OFFICE OF EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION (OEDCA)

Summer 2024 EMPLOYMENT LAW DIGEST

Foreword

The Office of Employment Discrimination, Complaint Adjudication (OEDCA) is delighted to introduce the Fall 2024 edition of our *Employment Law Digest.* This edition features summaries of discrimination findings issued in FY2023 and FY2024. The findings in this edition were based on investigative records provided to OEDCA by the Office of Resolution Management, Diversity, and Inclusion.

Among the topics covered in this edition of the *Employment Law Digest* are: when supervisors' statements about employees' protected EEO activity constitute per se retaliation; the Agency's burden of production in non-selection cases; reasonable accommodation issues such as delay, failure to provide an effective accommodation, failure to establish undue hardship and failure to engage in the interactive process; hostile work environment harassment due to misgendering, and sexual harassment, specifically the Agency's affirmative defense requirement to provide prompt, appropriate corrective action. The *Employment Law Digest* also considers a violation of the Equal Pay Act, and disclosure of confidential medical information in violation of the Rehabilitation Act of 1973.

OEDCA is an independent Department of Veterans Affairs (VA) adjudicatory authority created by Congress. OEDCA's mission is to objectively review the merits of federal employment discrimination claims filed by VA employees and applicants for VA employment. The OEDCA *Employment Law Digest* is intended to provide an overview of significant cases and noteworthy developments in the area of federal employment law. The summaries below are not intended to be exhaustive as to the selected subject matter, nor are they to be given the legal weight of case law in citations, nor viewed as legal advice.

PER SE RETALIATION FOUND

The Complainant filed an EEO complaint after he was informed that during a virtual Teams© meeting, which he did not attend, his second level supervisor in conversation with another supervisor, stated during a break in the meeting "We need to talk about [Complainant]. Apparently, he's filed an EEO against [Supervisor 1]." Numerous employees and managers witnessed the disclosure of Complainant's protected EEO activity during the meeting break.

OEDCA noted that the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 protect individuals from any retaliatory action that is reasonably likely to deter a reasonable person from opposing discrimination or participating in the EEO process.

Here, even though Complainant did not attend the meeting, a management official disclosed Complainant's EEO activity without his consent to several employees and managers who did not have a need to know. The disclosure of EEO activity to individuals who do not have a need to know without a complainant's consent has been found to have a potentially chilling effect, intimidating employees from utilizing the EEO complaint process or proceeding with an EEO complaint. Shanta S. v. Dep't of Transportation, EEOC Appeal No. 2020003787 (2021). Since the second level supervisor's disclosure of Complainant's EEO activity could have a "chilling effect" on employees' willingness to assert their rights under federal EEO law, OEDCA found that the supervisor's disclosure constituted per se retaliation in violation of Title VII.

BOTTOM LINE: **Per se retaliation occurs when a supervisor's actions or comments are reasonably likely to discourage employees from participating in the EEO process. While there may be circumstances where it is appropriate for specific managers to discuss the substance of an employee's EEO complaint in furtherance of processing or resolving a complaint, it is never appropriate for an employee's EEO activity to be the subject of general discussion. Therefore, general disclosure of an employee's EEO activity constitutes per se retaliation because it creates a chilling effect and is likely to deter employees from exercising their EEO rights. This is true regardless of whether the disclosure actually dissuades an employee from pursuing an EEO complaint.**

NON-SELECTION – AGENCY'S BURDEN OF PRODUCTION

The Complainant applied for an Assistant Human Resources Officer position. The Complainant scored significantly higher than any other applicant during the initial round of interviews and tied with another candidate for the highest cumulative score during the second round of interviews. The Complainant was not selected for the position and filed an EEO complaint alleging race, sex, and age discrimination.

Despite two EEO investigations, the selection panel members failed to articulate a specific explanation for Complainant's non-selection, stating only that the selectee "scored higher." The panel also did not produce any documentary evidence to support its selection decision such as interview notes or scoring sheets, noting that it failed to retain them.

While an agency's burden of production is not onerous, it must provide a specific, clear, and individualized explanation for its selection decision. This is required for a complainant to have the opportunity to prove that the asserted reason was a pretext for discriminatory animus. Minna Z. v. Dep't. of Agriculture, EEOC Appeal No. 2023002336 (2024), citing Stewart v. Dep't. of Homeland Security, EEOC Request No. 0520070124 (2011).

Here, management officials failed to provide specific information why the Complainant was not selected, thus, the record did not contain an explanation of what specific qualities made the selectee a better qualified candidate than the Complainant. Consequently, OEDCA found that the Agency failed to meet its burden of production and thereby failed to overcome the

Complainant's prima facie case of discrimination. The Complainant prevailed without having to prove pretext.

BOTTOM LINE: **The Agency must provide sufficient substantive information to indicate why it selected the selectee and not the Complainant. Typically, this is done by providing statements from selection panel members and selecting officials explaining how the Complainant's qualifications were evaluated compared to the selectee's qualifications and providing accompanying interview score sheets and ranking sheets. The evidence presented by the Agency must be sufficient to provide a specific, clear, and individualized explanation why a Complainant was not selected for a position for which they were deemed qualified.**

DELAY IN PROVIDING REASONABLE ACCOMMODATION

The Complainant, a food service worker, was diagnosed with complete and permanent hearing loss. For three years, the Complainant was provided with a sign language interpreter who accompanied her throughout her scheduled shifts and whom she relied upon to communicate with her coworkers and to perform essential job duties. The Complainant's accommodation was apparently provided outside of the reasonable accommodation process.

Three months prior to its expiration, management officials received notice that interpreter services would cease unless the contractor received additional funding. Despite submitting the requisite documentation for continued funding, the Complainant's interpreter services ceased abruptly and did not resume for over three months, leaving the Complainant without an accommodation during this period.

OEDCA determined that the Agency was aware of the Complainant's disability, the Agency was aware that the Complainant was in need of an accommodation after she notified them that the interpreter services ceased, and that this was sufficient to trigger the Agency's obligation to engage in the interactive process. An employer must act promptly to provide reasonable accommodation. Susan B. v. Dep't of the Army, EEOC Appeal No. 2020001632 (2021).

OEDCA found that the Agency violated the Rehabilitation Act of 1973 when it unduly delayed in responding to the Complainant's request for accommodation and failed to provide effective interim accommodations.

OEDCA concluded that the Agency failed to engage in the interactive process, and did not provide alternative or interim accommodations when interpreter services were not available. OEDCA noted that the contract issue did not justify the delay in providing interim or alternative accommodations for the Complainant. OEDCA also noted that management's failure to process the Complainant's initial request as a reasonable accommodation likely contributed to the unreasonable delay in providing Complainant with an accommodation during the time period that the interpreter services contract was being processed.

BOTTOM LINE: **Agencies must respond expeditiously to a request for reasonable accommodation. When there is a delay in delivering a reasonable accommodation, the Agency must investigate whether there are interim measures that can be taken to assist the individual with a disability. Unreasonable delay in providing an accommodation is a violation of the Rehabilitation Act. To determine whether a delay is reasonable, the following factors will be considered: the length of the delay; whether the Complainant contributed to the delay; what the Agency was doing during the delay; and whether the accommodation was simple or complex to provide.**

FAILURE TO PROVIDE EFFECTIVE REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

The Complainant, an administrative officer, was in a car accident which resulted in substantial physical limitations that were expected to last about one year.

Complainant's disability limited sitting or standing for more than 40 minutes at a time.

Complainant requested flexible telework for when his condition flared up impacting his commute to work, which was 40 to 60 minutes, and he requested ergonomic equipment for the office as reasonable accommodations.

The Agency granted Complainant's request for ergonomic equipment; however, it denied Complainant's request for flexible telework citing undue hardship. The Agency noted that unscheduled absences were disruptive to the service and had a negative impact on the quality of service provided. As a result, Complainant used accrued and unpaid leave to cover absences when flare-ups prevented commuting.

OEDCA concluded that the ergonomic equipment alone, without flexible telework, did not sufficiently address Complainant's commuting restriction and therefore was ineffective as a reasonable accommodation. OEDCA further found that the record contained insufficient evidence to support the Agency's claim that allowing Complainant to telework periodically would cause an undue hardship as the Agency did not show that the determination was based on an individualized assessment of the Complainant's medical limitations as they relate to the Complainant's ability to perform the essential duties of the administrative officer position. Generalized assertions about employee absences and potential effects on the operations of a unit are insufficient to establish undue hardship. Tania O. v. Dep't of the Army, EEOC Appeal No. 2022001333 (2023).

OEDCA found that the Agency violated the Rehabilitation Act of 1973 due to management's failure to provide effective reasonable accommodation and its failure to establish that providing flexible telework would be an undue hardship.

BOTTOM LINE: **The Agency must determine whether the accommodation provided effectively accommodates the individual's limitations and must ensure that the accommodation enables the individual to perform the essential functions of their position. The Agency does not have to provide a reasonable accommodation that would cause an undue hardship. However, generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty for the operations of the unit or significant expense.**

REASONABLE ACCOMMODATION – FAILURE TO ENGAGE IN THE INTERACTIVE PROCESS CAN RESULT IN LIABILITY

The Complainant, a registered nurse, was a contract VA employee assigned to the emergency department at a VA Medical Center. The Complainant has a severe peanut allergy which results in difficulty breathing and possible anaphylactic shock when she is exposed to peanut products. The Complainant had been repeatedly exposed to peanut products in the emergency room and requested to have the nurses' station remain free from peanut products as a reasonable accommodation. Three days after this request, the Agency terminated the Complainant's employment.

The record revealed that the Agency did not engage Complainant in the interactive process to determine what measures would effectively accommodate her and instead assumed that she required the entire emergency department to be peanut-free at all times in order for her to safely perform her duties. The Agency also assumed that such an accommodation would result in an undue hardship reasoning that due to the high volume of patient traffic, it would not be possible to ensure that no peanut products would enter the Complainant's work area.

OEDCA concluded that had the Agency engaged in the interactive process, it would have learned that Complainant could have been effectively accommodated by limiting peanut products from the nurses' station, rather than limiting peanut products from the entire emergency department. Engaging in the interactive process would have allowed the Complainant to clarify the severity of her allergy

and/or the types of exposure that could trigger it, thereby enabling the Agency to make an informed decision regarding the accommodations that may have been available.

Further, the Agency did not establish that maintaining a peanut-free nurses' station would be an undue hardship and it did not offer any alternative accommodations to the Complainant. OEDCA found that the Agency violated the Rehabilitation Act of 1973 by terminating the Complainant's employment rather than engaging in the interactive process to develop an effective accommodation.

Failing to engage in the interactive process, does not, by itself, demand a finding that a complainant was denied a reasonable accommodation. Rather, to establish a denial of reasonable accommodation, the complainant must establish that the failure to engage in the interactive process resulted in the agency's failure to provide a reasonable accommodation. Joann F. v. Dep't of Veterans Affairs, EEOC Appeal No. 2023002675 (2024)

BOTTOM LINE: **After receiving a request for reasonable accommodation, the employer has a duty to engage in an interactive process with the requesting individual to clarify their needs and identify the appropriate reasonable accommodation. An Agency may be liable for failure to engage in the interactive process where the failure to engage results in the agency's failure to provide reasonable accommodation.**

SEXUAL HARASSMENT – FAILURE TO TAKE PROMPT, APPROPRIATE, CORRECTIVE ACTION RESULTS IN LIABILITY

The Complainant, a food service worker, was subjected to explicit sexual comments, requests for sex, comments about her body and unwelcome touching by a coworker. Complainant reported the harassment to management who referred the matter to facility police. The coworker was assigned to a different office and a no contact order was issued to the coworker. Despite these actions, the coworker continued to harass the Complainant.

When Complainant reported that the harassment was still occurring, the Agency told her a "safety plan" would be implemented, however, the Agency was unable to elaborate on the specifics of the "safety plan" and it did not investigate Complainant's sexual harassment claim for several months. As a result, Complainant resigned from employment as she no longer felt safe in her work environment due to the continued sexual harassment. In order to avoid liability in cases involving co-worker sexual harassment, once management becomes aware of the harassment, it must take immediate, appropriate and effective action to stop the unwanted conduct. Elaine P. v. Dep't of Defense, EEOC Appeal No. 2021001101 (2022).

OEDCA found that the coworker's conduct was sufficiently severe and pervasive to rise to the level of sexual harassment under Title VII of the Civil Rights Act of 1964. OEDCA also found the Agency liable for the sexual harassment because it failed to take sufficient action to immediately end the harassment and it could not provide the Complainant with reasonable assurances that the harassment would not recur, thus, the Agency's action was inadequate. OEDCA further found constructive discharge as the Complainant established that conduct that constituted discrimination under Title VII created intolerable work conditions which compelled her to resign from employment.

BOTTOM LINE: **Management has a duty to take immediate and appropriate corrective action upon receiving notice of sexual harassment. Additionally, management officials are obligated to take corrective action that will ensure that the sexual harassment has ceased. When harassment continues after the Agency has taken corrective action, the corrective action will be considered ineffective, and the Agency will be found liable for the harassment.**

HOSTILE ENVIRONMENT HARASSMENT BASED ON SEX FOUND

The Complainant, who was in the process of transitioning from male to female, requested

that management use she/her pronouns and refer to her by a new name. The Complainant's second level supervisor instructed the Complainant's immediate supervisor and team leads to disregard Complainant's request. The Complainant's second level supervisor continued to use the Complainant's dead name and incorrect pronouns despite being told by senior management that such conduct was inconsistent with EEO guidelines.

OEDCA noted that discrimination based on an individual's gender identity constitutes discrimination based on sex. OEDCA found that the second level supervisor's insistence on misgendering the Complainant and using the Complainant's former pre-transition name was sufficiently severe to constitute hostile environment harassment based on sex in violation of Title VII of the Civil Rights Act of 1964. Roxanna B. v. IRS, EEOC Appeal No. 2020004142 (2024). Management was aware of the harassing conduct and failed to take prompt, appropriate corrective action to stop it, thus, the Agency was held liable for the harassment.

BOTTOM LINE: **A "dead name" is the name that a transgender person was given at birth and no longer uses upon transitioning. "Misgendering" occurs when a person identifies the gender of a person incorrectly, such as by using the incorrect label or pronouns. Persistent failure to use an employee's correct name and pronouns may constitute unlawful sex-based harassment if such conduct is either sufficiently severe or pervasive to create a hostile work environment.**

RETALIATORY HARASSMENT FOUND

The Complainant, a medical provider, participated in protected EEO activity when he submitted an affidavit in support of his supervisor's EEO complaint. The Complainant's second level supervisor was named as a responsible management official in the supervisor's EEO complaint. Several months after the Complainant participated in protected EEO activity, his second level supervisor inappropriately pursued a patient complaint investigation against the Complainant, and treated him differently regarding telework and leave opportunities.

Harassment allegations based on reprisal need not meet the severe or pervasive standard to be unlawful under Title VII. Instead, a complainant must show that the alleged conduct was materially adverse and sufficient to deter protected EEO activity. Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, (2006); Emiko S. v. Dep't of the Navy, EEOC Appeal No. 2023000873 (2024); EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, § II.B, ex. 16. (Aug. 25, 2016).

The record revealed ample evidence that the Complainant's second level supervisor was aware prior to the initiation of the patient complaint investigation that the Complainant acted appropriately regarding the patient. Further, the record established that the second level supervisor denied the Complainant's emergency request to telework while allowing a similarly situated coworker to telework every other Friday, and there was no reasonable explanation offered for the difference in treatment. Consequently, OEDCA found that the Complainant established the requisite causal nexus between his protected EEO activity and the second level supervisor's conduct and OEDCA concluded that such conduct would have a chilling effect on employees' willingness to pursue discrimination complaints in the future. Thus, OEDCA found that the Agency was liable for retaliatory harassment in violation of Title VII.

BOTTOM LINE: **Participating as a witness in a coworker's EEO complaint is protected EEO activity. Adverse conduct based on an individual's protected EEO activity that is sufficient to deter participation in EEO activity is sufficient to establish retaliatory harassment.**

MEDICAL RECORDS CONFIDENTIALITY VIOLATED

After Complainant saw notes containing his medical information on his supervisor's desk, the Complainant contacted the facility's Privacy Officer and requested the Privacy Officer provide a report of the individuals who had accessed his medical records. The report indicated that the Complainant's medical

records had been accessed over 25 times by his supervisor and a co-worker, both of whom did not have a legitimate business reason to access such information.

The Rehabilitation Act of 1973 requires medical records to be treated as confidential except in certain limited circumstances. It is a per se violation of the Rehabilitation Act to access confidential employee medical records when the access is not shown to be job-related and consistent with business necessity. Dixie B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170175 (2019). The EEOC has found that the unauthorized access of an employee's medical records, without a valid business reason, constitutes a per se violation of the Rehabilitation Act.

The Complainant's supervisor and co-worker acknowledged that they accessed the Complainant's medical records, but they did not provide a valid reason for doing so. Neither did they establish that accessing the Complainant's medical records was within their job duties, nor did they articulate a valid business necessity for accessing the Complainant's medical records. Consequently, OEDCA concluded that the access of the Complainant's medical records was not job-related or consistent with business necessity and found that a per se violation of the Rehabilitation Act occurred.

BOTTOM LINE: **While supervisors may be informed of an employee's diagnosis if it is related to work-related restrictions, need for accommodation, or medical leave, the unauthorized access of an employee's confidential medical records, without a legitimate business reason, constitutes a per se violation of the Rehabilitation Act.**

EQUAL PAY ACT VIOLATION FOUND

The Complainant, a female staff physician, alleged that the Agency violated the Equal Pay Act (EPA) by compensating two male staff physician coworkers at a substantially higher rate for performing the same work despite the fact that she had been employed on the staff the longest. The Agency acknowledged that the Complainant and another female staff physician received lower pay than their male coworkers for performing the same duties. The Agency contended that the difference in pay was based on a factor other than sex. Specifically, the Agency asserted that the Complainant's pay was based on credentials, privileges, tenure in VA employment and market pay comparisons for individuals with like professional skill sets.

The EPA permits a compensation differential based on a factor other than sex. In order to establish this defense, an Agency must establish that a gender-neutral factor, applied consistently, explains the compensation disparity and that the factor is related to job requirements or is otherwise beneficial to the Agency's business. The Agency must also show that the factor is used reasonably in light of the Agency's stated business purpose as well as its other practices. Larraine D., Denese G., Kerrie F., v. Agency for International Development, EEOC Appeal No. 202203818 (2023).

OEDCA noted that the Agency did not establish that the pay differential was due to a factor other than sex, such as a seniority system, a merit system, or an incentive system. OEDCA further noted that the Agency did not present evidence to show that there was any difference between the Complainant and the male comparators with regard to the factors it considered to establish pay. OEDCA concluded that the Agency failed to prove that the pay disparity between the Complainant and her male comparators was based on a factor other than sex. Therefore, OEDCA found that the Agency violated the EPA by paying the Complainant less than similarly situated male employees for performing the same work.

BOTTOM LINE: **An Agency fails to establish the affirmative defense for pay disparity under the EPA when it fails to provide a legitimate nondiscriminatory explanation for the pay disparity or fails to prove that the policy causing the pay disparity is applied consistently and is related to job requirements.**.