION OF CHOICE NOT A GUARANTEED RIGHT***

In many situations, an employer will conclude that the preferred job accommodation requested by a disabled employee is reasonable and will provide it. However, as the following case illustrates, an accommodation of choice is not a right guaranteed by law.

A VA employee was found to have been exposed to tuberculosis following an annual TB test at the employee health unit. The employee was hospitalized in isolation for four days and treated.

Upon her return to work, she notified her supervisors that she would have to schedule doctor's appointments three times per month in order to continue her treatment. Because she had nearly depleted her leave balance, she requested either a part-time schedule or a 4-day per week/ten-hour per day work schedule. Management denied her request and instead told her to exhaust her remaining sick and annual leave, after which she would be authorized advanced sick leave or leave without pay. At the time, the complainant was already on a 9-hour per day schedule, thus allowing her one workday off every other week. Dissatisfied with this response, the complainant filed a claim alleging discrimination due to her disability when management denied the accommodation that she had requested.

After first assuming that the complainant was an individual with a disability[1], an EEOC judge found that management provided a reasonable and effective accommodation. OEDCA accepted that finding in its Final Or-

[1] It did not appear from the record that the complainant presented enough evidence to show that her medical condition amounted to a disability--*i.e.*, that she had an impairment that substantially limited a major life activity. For purposes of analysis, however, the judge assumed that she was an individual with a disability and, hence, entitled to an accommodation.

der and the EEOC's Office of Federal Operations upheld that finding on appeal.

In its decision, the OFO noted that while an employer is required to make reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, the employer may choose among reasonable accommodations as long as the chosen accommodation is effective. An effective accommodation removes a workplace barrier, thereby providing an individual with an equal opportunity to apply for a position, perform the essential functions of a position, or gain equal access to a benefit or privilege of employment.

If there is more than one accommodation that is effective, the employee's preference should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations.

In this case, the OFO concluded that management's decision to provide accrued and advanced leave, as well as leave without pay, was both reasonable and effective, especially since she already had two workdays off each month because of her 9-hour per day schedule. Although she had depleted her leave allowance, had she not done so she would have had sufficient leave available to attend her third appointment each month. While not the complainant's preferred accommodation, the choice management made in this case satisfied whatever burden it may have had to accommodate.

**IV**

***MANAGEMENT AVOIDS LIABILITY FOR SEXUAL HARASSMENT BY TAKING PROMPT, EFFECTIVE ACTION***

As the following case illustrates, even if an employee is able to prove that sex harassment by a co-worker occurred as alleged, management may still avoid liability if it can show that it took prompt, appropriate, and effective action to stop the harassment.

The complainant, a nursing assistant, worked in the same clinic as a physician. At first, she and the physician joked a bit, but before long he began harassing her. The harassment took the form of inappropriate comments, verbal requests for sex, and touching. The touching included rubbing her buttock, grabbing her breasts, rubbing his penis against her back, and/or reaching between her legs and touching her vagina. She further testified that his conduct was unwelcome and that she clearly communicated that fact to him. However, she delayed reporting the incidents to her nursing supervisor for over two months, hoping she would be able to handle the matter herself and fearing the gossip that might ensue if she complained. However, the harassment continued and she finally reported it to her supervisor after an incident in which the physician grabbed her breast. She also filed a discrimination complaint.

Her supervisor immediately reported the matter to higher-level officials who promptly ordered an inquiry. The physician was placed on administrative leave pending the outcome of the inquiry. The inquiry found that the harassment occurred as alleged by the complainant. In view of the findings, the medical center director ordered the physician's removal. The physician resigned prior to the effective date of the removal.

In its final agency decision, OEDCA found that the complainant sustained her burden of proving by a preponderance of the evidence that she was sexually harassed. The alleged incidents occurred, were due to her gender, and were unwelcome. Moreover, they were sufficiently severe as to create a hostile and abusive work environment.

Finding that the harassment occurred, however, does not end the inquiry. In cases involving co-worker[2] harassment, the employer will be liable only if the victim is able to show that the employer failed to take prompt, appropriate, and effective action to halt the harassment as soon as it became aware of it. In this case OEDCA concluded that management was not liable, as it did exactly what the law required it to do as soon as it became aware of the complainant's allegations. It placed the physician on administrative leave and conducted an immediate investigation notwithstanding the complainant's EEO complaint, which would not be adjudicated until 18 months later. It also removed the physician when its inquiry confirmed the complainant's allegations. Thus, management acted promptly, appropriately, and effectively.

In its decision, OEDCA also found that even if the physician had some sort of supervisory role that was not apparent from the record, management would still have avoided liability because it successfully established an affirmative defense to the claim. It did this by proving that it (1) exercised reasonable care to prevent and promptly correct the harassment and (2) the complainant failed to avoid harm by unreasonably failing to report the harassment for over two months, a long time given the serious nature of the incidents.

## V

## *ONE YEAR AGE DIFFERENCE NOT ENOUGH TO PROVE A PRIMA FACIE CASE OF AGE BIAS*

As the following case illustrates, an insignificant difference in the age of a complainant and a comparator will defeat an age discrimination claim.

The complainant, 51 years of age at the time in question, was one of several individuals who applied for a GS-13 supervisory position in the Voluntary Service at a VA medical facility. The HR office found her qualified and

[2] OEDCA concluded that the facts in the record demonstrated that the physician did not have supervisory authority over the complainant and was only a co-worker in the same clinic.

referred her to the selecting official along with four other qualified applicants. The applicants were referred on different certificates, as three were promotion eligible, one was eligible under a separate appointing authority, and one – the complainant – was a reassignment eligible, as she was already a GS-13.

In accordance with the facility's merit promotion procedures, the selecting official (SO) was free to use only one certificate or as many certificates as he deemed necessary in making the final decision. In this case, the SO opted to use only the promotion eligible certificate and interviewed the three applicants whose names appeared on it. Hence, because the complainant's name did not appear on that certificate, she was not interviewed. The SO eventually chose a female applicant younger than the complainant. The complainant responded by filing a complaint alleging, among other things, age discrimination.

Following a hearing, an EEOC administrative judge issued a decision in favor of the VA, finding that the complainant's evidence was not even sufficient to establish a *prima facie* case of age discrimination. Specifically, the judge noted that the selectee was 50 years of age and, hence, only <u>one</u> year younger than the complainant. To create an inference of age discrimination, the comparator – *i.e,* the selectee – must be substantially younger than the complainant.

While there is no bright-line rule that defines "substantially younger", the courts and the EEOC have frequently found that differences in excess of five years meet the definition.

This case also points out a common misunderstanding among employees regarding referral certificates. HR may, and often does, refer applicants to a selecting official on more than one certificate, depending on whether they are promotion eligible, reassignment eligible, reinstatement eligible, or eligible under any other appointing authorities. However, a selecting official is not obligated to interview all of the applicants on all of the certificates. As a general rule, the SO may choose to limit his or her consideration to one certificate only, or to some but not all of the certificates. However, if one applicant on the certificate(s) used is interviewed, all applicants on that certificate must be interviewed.

**VI**

***RELIGIOUS ACCOMMODATION CLAIM NOT TIMELY RAISED***

As noted below, some complaints are dismissed without ever being investigated if the complainant fails to comply with certain procedural requirements. Timeliness is one of those requirements. The issue in this case was when did the clock start ticking.

The complainant worked as a Medical Laboratory Aid at a VA medical center. Like all other employees in the

laboratory, her tour of duty required that she work every other weekend. On August 24, 2003, she sent a note to her supervisor requesting all Sundays off due to religious reasons. On August 26, 2003, the supervisor denied her request. On January 15, 2004, she contacted an EEO counselor about the denial and thereafter filed a complaint of religious discrimination, wherein she alleged that her request for accommodation was reasonable and should have been granted.

After reviewing the matter, an EEOC administrative judge refused to consider the merits of the complainant's religious discrimination claim – not because it lacked merit – but because it was not timely raised with an EEO counselor. He noted that EEO regulations generally require a complainant to bring claims of alleged discrimination to an EEO counselor's attention within 45 days of the discriminatory action in question. In this case, the time period between the denial of the request and the counselor contact far exceeded 45 days. The judge therefore dismissed the complaint for untimeliness without considering the merits of the accommodation claim.

The complainant had argued that the violation was continuing in nature – *i.e.*, it occurred each Sunday she had to work – and was therefore not untimely. The judge, however, disagreed, noting that the denial of her accommodation request was a discrete act that occurred on August 26, 2003, and not thereafter. He further noted that on that date the complainant also had enough information under the "reasonable suspicion" standard to initiate the complaint process, even if she did not believe that she had enough evidence at that point to prove her claim. Under this standard, the 45-day clock starts ticking as soon as the individual has a "reasonable suspicion" that discrimination occurred, despite the lack of supportive facts and evidence to prove it. In this case, she obviously should have suspected religious discrimination on the day she learned that her request for religious accommodation was denied.

## VII

### *SOLICITING STATEMENTS FOR USE IN DEFENDING AGAINST SUBORDINATE'S EEO CLAIM FOUND TO BE RETALIATORY*

Complainant alleged that she was subjected to reprisal discrimination when a supervisor [hereinafter RMO] sent an e-mail to all employees in his section asking them for statements he could use to defend against an EEO complaint she had filed against him. Another supervisor in the same section testified that she believes the RMO sent out the e-mail because he felt that the EEO complaint was an assault on his character and work performance, and he felt like he had to defend himself. The RMO failed to testify or provide a statement regarding the matter.

The Equal Employment Opportunity Commission and the courts have

stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. The anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse," which in the retaliation context means any adverse treatment reasonably likely to dissuade a reasonable person from engaging in protected activity.

After reviewing the facts of this case, the Commission found that the RMO's e-mail to several employees in the section was the type of conduct reasonably likely to deter individuals in that section from engaging in EEO protected activity. Therefore, the Commission found that the RMO's action constituted prohibited reprisal discrimination.

Note that the RMO neither threatened to take nor took an ultimate or significant adverse action against the employee involving the terms and conditions of her employment. He took no action at all against her. Nevertheless, the sending of the e-mail was reasonably likely to dissuade her and others from pursuing EEO protected activity, and that alone is sufficient to constitute prohibited retaliation.

## VIII

## *VA JOB TRAINING PROGRAM NOT CONSIDERED EMPLOYMENT FOR TITLE VII PURPOSES*

As the following case illustrates, not everyone working in a VA facility is an employee.

A temporary food service worker at a VA medical center claimed he was discriminated against because of his race when he was terminated following a verbal altercation with a VA shuttle bus driver. Upon receipt of his formal complaint, the VA's Office of Resolution Management conducted a procedural review to determine if the complaint was acceptable for investigation. Such a review does not consider the merits of the complaint (*i.e.*, whether or not discrimination occurred) but, rather, whether the complaint complies with all procedural prerequisites.

Based on that review, the ORM issued a decision dismissing the complaint for "failure to state a claim." Specifically, the decision concluded that the complainant was not a VA employee but, rather, a VA patient who was working in an unpaid position at the medical center as part of a vocational rehabilitation program. According to the "Agreement to Train" submitted by the medical center, the job training is a VA benefit to veterans with service-connected disabilities to enable them to obtain and maintain suitable employment. The program seeks to transition veterans from military service to civilian employment. Thus, as the complainant was not an employee or applicant for employment at the time, he lacked standing - *i.e.*, he was not eligible to utilize the federal sector EEO complaint process.

The complainant appealed ORM's decision to the Equal Employment Opportunity Commission, but the Commission upheld ORM's dismissal, stating that the circumstances surrounding his job training are not normally those associated with employment by the agency. Since this was a VA benefit program, the Commission correctly held that it had no jurisdiction over the matter.

## IX

### *REFERENCE CHECKING AS A HIRING TOOL*

*(The following article is reproduced with permission of "FEDmanager", a weekly e-mail newsletter for Federal executives, managers, and supervisors published by the Washington, D.C. law firm of Shaw, Bransford, Veilleux, and Roth, P.C.)*

Reference checking is a useful but underused tool in the federal hiring process. Communication with a candidate's reference should not be limited to confirming dates of employment and positions held. Ideally, it should include specific information that can form part of the overall assessment of a candidate's fitness for a position whenever possible. Failure to inquire about specific information concerning a candidate's past performance and abilities is a lost opportunity that may eventually lead to undesirable results.

Some federal managers are reluctant to discuss their experiences with a current or former employee. One concern seems to be fear of the potential for liability in a defamation or EEO suit. This concern has led many private sector employers to limit their references to confirming objectively verifiable information, such as dates of employment and salaries. However, federal employers do not have the same potential for exposure as private sector employers. Federal employers usually enjoy qualified immunity when checking references or providing references, as long as the discussion is limited in good faith to job-related matters in an effort to assess a candidate's fitness for the legitimate requirements of the contemplated position.

The key to checking a reference and to giving a reference is to keep the discussion specific, factual, and job-related. When giving a reference, you should stick to the facts. More specifically, you should stick to facts you personally observed. Aside from the obvious legal considerations, focusing the discussion on facts, rather than opinions, will allow prospective employers to form their own opinions. Similarly, when seeking a reference, you should ask probing questions about the work and work habits of the candidate. By drawing specific examples out of the former employer, you will obtain enough information to form your own judgment, rather than having to rely on the judgment of a former employer whose opinion may differ from your own.

Some federal managers are also concerned about the requirements of the

Privacy Act when it comes to employment references. The Privacy Act protects certain types of information that is stored in a system of records, but it does not protect most job-related information that is independently based on your own personal observations in the workplace. If you stick to the employee's performance and work habits, it will not be hard to stay on the right side of the line. For instance, it is never appropriate to discuss such things as disabilities, sick leave usage, religious practices, family circumstances, EEO complaints and other matters that are not strictly related to job requirements. In contrast, it is appropriate to discuss an employee's performance, without speculating as to the cause of any performance deficiencies. Appropriate subjects also include: the quality of an employee's work; the depth of an employee's knowledge of a subject matter; an employee's job skills and expertise; the timeliness of an employee's work; and the extent of an employee's compliance with rules.

One other relevant consideration in giving references involves settlement agreements. If your agency has settled a case with a former employee, the settlement agreement may provide for a "clean record" or a neutral reference. You should get detailed guidance from Human Resources or your agency's attorneys on how to comply with any such agreements. Keep in mind that the terms of each settlement agreement may be unique, so you will need clear guidance on the requirements of each individual settlement agreement.

**X**

***ADA AMENDMENTS ACT OF 2008 EXPANDS THE SCOPE OF ADA COVERAGE***

By now, many of you have already learned of the significant new changes to the *Americans with Disabilities Act*. The ADA Amendments Act (ADAAA) will greatly expand coverage under the ADA for all cause of action arising on or after January 1, 2009. Managers, supervisors, and HR specialists need to become familiar with these changes, as the number of reasonable accommodation requests is likely to increase because of the expanded coverage afforded under the *ADAAA*.

The *ADAAA* came about as a result of Congressional dissatisfaction with several U.S. Supreme Court decisions that narrowly interpreted the *Americans with Disabilities Act* in a manner that made it difficult for individuals to prove that they had a disability, thereby denying them the opportunity for a reasonable workplace accommodation. The *ADAAA,* in essence, overturns those Supreme Court decisions and will usher in a new era in disability law that will likely result in much litigation that seeks to define the parameters of the new law.

Some of the highlights of the new law are as follows:

- The definition of disability must now be construed in favor of

broad coverage. Hence, the definition of "substantially limits", with regard to major life activities, must be changed, as Congress considered EEOC's current regulatory definition too restrictive. Congress delegated to the EEOC the task of coming up with a new definition. It will be several months, at least, before the Commission issues new regulations defining this term.

- An impairment that is episodic or in remission will be a disability if it substantially limits a major life activity when active.

- Disability determinations must now be made <u>without</u> considering mitigating measures, such as medication, hearing aids, prosthetics, medical supplies, appliances, low vision devices, etc. The only exception is ordinary eyeglasses and contact lenses.

- The ameliorative effects of assistive technologies, reasonable accommodations, learned behaviors, auxiliary services, *etc.* may <u>not</u> be considered in determining if an impairment substantially limits a major life activity.

- The definition of "major life activities" has been broadened to include the operation of major bodily functions, including the immune system; cell growth, digestive, bowel, and bladder functions; reproductive functions; *etc*. The definition also includes some activities previously excluded by some court decisions, such as lifting, concentrating, thinking, etc. The *ADAAA* contains a <u>nonexclusive</u> list of major life activities.

- The "regarded-as-disabled" definition has been broadened so that an impairment does not have to limit or be perceived to limit a major life activity in order for a person the meet the definition.

- The "regarded as having an impairment" definition does not apply to impairments that are transitory **<u>and</u>** minor (note the word "and"). Transitory means an actual or expected duration of six months or less.

- Employers need not provide a reasonable accommodation to an individual who is "regarded as" disabled.

These changes will have a dramatic impact on the handling of reasonable accommodation requests by employers <u>for causes of action arising as of January 1, 2009</u> (for example: denial of an accommodation request, where the denial takes place on or after January 1st, will be governed by the new law.) In many cases, employers will simply have to assume that an employee's impairment, if supported by medical evidence, qualifies as a disability under the *ADAAA* if the employee re-

quests a reasonable accommodation. For now, until EEOC's future regulations and case law provide more clarity, the focus should be on the accommodation request itself rather than whether the person requesting the accommodation meets the definition of "individual with a disability."

Now more than ever HR specialists, managers, and others involved in the reasonable accommodation process should always seek the advice of a Regional Counsel attorney when confronted with a reasonable accommodation request.

## Cumulative Index

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