

- △ Establish action not applied alike between different EEO groups. (Are compared employees in the same work unit or the same chain of command?)
- △ Establish agency's reason not supported by evidence or inaccurate.

FAILURE TO PROVIDE A REASONABLE ACCOMMODATION (Religion)

Prima Facie Case

- △ Establish religious belief that conflicts with employment requirement. (bona fide religious belief)
- △ Establish supervisor informed of need for accommodation.
- △ Establish adverse employment action taken against complainant for failure to comply with employment requirement.

Agency' (LNR) for not providing accommodation

- △ Agency must state LNR reason.

Agency's legitimate non-discriminatory reason is pretext for discrimination

- △ Establish accommodation would not cause undue hardship.
 - Overall size of agency division.
 - Type of operation.
 - Nature and cost of accommodation.

FAILURE TO PROVIDE A REASONABLE ACCOMMODATION (Disability)

- △ **Establish disability.**
 - Identify the physical or mental impairment.
 - Identify the impairment's substantial limitation of a major life activity.
- △ **Establish that agency knows of complainant's disability.**
- △ **Establish that complainant is qualified for the position.**
- △ **Identify essential job functions.**
- △ **Establish complainant can perform essential functions of the job with or w/out accommodation.**
- △ **Establish when complainant asked for an accommodation.**
- △ **Establish interactive process or lack thereof.**
 - Identify accommodation suggestions made by complainant.
 - Identify action, if any, agency took to identify possible accommodations.
 - Establish whether agency considered complainant's accommodation request(s).
 - If the agency identified an accommodation, does it enable the complainant to perform the essential functions of job?
- △ **Establish whether the agency actually provided an accommodation. (offered reassignment)**

- △ **Identify a reason if any, that the agency gave for its refusal to engage in the interactive process and/or provide accommodation.**
- △ **Establish that the accommodation did not cause an undue hardship.**
 - Overall size of agency division.
 - Type of operation.
 - Nature and cost of accommodation.

NOTE: If the Agency offered a reasonable accommodation and it was rejected by the complainant, the complainant will not be entitled to compensatory damages

HARASSMENT CASES

QUID PRO QUO SEXUAL HARASSMENT

Prima Facie Case

- △ Establish the harasser has authority over the employee.
- △ Establish the harasser made unwelcome requests for sexual favors from or unwelcome sexual advances toward the employee.
- △ Establish the harasser stated or implied that the employee must submit to receive or keep a job benefit, and as a result.
- △ Establish the employee suffered an **economic harm or tangible work** detriment as a result of denying the advances for sexual favors.

NOTE: Agency strictly liable if harassment by **supervisor** with immediate or successively higher authority over the employee culminates in a **tangible employment action**, such as demotion, discharge, or undesirable reassignment

Discriminatory harassment by coworkers may result in agency liability if the agency knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. (29 C.F.R. 1604.11(d)).

HOSTILE WORK ENVIRONMENT BECAUSE OF PROTECTED CLASS

Prima Facie Case

- △ Establish that harasser is a supervisor, co-worker, or a non-employee over whom the employer has control.
- △ Establish complainant was subject to unwelcome conduct based on a protected class by harasser.
- △ Establish the conduct was sufficiently severe or pervasive. (stray marks or isolated remarks will not suffice)
- △ Establish the conduct had the effect of unreasonably interfering with the complainant's work performance or seriously affected the psychological wellbeing of the plaintiff.
- △ Establish there is a basis of imputing liability.

NOTE: When no tangible employment action has taken place, then the employer has an affirmative defense that consists of two elements: 1) employer exercised reasonable care to prevent or correct harassing behavior; and 2) the employee failed to take advantage of any preventative or corrective opportunities provided by employer.

NOTE: When an Agency does not follow its anti-harassment policies and procedures no affirmative defense is available to it.

THE DEVIL'S IN THE DETAILS

EEO Advocates have begun to notice an unsettling wave of change crash over a once familiar shore. *The Acknowledgement and Order*, also known as an A&O, previously issued by Administrative Judges with familiar deadlines and standard provisions is now a strange scene of old and new.

For years it seemed every Administrative Judge's A&O would set the same deadlines and operate under the same guidelines, as steady as the tide. Now complainants and representatives have seen Administrative Judges putting their own personal stamp on the proceedings. For instance, one representative found that the deadline for initiating discovery had moved from 20 days from the receipt of the A&O to 15 days, a 25 percent reduction in time! Other advocates are finding different changes, such as: (1) reduction in discovery completion time from 90 to 60 days; (2) requiring submissions to be dated from the date of the A&O rather than from the date of receipt; (3) prohibitions on discovery; and (4) supplemental orders requiring everything between enumerated lists of damage components to joint stipulations of facts.

WHAT DOES THIS MEAN?

There are two major problems with these orders. First, advocates may be under the false assumption that all A&Os contain the same deadlines. Second, complainants are seeing the erosion of their most precious resource – time – right before their eyes.

While there has been no official word from EEOC regarding the rationale behind the switch, the fact that many of the time lines have been shortened suggests that this is an attempt to expedite a Judge's docket so the backlog is reduced. Certainly having a lower backlog is an admirable goal, but the methods employed in these A&Os may prove to be problematic for advocates and individual complainants. These changes could present problems to both complainants and representatives, as failure to comply with the appropriate Order could result in missed deadlines and sanctions against the complainant, severe enough to jeopardize their EEO case.

WHAT SHOULD YOU DO IN CASE OF DISCRIMINATION?

The Women's and Fair Practices Staff will keep you updated in the EEO Advocate on any information we receive about these changes.

Because every A&O could potentially be different it will be difficult to map the changes. Each case may go forward in a

procedurally different manner than the last case, and each Administrative Judge may change their approach with time.

There is one vital thing that YOU can do to combat this problem, **read the A&O very carefully**. The devil is in the details, because most A&O's still have the standardized appearance of past A&Os. Failure to read carefully and critically will result in a false assumption by either the complainant or representative.

A handy tip is to have a calendar on hand when you read the A&O and count the days right then and there to determine the responsive deadline.

Don't let the A&O changes jeopardize your case! Read carefully; take notes, use calendars, and above all, **READ CAREFULLY!** With your attention to detail, you can minimize or eliminate any negative impact these new orders may have on a case.

Can You Take Leave If Your Loved One Is Sick?

This question turns on whether your loved one qualifies as a "family member" under the Office of Personnel Management's definition for the purpose of taking sick leave. On July 14, 2010, OPM issued a Final Rule (5 C.F.R. § 630) incorporating Section 1 of the President's June 17, 2009 Memorandum on Federal Benefits and Non-Discrimination into regulations regarding sick leave, as an effort to help ensure that agencies are taking into consideration their diverse work force's needs to better support and balance their many personal, family, and work obligations.

Effective July 14, 2010, the definitions of "family member" and "immediate relative" will include domestic partners, both same sex and opposite sex, to the list of relationships that allow a federal worker to take leave. This brings us one step closer to treating every employee equally, whereas OPM previously had allowed each agency to interpret the phrase themselves.

These new definitions will ensure consistency in applying the regulations, and mean that many federal workers will no longer have to struggle to choose between their jobs and their loved ones.

You CAN take leave to care for your boyfriend or girlfriend as a domestic partner since it includes opposite sex partners too. Also, note that these new definitions also apply to military members that wish to take leave to care for their domestic partners. This enables members of the military to take leave without disclosing whether he or she is in a same sex relationship, thereby allowing military members to conform to the current "don't ask, don't tell" policy.

WHAT DOES THIS MEAN?

The term domestic partner is now included in the definition of family member and immediate relative for the use of sick leave, funeral leave, voluntary leave transfer, voluntary

leave bank, and emergency leave transfer. The definition of a domestic partner means "an adult in a committed relationship with another adult, including both same-sex and opposite-sex relationship." A civil union is one of the ways to explicitly establish a committed relationship. "A committed relationship means that the employee, and the domestic partner of the employee, are each other's sole domestic partner (and not married to or domestic partners with anyone else); and share responsibility for a significant measure of each other's common welfare and financial obligations." (5 C.F.R. § 630.201(b)) As for documentation for a committed relationship, agencies have the discretion to administer their own leave programs so long as the agency follows the same procedures for all employees equally.

In addition, the parents and children of domestic partners have been added to the definition of a family member.

Please note that the new definition of family member does not apply to the Family and Medical Leave Act (FMLA) (5 U.S.C. § 6381-6387; 5 C.F.R. § 630, subpart L), which must be changed by Congress. This means that if you decide to take FMLA leave, you cannot take it to care for your domestic partner.

WHAT SHOULD YOU DO IN CASE OF DISCRIMINATION?

If you suspect that your employer is discriminating against you on the basis of your sexual orientation, please contact your AFGE local union. Many collective bargaining agreements protect employees who allege discrimination on the basis of sexual orientation. Also, it is a prohibited personnel practice under Federal law. 5 U.S.C. § 2302(b) (10) prohibits discrimination against federal employees or federal job applicants based on factors **not related to job performance**, including sexual orientation.

PROMOTION PANEL'S NOTES DO NOT SUPPORT SELECTION

Complainant, a Prosthetic Clerk for the Department of Veteran Affairs, filed a discrimination complaint alleging race and sex



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Women's/Fair Practices Departments
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discrimination and reprisal when he was not selected for a GS-7/9 Prosthetic Representative position. The Complainant worked for VA for more than 24 years and worked in the Prosthetics Department for 10 years. The Complainant's supervisor, white male, was trained by the Complainant, as well as the selectee (white female). Calloway v. Department of Veteran Affairs, EEOC Appeal No. 0120080458 (September 29, 2009).

The Complainant alleged pre-selection and discrimination based on the way the interview panel was established and the selectee's prior knowledge of the knowledge, skills and abilities of the prosthetic representative position prior to the vacancy being posted. Complainant asserted he was more qualified for the position, but he was not able to be promoted at the facility for more than 10 years without having to fight for it.

On appeal to the Office of Federal Operations (OFO), the EEOC reversed the AJ, finding that the Complainant was subjected to race and sex discrimination when he was not selected for the Prosthetic Representative position. The EEOC concluded that the interview panelists' ratings of the Complainant and the selectee were inconsistent, contradictory to the skills needed for the position and overall unworthy of belief. The evidence showed the Complainant was more qualified than the selectee and there was proof of racial and gender animus. The Complainant showed his supervisor refused to promote him and any other African-American male during his tenure as supervisor due to his resentment of African-Americans. His supervisor told him and other workers that a black man left him in the battlefield to die in the Vietnam War and he would never forget it.

WHAT DOES THIS MEAN?

Persistence pays off in the long run. The details to any promotion action need to be carefully reviewed and pursued to establish pretext.



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO



How Can I Prove I Have Been Discriminated Against?¹

This is not an easy task, since the complainant has the burden to prove to an Administrative Judge that they were discriminated against by the agency. The burden is entirely on the employee who filed the EEO complainant. Here are some elements of proof that will guide you in proving your case.

NON-SELECTION FOR A PROMOTION

Prima Facie Case

- △ Establish membership in a *protected group*. (race, age, gender, religion, disability, national origin, etc.)
- △ Establish complainant qualified for vacancy.
- △ Establish complainant denied promotion.
- △ Establish vacancy filled and selectee not a member of complainant's protected group.

Agency's legitimate non-discriminatory reason (LNR) for negative employment action

- △ Identify legitimate non-discriminatory reason.

Show Agency's legitimate non-discriminatory reason is pretext for discrimination

- △ Establish reason is unworthy of belief.
- △ Establish agency action not supported by evidence or inaccurate.
- △ Establish complainant's qualifications are superior.
- △ The selection process was biased or flawed.

TERMINATION OR DISCIPLINARY ACTIONS

Prima Facie Case

- △ Establish membership in a *protected group*. (race, age, gender, religion, disability, national origin, etc.)
- △ Establish complainant qualified for current position.
- △ Establish complainant is/was satisfying the normal requirements of position.
- △ Establish complainant fired or disciplined.
- △ Establish complainant was replaced by an employee outside the protected group or was singled out for discharge or discipline while *similarly situated* employees were retained or not comparably disciplined.²

THE EEO Advocate

A Newsletter for Litigators

Summer 2010

Agency's (LNR) for negative employment action

- △ Identify legitimate non-discriminatory reason for negative employment action.

Agency's (LNR) is pretext for discrimination

- △ Establish legitimate non-discriminatory reason is unworthy of belief.
- △ Establish action not applied alike between different EEO groups.
- △ Establish agency legitimate non-discriminatory reason not supported by evidence or inaccurate.

REPRISAL/RETALIATION

Prima Facie Case

- △ Establish complainant previously engaged in protected EEO activity. (witness, representative, opposed discrimination in workplace)
- △ Establish responsible management official was aware of EEO activity.
- △ Establish adverse treatment or conduct occurred that would likely deter a reasonable person from engaging in EEO activity.
- △ Establish the adverse treatment followed the protected activity within such a short period that a court can infer retaliatory motivation. (usually up to three month period)

Agency's (LNR) for negative employment action

- △ Identify agency's legitimate non-discriminatory reason.

Agency's (LNR) pretext for discrimination

- △ Establish legitimate non-discriminatory reason is unworthy of belief.

¹For more information please see the EEO's website: <http://www.eeoc.gov/federal/directives/md110/appendix1.html>

²Similarly situated includes employees who are "comparators" who are NOT in your protected class, but who are in the same work unit or the same chain of command as complainant.

What is an EEO National Office Equalizer?

Certified EEO National Office Equalizers will handle their own EEO cases and assist the Women's and Fair Practices Department's attorneys with EEO cases. They will also help fight discrimination for our TSA members and assist in AFGE's TSA Campaign. The Women's and Fair Practices Departments work together with the National Vice Presidents and Local Presidents to expand AFGE's ability to fight for civil, human, women and workers' rights by offering greater assistance on EEO complaints through the use of these Equalizers.

The EEO Equalizer Institute

The Women's and Fair Practices Departments developed a new educational and skills-building training institute that was launched in September 2007: the National Office EEO Equalizer Institute. The immediate goal of the institute is to offer a deeper examination of the litigation skills necessary to take a discrimination case completely through the EEOC, MSPB, and arbitration processes. The long-term goal, however, is to use the Institute to secure a cadre of local representatives to be certified as National Office Equalizers.

The ideal National Office Equalizer is a seasoned Local representative who has obtained experience through participation in training and/or actual representation before the EEOC and MSPB, and in arbitration.

The training is conducted in two-parts. The training covers a full array of discrimination laws and theories, as well as legal skills and strategies. Some of the pretrial and trial subjects involve preparing appeals, drafting briefs, conducting cross and direct examination, responding to summary judgment motions, initiating discovery, defending EEO depositions, handling mixed cases, and researching case law and regulations. A final assignment is given to the students to assist in their on-the-job training. The assignment requires the application of many of the skills that were taught in the Institute. Students will be evaluated to be certified as WFP's National Office EEO Equalizers based on the requirements .

Send us your Application

We will be accepting new applications **through November 2010** for the next class of EEO National Equalizers in late 2011.

Please send your application to AFGE's Women's and Fair Practices Departments, 80 F Street, NW, Washington, D.C. 20001, ATTN: EEO Equalizer Institute. You may also fax applications to 202-639-4112.



AFGE WANTS YOU!

**HELP STAMP OUT
DISCRIMINATION IN
THE WORKPLACE**

Become a National Office Equalizer!

An Equalizer is a trained experienced EEO Representative.

Have you:

Taken EEO Training (AFGE training, EEOC, or other source)?

Represented individuals in the EEO process ?

For More Information on Becoming An Equalizer - Complete and Return the Bottom Portion to your
Local President, Council President, District Coordinator, or NVP.

NAME: _____ AGENCY _____ LOCAL _____ DISTRICT _____

ADDRESS: _____

HOME No. and EMAIL _____

EEO TRAININGS TAKEN: _____

Number of EEO Cases Worked On: _____ Number of EEO Cases taken to Hearing: _____