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

FROM THE ASSOCIATE 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 disability claims, veterans' preference and nonveterans, union activity *vs*. protected activity, "post-offer" medical exams, sexual harassment, nurse promotions, and "qualified" *vs*. "best qualified". Also in this issue is a Q & A on reprisal in the Federal sector.

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.

KAREN CLEGG

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I

SUPERVISOR'S KNOWLEDGE OF COMPLAINANT'S DISABILITY NOT SHOWN

The following case illustrates why some complainants are unsuccessful in proving that a personnel action was due to their disability.

The complainant, a GS-12 IT Specialist, claimed disability discrimination in connection with a decision by his supervisor not to reassign him to an Information Security Officer (ISO) position. At the time, he had a 70% service-connected disability rating issued by the Department of Veterans Affairs for Post Traumatic Stress Syndrome (PTSD). The EEOC administrative judge hearing his case assumed for the sake of argument that the 70% disability rating from the VA was sufficient to show that he was a qualified individual with a disability.[1]

Nevertheless, the judge found that the complainant was unable to show that the reassignment decision was motivated by his disability. The complainant claimed that his supervisor knew of his PTSD condition because he advised the supervisor of the condition, and because information about his condition is included in his medical record maintained at the medical center where he worked. The supervisor denied knowledge of the condition, stating that the complainant only told her on one occasion that he had a "disability", but never indicated what the disability was, and she never asked him for details. The judge found the supervisor's testimony on this point credible.

As for the complainant's medical record maintained at the facility, the supervisor testified that because of strict privacy rules she has no access to such records. The judge likewise found her testimony on this point credible, and the complainant offered no evidence to show that she had improperly accessed his medical record. Absent evidence of awareness by the supervisor of the specific nature of the complainant's' disability, the complainant was unable to prove even a *prima facie* case of disability discrimination.

The facts of this case are not unusual. Many employees or applicants for employment base their disability discrimination claim, at least in part, on the fact that the responsible management official "must have known" of the disability because "it's in my medical record." The assumption, of course, is that management officials at VA medical centers have access to veterans' and/or employees' medical records and consult them regularly before making personnel decisions. Such an assumption, of course, is erroneous, as medical information is strictly confidential. Indeed, unauthorized access to another individual's medical infor-

[1] A VA disability rating is not sufficient, by itself, to prove that a veteran is an individual with a disability for purposes of *The Rehabilitation Act* because VA disability ratings take into account a number of factors not relevant to the definition of a disability under the Act.

mation is a violation of *The Rehabilitations Act* as well as other statutes relating to medical privacy and could result in severe punishment.

For similar reasons, some disability complaints fail because complainants neglect to present evidence of their disability, thinking that the information is in their medical record maintained at the medical center and, therefore, "the VA is already aware of it". Once again, this assumption is erroneous, as the agency's EEO investigator is not permitted to access an employee's or veteran's medical record without explicit written authorization from the employee or veteran. It is the complainant's responsibility to present or otherwise make available evidence of a disability.

II

NON-VETERANS NOT A PROTECTED GROUP UNDER CIVIL RIGHTS LAWS

The complainant, who is not a veteran, applied under a vacancy announcement for a position as a Veterans Service Representative. The announcement indicated that the area of consideration was limited to "status candidates" (those with "competitive" civil service status by virtue of current or prior federal employment in career-type appointments), and to veterans who qualified under one of several noncompetitive special appointing authorities, and also to veterans qualifying under the Veterans Employment Opportunities Act (VEOA).

As the complainant did not have competitive status and was not a veteran, she was not eligible for referral under the terms of the announcement. Hence, her name was not placed on any of the referral certificates submitted to the selecting official. A total of 56 applicants were referred on several different certificates, and 20 other candidates were determined to be either not qualified or not eligible. Upon notification of her nonreferral, the complainant filed an EEO complaint alleging, among other things, that she was wrongly denied the position because of her status as a nonveteran.

After reviewing her claim, an EEOC judge ruled against her, noting that being a non-veteran is not a protected group under the civil rights statutes that the Commission enforces.

III

UNION ACTIVITY NOT "PROTECTED ACTIVITY" FOR PURPOSES OF A TITLE VII REPRISAL CLAIM

As the following case illustrates, a supervisor's animus toward an individual because of his or her union activities is generally not enough, by itself, to show unlawful retaliation under Title VII.

The complainant, a Restoration Technician, served as a union Vice-

President and later as President. A significant part of his technician duties involved scheduling patients for prosthetics services. Although his supervisors directed him to schedule at least two patients per week, and despite constant reminding, he regularly failed to do so. Following an AWOL incident, management issued him a 10-day suspension for the AWOL and the failure to schedule. He responded by filing a retaliation complaint alleging that the suspension was an act of reprisal against him because of his prior EEO activity.

After reviewing the case, an EEOC administrative judge ruled in favor of the Department. Although the complainant had previously filed an EEO complaint that was adjudicated only four months before the suspension, thus establishing a prima facie case, management articulated legitimate non-retaliatory reasons for issuing the suspension. Hence, in order to prevail, the complainant had to prove by a preponderance of the evidence that the reasons articulated for the suspension were a pretext for retaliation.

The only evidence of pretext he presented was a statement allegedly made by the disciplining official that "[the complainant] is President of AFGE Local 2778, and forever operates with contempt toward authority…." The EEOC judge noted -- correctly -- that such a statement, if made, certainly proves animus toward the complainant because of his union activities, but does not prove that the animus was also due to the complainant's EEO activities. The complainant presented no credible evidence that he engaged in EEO protected activity in connection with his union activities, such as advising and/or representing union members in EEO complaints, protesting to management about matters relating to employment discrimination, *etc*. Absent such evidence, the complainant's union activity, by itself, is not EEO protected activity. Hence, even if management retaliated against him because of his union activities, such retaliation is not prohibited by Title VII of the *Civil Rights Act of 1964*, or other civil rights laws enforced by the Equal Employment Opportunity Commission.[2]

IV

"POST-OFFER" MEDICAL EXAMINATION DID NOT VIOLATE *THE REHABILITATION ACT*

The following case is fairly typical of disability discrimination claims filed by VA employees who complain about job disqualifications resulting from post-offer pre-employment medical examinations. It also explains why most such complaints fail.

The complainant applied for a position as a supply technician at a VA medical center. The vacancy announcement notified applicants that the selectee would be required to meet the physical

[2] Neither OEDCA nor the EEOC has jurisdiction to determine whether the suspension might constitute a prohibited personnel practice under the *Civil Service Reform Act of 1978*.

requirements of the position. The job in question entailed heavy lifting – considered an essential job function – of up to as much as 45 pounds. The complainant was selected and offered the position, subject to passing a physical examination conducted by the VA Employee Health Physician.

During the physical, the complainant disclosed that she had a back problem, was under the care of a physician, and could not lift more than 25 pounds. The examining physician asked the complainant to provide an evaluation from her physician. The private physician's evaluation confirmed the back problem, the lifting restriction of no more than 25 pounds, and also recommended against pushing items heavier than 25 pounds.. The examining physician disqualified the complainant for medical reasons. The Office of Human Resources subsequently notified her that the employment offer was being withdrawn because of the medical exam results. A discrimination complaint ensued, wherein the complainant alleged, among other things, that the withdrawal of the employment offer discriminated against her because of her disability.

After reviewing the facts, OEDCA found no violation of *The Rehabilitation Act* or *The Americans with Disabilities Act.* An employer is permitted to require post-offer medical examinations before the employee actually starts working, and an employer may condition the offer of employment on the results of the examination, providing all entering employees in the same job category face similar requirements regardless of disability. If the employer later withdraws the offer of employment because medical examination shows that the individual does not meet employment criteria, it must show that the criteria are job related and consistent with business necessity.

In this case, management showed that the position in question had, as an essential job function, the ability to lift up to 45 pounds, a requirement that could not be accommodated, short of having other employees perform this essential function for the complainant.

Moreover, OEDCA concluded that the complainant was not even an individual with a disability because her 25 pound lifting and pushing restriction is not substantially limiting. In order for a medical condition – in this case back problems – to constitute a disability, the condition must substantially limit a major life activity. The courts and the EEOC have consistently held that 25-pound lifting restrictions do not substantially limit the ability to lift.

Accordingly, the back condition was not an actual disability and, furthermore, management did not perceive the complainant as disabled. It merely perceived her as having a medical condition that prevented her from doing a specific job that had a specific lifting requirement. Hence the agency was under no legal obligation to accommodate her condition.

V

CLAIM BY HARASSER THAT HE WAS THE VICTIM OF HARASSMENT DOESN'T FLY

As the following case illustrates, employees who respond to charges of sexual harassment by claiming that the victims harassed them rarely prevail.

In this case, the complainant, a male Program Clerk, returned from vacation to learn that he had been moved from the 3rd floor where he had been working to the first floor. When he inquired as to the reason for the move, he was advised that a female co-worker had accused him of sexual harassment. In response, the complaint told his supervisor that it was the female co-worker who had actually been sexually harassing him.

According to the complainant, the co-worker related to him on one occasion that she had a man over her house who "could not perform" so she kicked him out and stated that she "needed someone who could do the job." When he told her she needed "a real man", she told him that he didn't like Black women and "couldn't handle a Black woman." On another occasion, he claimed that the co-worker entered his work area wearing tight-fitting jeans and rubbing her buttock, and then stated, "I know it's nice, but you can't have it." On another occasion, he claims she rubbed her breasts against him. The complainant admits that no one witnessed these events and that he never told anyone about them or complained about them until he learned of her sexual harassment complaint against him.

Given these facts, an EEOC judge ruled in the Department's favor, finding that, even if the claimed events occurred, management would not be liable because he was unable to show that management knew of the claimed harassment and failed to take prompt, effective, and appropriate action. In reaching this decision, the judge assumed, solely for argument's sake, that these events occurred exactly as alleged by the complainant. However, the complainant's failure to report these events or complain about them until a sexual harassment claim was lodged against him also detracts from his credibility and casts doubt on his claims.

The lesson here for employees who truly believe that they have been harassed is to report it sooner rather than later. Obviously, any such claim made in response to an adverse action or a harassment allegation made against them will inevitably raise questions regarding their credibility and motivation for filing their claim.

VI

"QUALIFIED", "WELL QUALIFIED", AND "HIGHLY QUALIFIED" DOES NOT NECESSARILY MEAN "BEST QUALIFIED"

The following case is typical of many

cases involving nonselections and nonpromotions wherein complainants believe they should have been selected because they were "qualified", "well qualified", or "highly qualified."

The complainant, a Rehabilitation Technician, applied but was not selected for the position of Addiction Therapist. Her qualifications included a master's Degree in Psychology, a license in Marriage and Family, and eight years of experience with inpatients, outpatients, and patients with a dual diagnosis (*i.e.*, both chemical and alcohol dependency). Believing she was at least as qualified as the selectee, and that she could have performed the duties of the position had she been chosen, she filed an EEO complaint alleging race, national origin, and gender discrimination.

After reviewing the agency's investigative file, an EEOC administrative judge found in favor of the agency. The judge was not persuaded by the complainant's claim that she should have been chosen because she was qualified for and could have performed the duties of the position. Although she was indeed qualified, the judge agreed with the selecting official that the selectee appeared <u>better</u> qualified because of his certification as a chemical dependency counselor, his prior experience in chemical dependency treatment programs, and his superior performance during the interview.

Even assuming the complainant was "as qualified" as the selectee, an agency has discretion to choose from among equally qualified candidates, so long as the decision is not based on discriminatory factors. The complainant presented no evidence that her gender, race, or national origin played any role in the decision. To do so, on the basis of comparative qualifications, she would have had to show that her qualifications were <u>plainly superior</u> to those of the selectee.

As the EEOC judge noted, she did not do that in this case. Indeed, it was the selectee's qualifications that were plainly superior, given his certification in chemical dependency counseling and his prior experience in addiction therapy. While qualified for this position, the complainant was not the best-qualified candidate, and the fact that she could have done the job if chosen is irrelevant. All of the applicants referred to the selecting official as "qualified" could have done the job – that is why they were referred as qualified. The selecting official was required to choose the best-qualified candidate, *i.e.*, the person he thought could best do the job. The EEOC judge concluded that the best-qualified person was, in fact, chosen. Hence, the complainant's discrimination claim failed.

VII

EXCEEDING NURSE PERFORMANCE STANDARDS FOR NURSE I GRADE NOT SUFFICIENT FOR PROMOTION TO THE NURSE II IN GRADE.

A claim often raised in complaints involving nurse promotions is that better-than-average performance in a nurse's current grade should be sufficient to permit the nurse to be promoted to the next higher grade. As seen in the following case, much more is required for promotion.

The complainant was employed as a Nurse I in an emergency room walk-in clinic. A Nurse Professional Standards Board ("Board") convened to determine if he was qualified for promotion to the Nurse II grade. His most recent proficiency report (*i.e.*, performance appraisal) rated him as "Highly Satisfactory." Following a review of his personnel record and proficiency report, the Board notified him that he failed to meet the criteria (commonly referred to as "dimensions") required for promotion to Level II.

Dissatisfied with the Board's judgment concerning his qualifications, he filed an EEO complaint alleging reprisal and gender discrimination. His argument, in essence, was that since he was a charge nurse and had exceeded the performance standards for his Level I grade by receiving a "Highly Satisfactory" proficiency report, he was therefore qualified for promotion to Level II. An EEOC judge disagreed, and so did OEDCA.

The criteria and procedures for promoting registered nurses in the VA are unlike those utilized in typical competitive or career-ladder (*i.e.*, non-competitive) promotion actions in the Federal personnel system. Unlike competitive promotion actions, nurses may be promoted to certain grades without the need for a vacancy, as the grades are linked not to a specific position but rather, to the individual's qualifications, performance, and scope of responsibilities. Moreover, unlike career-ladder promotions, nurses are not automatically entitled to promotion merely because of satisfactory or better-than-satisfactory performance. Instead, nurses must satisfy specific professional, performance, and educational criteria for the next higher grade, as stated in the *VA Nurse Qualification Standards*. These standards generally require evidence of nursing leadership and problem solving in a number of areas. Thus, it is not uncommon for nurses to be passed-over for promotion, despite a record of above average or even outstanding performance.

Evidence that the nurse has met the promotion criteria is found in the nurse's annual proficiency report prepared by the nurse's supervisor as well as other documents contained in his or her official personnel folder (OPF).[3] The proficiency report summarizes the nurse's scope of responsibility, performance, and achievements for the previous year.

If the Board concludes, based on a review of the proficiency report and

[3] The nurse does not actually appear before the Board. The Board's decision is based solely on documents pertaining to the candidate's qualifications, performance, achievements, and scope of responsibility.

other documents, that the nurse has not met the criteria, it will recommend that the nurse not be promoted. If a nurse is not promoted, further promotion review will normally take place at intervals of 1 to 3 years, at the discretion of the local Board. In the interim, however, the nurse, may request the Board to reconsider a decision if important information was not included in the materials presented to the Board.

In the instant case, the Board determined that the complainant failed to meet five of the nine dimensions (practice, performance, ethics, collaboration, and research) required for promotion. Board members provided specific examples of the types of experience and/or activities that would satisfy each of these criteria and testified that the complainant's proficiency report did not address these areas. In general, despite the fact that the complainant had served as a charge nurse and had received better than average performance ratings, his record did not show evidence of the type of nursing leadership and problem solving activities and accomplishments needed to satisfy five of the dimensions required for promotion to Level II.

VIII

EEOC OFFICIAL ANSWERS QUESTIONS ABOUT REPRISAL

Q: **Does fear of retaliation complaints hamper effective supervision.**

A: At EEOC we engage in a lot of training and outreach to share with managers and supervisors what their rights and responsibilities are under antidiscrimination laws. Well-trained supervisors are not fearful of complaints. Those who are fearful are those who really don't understand the process and the laws.

Q: **Does the large number of cases mean that retaliation for EEO activity is actually a widespread problem in the federal government, or is there another likely explanation?**

A: The numbers speak for themselves, but you have to read the cases to get a feel for what is really going on. I remember one recent case in which a supervisor, when asked to explain why he hadn't referred an employee for management opportunities, said that the employee's previous EEO complaint was the "straw that broke the camel's back." One supervisor specifically rated an employee's performance lower because he had filed an EEO complaint. In another decision, a letter of termination gave, as one reason for firing the employee, the employee's EEO complaint activity. The reality is that supervisors who are not properly trained may become angry and retaliate against someone who has filed a complaint or contacted an EEO counselor.

Q: **As you have worked with agencies, have you seen any best practices (training or other programs) that were effective in stemming the tide of retaliation complaints?**

A: The most effective means of stopping all forms of unlawful workplace discrimination, including retaliation, is simply training, training, training. Rather than being fearful of taking action, well-trained federal supervisors are actually more decisive in addressing workplace problems. My colleague Dexter Brooks is our national federal sector training coordinator at EEOC, and he is often contacted to develop and deliver supervisory courses. He can be reached at dexter.brooks@eeoc.gov.

Q: **Do you have specific suggestions on what agencies can do to limit these complaints, aside from training?**

A: Better communication between supervisors and employees. Many more people contact an EEO counselor over the course of a year than actually file formal complaints. The EEO counselor makes an informal inquiry, gets an explanation from the supervisor for an action, and the explanation satisfies the employee. This tells me that a better trained supervisor who clearly communicates to employees and applicants really will reduce the number of complaints filed.

Q: **Can retaliation complaints be avoided with better management, or are they simply inevitable?**

A: Many cases of actual retaliation stem from situations in which an employee files a complaint of discrimination which turns out to be without merit. The supervisor involved, however, angered at having been accused of discrimination, retaliates against the employee. Well-trained supervisors understand that the discrimination complaint process is available to all federal employees and applicants, and they do not take it personally.

Q: **Do you expect that Burlington will lead to more retaliation complaints -- or more successful complaints -- in the federal sector as many practitioners expect in the private sector?**

A: If you compare the standard given to us by the Supreme Court in Burlington to the standard used by the EEOC in our federal sector cases for years now, you will see that they are strikingly similar. Based on this comparison, I personally don't see any reason to expect a larger number of complaints in the federal workplace. But even if there is no appreciable increase in complaints of retaliation as a result of Burlington, we must still acknowledge that retaliation is the most widely perceived basis of unlawful discrimination in the federal workplace today.

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Legal Advice: X, 3, p. 9-10
Legal Representation: *(See: Representation)*
Licensure (See also: Nurses: Licensure): I, 1, p. 2; VII, 2, p. 8-10; X, 3, p. 2-3

M
Manipulation (of the promotion/selection/hiring process): (*See*: Promotions/Selections/Hiring:
Manipulation of the Process)
Mediation: (*See: ADR)*
Medical Condition/Impairment: (*See: Disability)*
Medical Examinations/Inquiries: (*See: Disability: Medical Examinations/Inquiries)*
Medical Information: (*See: Disability: Medical Records)*
Mental Impairment: (*See: Disability: Type of)*
Merit Promotion Files: (*see: Promotions)*
Merit Systems Protection Board (appeals to): (*See: Election of Remedies)*
Mistake of Fact: (*See: Settlement Agreements)*
Mixed Case Complaint (election to pursue): (*See: Election of Remedies)*
Moot(ness): IV, 4, p. 10-11
MSPB Appeals: (*See: Election of Remedies)*
Multiple Ailments: (*See: Disability: Type of)*

N
National Origin: V, 4, p. 12-15 ; VI, 2, p. 2-3; XI, 1, p. 6-7; XI, 3, p. 2-3
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Non-Sexual Harassment: (*See: Harassment)*
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Nurses:
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Promotions (non-competitive): I, 1, p. 16; IV, 4, p. 2-3; VI, 2, p. 6-8
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Performance (as justification for): IV, 4, p. 2-3; VI, 2, p. 6-8
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O
Obesity: (*See: Disability: Type of)*
"Observably Superior": (*See: "Plainly Superior")*
Offensive Remarks: (*See: Comments)*
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Official Time (to prepare for/participate in EEO process): VIII, 2, pp. 4-5 and 9-10; IX, 2, p. 7-8
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"Opposition" (activity opposing discrimination): (*See: Reprisal: Protected EEO Activity)*
Oral Agreements: (*See: Settlement Agreements)*
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OWCP Clearances (to return to full duty): (*See: Disability: Accommodation)*

P
Paranoid Schizophrenia: (*See: Disability: Type of)*
Parking Spaces (*See: Disability: Accommodation*)
Participation (in EEO complaint process): (*See: Reprisal: Protected EEO Activity)*
Performance (removal/termination because of): (*See: Removal Actions)*
Performance Appraisals:
Pretext:
Found:
Not Found: XI, 2, p. 3-4
Reason(s) articulated for --
Burden of articulation met (specific reason given for nonpromotion or nonselection), XI, 2, p. 3-4
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
Found not true (see Pretext Found)
Found True (see Pretext Not Found)
Use of (in promotion/selection actions): II, 3, p. 3
Performance Problems (need to document): V, 3, pp. 8-10 and 10-12; VI, 4, pp. 2-3 and 5-6
Physical Impairment: (*See: Disability: Type of)*
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)*
Privacy (right to): X, 1, p. 9-11 (urine screening)
Problem Employees: V, 3, pp. 8-10 and 10-12; VI, 4, p. 5-6; VII, 1, p. 9-10 (article); VII, 2, p. 3-4 (*See also: Performance Problems)*
Procedural Dismissals: (*See specific ground(s) for dismissal – e.g., failure to state a claim, untimeliness, etc.)*
Promotions/Selections/Hiring:
Affirmative Action Plans (use of): II, 1, p. 7
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Documentation (need to retain): III, 4, p. 5-6; IV, 4, p. 4-5; V, 3, p. 8-10; VI, 1, p. 5-6; VI, 4, pp. 2-3 and 8-9; VIII, 4, p. 10-11; IX, 4, p. 4-5
Education: (*See: Qualifications: Education)*
Experience: (*See: Promotions/Selections/Hiring: Pretext: Evidence)*
Innocence of Decision Maker: V, 3, p. 2-3;
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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Nurses (non-competitive promotions): (*See: Nurses: Promotions*)
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
Interview Not Granted as: II, 1, p. 7-8
Opinion (of complainant as to his/her qualifications as): (*See: Qualifications: Opinion)*
Mistakes: V, 1, p. 5-6; X, 1, p. 8-9
Performance Appraisals: V, 1, p. 4-5; VI, 4, p. 2-3
Priority Consideration (use of as): (*See:* Promotions/Selections/Hiring: Priority Consideration)
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Seniority: IV, 3, p. 9-11; V, 3, p. 8-10
Subjective Factors (use of by selecting official): IV, 3, P. 9-11
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; **XII,1, p.6-7**
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; **XII, 1, p.9-10**
- "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)*
EEOC Compliance Manual (Section 8): I, 1, p. 20
Elements of Claim: I, 1, p. 20; II, 4, p. 7-8; IV, 4, p. 5-6; V, 4, p. 3-4; VI, 2, p. 5-6; VIII, 3, p. 3-5, X, 2, p. 2
Evidence of: I, 1, p. 13, 15, and 18: II, 2, pp. 3, 6, and 8-9; II, 3, p. 5; III, 2, p. 4; IX, 1, p. 2-3; IX, 4, p. 4-5
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
Inquiries about how to File an EEO Complaint**:** X, 4, p. 6-8
OSHA Complaints (not protected activity): X, 4, p. 5-6
Participation Type Activity: VIII, 1, p. 6-7; X, 1, p. 2; : X, 4, p. 5-6
RMO (responsible management official, named as): VIII, 1, p. 6-7
Threat to File Lawsuit (made by supervisor): VII, 3, p. 5-6
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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"Ultimate" Action: I, 1, p. 20
"Whistle-Blowing" Activities (reprisal due to): III, 3, p. 6-7; X, 4, p. 5-6
Responsible Management Official: X, 3, p. 10-11 (article about)
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
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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
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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)*