OEDCA DIGEST

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Office of Employment Discrimination
Complaint Adjudication

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 in this issue include accommodation of disability-related absences, sexual harassment claims involving consensual relationships, retaliation resulting from inappropriate corrective action in sexual harassment complaints, *per se* retaliation, failure to consider an affirmative employment plan in a promotion action, and other frequently raised issues.

Also included is a discussion of EEOC's recently issued policy guidance on reasonable accommodation under the *Americans with Disabilities Act of 1990*, particularly with respect to the requirement to consider reassignment to a vacant position.

The *OEDCA Digest* is available on the World Wide Web at: *www.va.gov/orm*.

Charles R. Delobe

I

INVOLUNTARY REASSIGNMENT OF VICTIM OF SEXUAL HARASSMENT IN THE INTEREST OF "HARMONY AND PATIENT CARE" FOUND TO BE RETALIATION

The complainant filed a sexual harassment complaint that included an allegation that the decision to reassign her following the incident of harassment was an act of retaliation for reporting the incident. Following a hearing, an EEOC administrative judge recommended a finding of discrimination on both the sexual harassment and retaliation claims. OEDCA later adopted the administrative judge's recommended decision as the Department's final agency decision.

Following an incident in which the complainant was physically assaulted by a male co-worker in a linen room, management officials reassigned both individuals, rather than just the harasser. The complainant objected to the reassignment, preferring to remain in the familiar surroundings where she had worked since 1984.

The rationale given for reassigning the complainant was to ensure harmony on the ward and good patient care. According to one witness, the reassignment was necessary because of concern that friends of the harasser might subject the complainant to a hostile environment. The witness feared that the complainant's continued presence on the ward under such circumstances would cause problems and adversely impact the patient care environment.

However, the EEO manager at the facility had advised management that the facility's policy and past practice was not to reassign alleged victims of harassment against their will, and that doing so would be construed as punitive and retaliatory. Despite this advice, management reassigned the complainant, asserting that the reassignment did not result in any work-related harm, and that it was not punishment, as both the harasser and the complainant were being treated equally.

In its decision, OEDCA noted that the victim of harassment must not be required to take an involuntary transfer or reassignment, even when the avowed purpose is to further the employer's business objectives. Instead, it is the offending party that must bear the adverse effects resulting from the harassment.

Further, the complainant's reassignment, contrary to management's assertion, adversely impacted the complainant, was viewed by her as punitive, and was the type of response likely to deter a complainant from complaining about sexual harassment in the future. Management, in this case, did more than just fail to take appropriate action in response to a sexual harassment complaint. Instead, it penalized the complainant for complaining and, hence, retaliated against her.

II

FOOD SERVICE WORKER WHO WAS UNABLE TO LOAD TRAYS DUE TO BACK PROBLEMS WAS NOT A "QUALIFIED INDIVIDUAL WITH A

DISABILITY" UNDER THE REHABILITATION ACT

OEDCA adopted as its final agency decision an EEOC administrative judge's recommended decision that the Department did not discriminate against the complainant, a Food Service Worker, when it reassigned her to a lower-graded clerical position because she was unable to perform her duties due to a back injury.

The complainant's food service duties included, among other things, loading and unloading trays from a food cart and pushing the food cart when delivering the food trays to patients. The job required frequent bending and stooping when loading and unloading the trays, and lifting and pushing objects that weigh 30 pounds or more.

The complainant alleged that she was unable to load and unload trays because she had recently reinjured her back on the job. The injury prompted her physician to impose a ten-pound lifting restriction, with no bending or stooping. The complainant filed an OWCP claim that was denied, as there was no evidence that the injury was job-related. Thereafter, management officials refused her request for a "loader" to help her load and unload trays, stating that they had no obligation to accommodate her back condition because the injury to her back was not job-related. They did, however, offer, and the complainant accepted, a reassignment to a vacant, clerical position for which she was qualified.

OEDCA found, as did the administrative judge, that while the complainant's ability to perform basic manual tasks was significantly limited by her back injury, she was not "an individual with a disability." Because her physician stated that he would be reevaluating her condition at eight-week intervals, her condition was considered temporary rather than permanent. Temporary medical conditions are not disabilities under the *Rehabilitation Act*.

Furthermore, even assuming that she was disabled, the complainant failed to prove that she was a "qualified individual with a disability," as she failed to demonstrate that she could perform the essential functions of the Food Service Worker position. The Department presented persuasive evidence that loading and unloading trays, as well as lifting and pushing other heavy objects, are essential functions of the position. The complainant's bending, stooping, and lifting restrictions prevented her from performing these essential tasks.

Although the complainant requested accommodation (*i.e.,* a "loader" to help her with the food trays), management noted that "loader" positions had been eliminated at that facility. An employer is not required to hire or assign other employees to perform the essential functions of a disabled employee's position; nor is an employer required to decrease performance standards.

Although management prevailed in this case, it was not because the responsible management officials were cognizant of their legal obligations under the Rehabilitation Act. In claiming that accommodation was not required absent a job-related injury, they were clearly confusing the reasonable accom-

modation requirement imposed by law with rules or policy at that facility pertaining to temporary, light-duty assignments for employees with job-related injuries. The legal duty to accommodate is not contingent on whether a disability is "job related." Any "qualified individual with a disability", regardless of the cause of the disability, is entitled to reasonable accommodation, provided the accommodation does not create an undue hardship on the employer. In this case, even if the complainant were a "qualified individual with a disability," the accommodation she requested would have created such a hardship.

III

REASONABLE ACCOMMODATION REQUIRES AN EMPLOYER TO EXCUSE DISABILITY-RELATED ABSENCES UNLESS SUCH ABSENCES CAUSE AN UNDUE HARDSHIP

OEDCA adopted as the Department's final agency decision an EEOC administrative judge's recommended finding that a disabled employee was discriminated against when management officials notified her that she would be carried as absent without leave (AWOL) following a three-and-a-half month absence from work due to her disability (degenerative disc).

The evidence showed that the complainant's physician had indicated on March 7th that she would need at least one additional month before being able to return to work. On March 18th, management notified her that she would be carried as AWOL, retroactive to March 10th, for failing to provide adequate documentation regarding her inability to perform the functions of her job. On March 19th, the day following the issuance of the AWOL notice, the facility inexplicably approved the complainant's request to participate in the Voluntary Leave Transfer Program. However, she apparently did not receive any donations of leave and remained in an AWOL status.

On March 25th, her physician submitted a letter describing her disability and indicating that she would need additional time off to undertake a course of physical therapy. The letter failed to specify a return-to-duty date, and there is no evidence in the record that management officials sought clarification of that point.

The evidence also showed that her supervisor had indicated that she could have accommodated the complainant through April 6th by having a subordinate employee fill in for her. However, if she were to remain out for longer than one month, he would need "to take other steps." He failed, however, to specify what those other steps might be.

The administrative judge found, and OEDCA agreed, that the complainant was a "qualified individual with a disability" and that management officials failed to present any evidence that the absence requested would have created an undue hardship on its operations. On the contrary, her supervisor stated that absences could have been accommodated for a specified period; and he presented no evidence that absences after that period would have presented an undue hardship. Absent

such evidence, management failed to prove that it could not accommodate the complainant's need for time off.

While an employer clearly has a legitimate interest in having its employees in regular attendance, it cannot use an employee's disability-related absences to claim that the employee is not a "qualified individual with a disability," and hence not eligible for accommodation. If the employee is an otherwise qualified individual with a disability, the employer must prove that tolerating the disability-related absences would create an undue hardship. Failure to do so, as in this case, will result in liability.

IV

CONSENSUAL SEXUAL RELATIONSHIP BETWEEN A COMPLAINANT'S SPOUSE AND A THIRD PARTY, WHERE ALL THREE PARTIES WORK AT THE SAME FACILITY, NOT SEXUAL HARASSMENT

An employee filed a complaint alleging, in part, that she was forced to resign because of sexual harassment after learning that her husband and her immediate supervisor were involved in a consensual, sexual relationship. She claimed that the strain caused by the relationship resulted in deterioration in her relationships with co-workers, such that she was no longer able to continue working at the facility. She resigned ten days after learning of the relationship. Management officials counseled her supervisor concerning the matter.

In its final agency decision, OEDCA adopted an administrative judge's recommended decision finding that the complainant's resignation was not due to sexual harassment. The supervisor's conduct was clearly inappropriate. However, it is equally clear that such conduct does not constitute sexual harassment under Title VII of the *Civil Rights Act of 1964*. Moreover, even assuming for the sake of argument that her supervisor's conduct could be considered abusive and hostile, the conduct was not directed at the complainant because of her sex.

The Equal Employment Opportunity Commission, in similar factual circumstances, has held that a consensual, sexual relationship between the spouse of a federal employee and a third party, where all three parties are employed by the same federal agency, does not constitute sexual harassment because the conduct in question is not directed against the employee because of his or her sex. Absent such a showing, there can be no Title VII violation.

V

FAILURE TO TAKE APPROPRIATE CORRECTIVE ACTION IN A SEXUAL HARASSMENT CASE MAY RESULT IN A FINDING OF RETALIATION

A female employee was sexually assaulted, but did not report it immediately for fear she might be reassigned. Persuasive evidence in the record corroborated her version of the incident. Thereafter, the assailant continued to harass her for several weeks during visits to her work area. The harassment included sexual

propositions and comments, and unwelcome sexual touching. The complainant confided in her co-workers who encouraged her to report the incident. Approximately seven weeks after the first incident, she reported the matter to her supervisor, who in turn notified his supervisor.

On the day following her report, the harasser's supervisors ordered him to have no further contact with the complainant, and altered his assignments to prevent him from visiting her work area. Thereafter, the complainant reported no further contacts with the harasser.

Management subsequently ordered an administrative investigation of the matter. Because the investigation report was vague as to its findings, and included inflammatory and defamatory comments concerning the complainant - essentially blaming her for being molested - her supervisor demanded a second investigation. The supervisor argued that the tone of the report would only deter future victims from reporting incidents of sexual abuse.

In response, management convened a second panel that reinvestigated the matter. The second panel later issued a report finding that the sexual assault occurred as alleged and recommending that the harasser be given a written reprimand. However, the report further found that the complainant was contributing to a hostile environment by discussing her personal problems with co-workers, including her relationship with her spouse. Finally, the report noted that she violated the facility's sexual harassment policy by not reporting the matter sooner. The panel recommended that she be referred to the facility's Employee Assistance Program (EAP) for counseling to help her "separate personal problems from the work site environment." In addition, the panel recommended that management take "appropriate action" against her because of her "violation" of the sexual harassment policy regarding timely reporting of incidents.

The facility director approved the second panel's findings and recommendations, adding that both employees were to receive counseling on "appropriate behavior in the workplace." The facility eventually proposed a reprimand for the harasser. In accordance with the director's instruction, the complainant's supervisor reluctantly forwarded the matter to the human resources office for "appropriate action" against the complainant because of her delay in reporting the harassment. That office, however, wisely declined to recommend discipline. The supervisor also counseled her as directed. The complainant refused to seek assistance from the EAP.

In its final decision, OEDCA found that the complainant was sexually harassed, as alleged. Moreover, it found that management was liable for the harassment because, although it acted promptly, some of the actions taken were not only inappropriate, but also retaliatory. Placing partial blame on the complainant for what happened to her, ordering her to undergo EAP counseling for behavior that was not of a sexual nature, and recommending that she be disciplined were actions likely to deter her and others from reporting sexual

harassment in the future. Unlawful retaliation is not limited to situations involving ultimate or significant adverse actions. It includes any conduct or action likely to have a chilling effect on an employee's right to complain about discrimination. In this case, the employee delayed reporting the matter for fear of being reassigned. Although the retaliation took a different form, her fears were not unfounded.

VI

COMPLAINANT'S EVIDENCE NOT SUFFICIENT TO SHOW PRETEXT

The complainant, employed as a GS-5 nursing assistant, applied but was not selected for a position as GS-7 Labor Relations Specialist. She subsequently filed a complaint alleging that her nonselection was due to her race (African-American) and gender. Following a hearing, an EEOC administrative judge recommended that the Department issue a final decision finding no discrimination. After reviewing the entire record, OEDCA accepted the judge's recommendation and issued a final decision finding that the complainant's nonselection was due to the selectee's qualifications rather than her race or gender.

The record indicates that both applicants were well qualified by virtue of their experience as union officials. Although the complainant had more years of experience than the selectee as a union officer, the selecting official found the quality of the selectee's experience to be superior. He cited several specific factors that favored the selectee, including, but not limited to, the selectee's non-confrontational approach to dispute resolution, his ability to see both sides of an issue and compromise, his knowledge of case law, and his ability to research issues.

The complainant argued that those reasons were merely a pretext to mask unlawful discrimination. Although she presented no evidence disputing the quality of the selectee's experience, she claimed that there were other facts suggesting a discriminatory motive. Specifically, she cited her greater number of years of experience, not being granted an interview, and previously being passed over twice for a similar position. She also pointed to the selecting official's failure to consider the facility's affirmative employment plan that showed a conspicuous absence of women and minorities in higher level positions.

OEDCA, as did EEOC's administrative judge, concluded that these facts were not evidence of pretext. More years of experience does not necessarily render one applicant better qualified than another, especially when the quality of another applicant's experience is superior. Likewise, previous non-selections are not evidence of discrimination with respect to a current selection action. Instead, they are merely evidence that the complainant was not considered the best-qualified applicant for those positions *vis-à-vis* the other applicants.

On the question of interviews, the selecting official explained that he was already familiar with the applicants and their work, and had reviewed their

official personnel folders and work products (*e.g.,* negotiated agreements). Hence, interviews were not necessary. His decision not to conduct interviews does not suggest a discriminatory motive.

Finally, the complainant's reliance on the facility's affirmative employment plan is misplaced. Such plans do not require selecting officials to hire or select applicants according to the numbers shown in the plan. Instead, they merely indicate where an employer should target its recruitment efforts to increase pools of eligible applicants. A selecting official's failure to consider such plans does not violate Title VII of the *Civil Rights Act*, and is not evidence of discrimination.

VII

***PER SE* RETALIATION FOUND WHERE SUPERVISOR REQUESTED COMPLAINANT TO WRITE AN EXCULPATORY STATEMENT**

The complainant contacted an EEO counselor to complain of disability discrimination. He identified his assistant service chief as the official responsible for the discrimination. After learning of the counselor contact, the assistant service chief (hereinafter referred to as the responsible management official, or RMO) called the complainant into a meeting to discuss the complaint.

According to the complainant, the meeting lasted for over an hour, during which time the RMO reminded him of all the things he (the RMO) had done for the complainant. Specifically, he reminded the complainant that he was homeless, without a job, and lacking job experience when the RMO hired him; that the RMO created the complainant's position for him and could take it away; and that if the complainant lost his job, he could not live for very long on his savings. The RMO then asked the complainant to return to the EEO counselor, withdraw the complaint, and "clear" the RMO's name. The complainant noted that the RMO even coached him on how to phrase the voluntary withdrawal statement.

The complainant did not withdraw his complaint. Instead, he contacted an EEO counselor after the meeting and alleged reprisal.

Although the RMO's version of what transpired during this meeting differs somewhat from the complainant's version, he nevertheless admitted discussing the EEO complaint. He also admitted reminding the complainant of the opportunity he gave him at a time when the complainant had nothing, and admitted asking the complainant to write an exculpatory statement.

Based on these facts, OEDCA found a *per se* violation of the anti-retaliation provisions of EEOC's regulations. A *per se* violation occurs whenever there is an attempt to interfere with the EEO complaint process, even if no tangible harm to the complainant ensues. Another case involving reprisal *per se* was summarized in the Fall 1998 issue of the *OEDCA Digest.* Cases such as these illustrate the inherent danger for supervisors in attempting to "discuss" an EEO complaint with a complainant.

Even when supervisors initiate such discussions in good faith, their position of authority will likely cause complainants to construe the discussion as a subtle form of intimidation. Management officials should bear in mind that a finding of reprisal is possible in such situations, even when they do not take an adverse action against the individual with whom they have the discussion.

VIII

EEOC'S NEW POLICY GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP CLARIFIES REQUIREMENTS RELATING TO REASSIGNMENT AS A REASONABLE ACCOMMODATION IN FEDERAL SECTOR EMPLOYMENT

The EEOC recently issued policy guidance clarifying the rights and responsibilities under the *Americans with Disabilities Act of 1990* (*ADA*) of employers and individuals with disabilities regarding reasonable accommodation and undue hardship. Because the guidance is applicable to federal sector employment discrimination complaints, management officials and employees alike should familiarize themselves with the rules and requirements contained in the guidance.

A critical and often overlooked requirement involves management's obligation to consider reassignment as a form of reasonable accommodation. This lack-of-awareness problem is exacerbated by the fact that EEOC has not revised its federal sector regulation in this area (29 C.F.R. Section 1614**.**203(g)) despite the fact that parts of the regulation have been superceded by the *ADA* and contain incorrect statements regarding several reassignment issues.

For example, EEOC's regulations incorrectly treat disability-related reassignments as a form of affirmative action rather than reasonable accommodation. The *ADA,* however, makes it clear that reassignment is now a reasonable accommodation requirement rather than simply one of affirmative action.

The new guidance states that reassignment to a **vacant** position must be provided to a **qualified employee** who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that the reassignment would cause an undue hardship. Applicants for employment are not entitled to reassignment.

An employee requires a reassignment **only if** s/he is unable to continue performing the essential functions of his/her current position, with or without reasonable accommodation. Hence, an employer must provide reassignment either when (1) reasonable accommodation in the employee's current job would cause undue hardship or (2) when it would not be possible (*i.e.*, there are no effective accommodations that would enable the employee to perform the essential functions of his/her current position.

Reassignment is thus the reasonable accommodation of last resort. However, if **both** the employer and the employee **voluntarily agree** that a reassignment would be preferable to remaining in the

current position with some form of accommodation, then the employer may reassign the employee.

Qualifications. An employee must be "qualified" for the new position. The employee is qualified if s/he (1) satisfies the requisite skill, experience, education and other job-related requirements, and (2) can perform the essential functions of the new position with or without reasonable accommodation. There is no obligation for the employer to train the disabled employee to become qualified for the new position. However, the employer must provide the employee with any training that is normally provided to anyone hired for or transferred to the position. An employee need not be the best-qualified individual for the position in order to obtain it by reassignment.

Vacancies. "Vacant" means that the position is available when the employee asks for reasonable accommodation, or the employer knows that it will become available within a reasonable amount of time. Of course, what is a "reasonable amount of time" can only be determined on a case-by-case basis considering all relevant facts, such as whether the employer, based on experience, can reasonably anticipate an appropriate vacancy within a short period of time.

Contrary to EEOC's current federal sector regulation at Section 203(g), a position is considered vacant even if the employer has already posted a notice or announcement seeking applications. However, an employer does not have to bump an employee from a job to create a vacancy; nor does it have to create a new position.

The vacant position must be equivalent in terms of pay, status, or other relevant factors. If there is no vacant equivalent position, the employer must reassign the employee to a vacant, lower-level position for which the individual is qualified. If there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee's current position in terms of pay, status, *etc*. If it is unclear which position come closest, the employer should consult with the employee about his/her preference before deciding.

Area of Consideration. Contrary to EEOC's current federal sector regulation, the ADA does not limit an employer's obligation to reassign only to vacancies within "the same commuting area and serviced by the same appointing authority". Rather, the extent to which the federal employer will be required to search for a vacant position will be an undue hardship issue. The extent to which the EEOC will require expanded searches by federal employers, and the point at which it would consider such searches to be an undue hardship, are unclear.

Promotion. Reassignment does not include giving an employee a promotion. Thus, for any vacancy that would involve a promotion, the employee must compete in the same manner with all other individuals applying for the same promotion. However, if the vacant position does not involve a promotion, and the employee is qualified for it, the employee is entitled to the position -- the employer must not require the employee to compete for it.

Probationary Employees. Contrary to EEOC's current federal sector regulation, an employer may not deny a reassignment to an employee solely because his/her status is designated as "probationary". As long as the disabled employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose, the employee is eligible for reassignment to a new position.

Generally, the longer the period of time in which the probationary employee has adequately performed the essential functions of the position, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability. However, if the probationary employee **never** adequately performed the essential functions of the position, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never "qualified" for the original position. In this situation, the employee is similar to an applicant who applies for a job for which s/he is not qualified, and then requests reassignment. As previously noted, applicants are not entitled to reassignment.

Policies Against Transfers. The ADA requires employers to provide reasonable accommodation to qualified individuals with disabilities, including reassignments, even though they are not available to others. This is true even in the case of employers who do not normally transfer employees, or who have policies prohibiting employee transfers. In such cases, absent a showing of undue hardship, the employer would have to make an exception or modify the policy to permit the reassignment.

Notifying the Employee about Vacancies and Potential Vacancies. The accommodation process is an interactive one. Hence, since the employer is in the best position to know which jobs are vacant, the employer should ask the employee about his/her qualifications and interests in order to narrow the search. The employee must assist in the process, and should identify any appropriate vacancies or potential vacancies about which the employee has information. Based on this information, the employer is then obligated to inform the employee about vacant positions for which s/he may be eligible as a reassignment. If the employer does not know whether the employee is qualified for a specific position, the employer should discuss with the employee his/her qualifications.

Fulfilling the Obligation. When the employer completes its search, identifies vacancies (including positions that will become vacant in a reasonable amount of time), notifies the employee of the results, and either offers an appropriate vacancy to the employee or informs him/her that no appropriate vacancies are available, the employer has fulfilled its obligation.