

# EEO FOCUS

## News You Can Use



### Mediation Makes Sound Business Sense

For a number of years the Army has encouraged the use of Alternate Dispute Resolution (ADR) to resolve workplace disputes. At Fort Carson, we employ mediation, a form of ADR where an impartial facilitator tries to assist parties in voluntarily reaching a mutually acceptable resolution to the issues in dispute. ADR simply encourages people to communicate with each other to reach an agreement that is fair and workable.

At Fort Carson during fiscal years 2009 and 2010, 33 informal and 27 formal EEO complaints were resolved using mediation. The EEO Office mediates informal complaints and we rely on independent DoD mediators to facilitate formal complaint mediation. Cumulatively the agency spent less than \$10,000 in administrative costs to conduct mediation. Comparatively, during the same period, we spent more than \$35,000 on administrative costs to process complaints not resolved through mediation. According to Equal Employment Opportunity Commission, time is also a factor to consider. Last year, federal EEO investigations took an average of 185 days to complete while a hearing by an Administrative Judge took 400 days — that's more than a year to adjudicate a single complaint. It is clear -- mediation makes sound business sense. If you'd like to learn more about mediation to resolve workplace disputes, please contact the EEO Office.

### 2010 Case Law Update

As a manager, Equal Employment Opportunity is an important part of your everyday work. What Equal Opportunity means for everyone is fair and consistent treatment based on performance and conduct. Each year the Equal Employment Opportunity Commission rules on thousands of cases of discrimination complaints. On average, less than 3% of all complaints filed end in a finding of discrimination. However, when discrimination is found we can all learn something from the ruling. Here is a sampling of decisions this past year for your consideration. Briefly review the information and think about what you believe the outcome should be. Later in the newsletter we'll reveal the outcome in each case.

Mr. Atkins, a former park ranger, was placed on restrictive duty with no law enforcement functions because his manager determined his

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*"All of us do not have equal talent, but all of us should have an equal opportunity to develop our talents."*

*John Fitzgerald  
Kennedy*

## 2010 EEO Case Law Update Continued

poorly controlled diabetes posed a direct threat to safety. Was Mr. Atkins discriminated against based on his disability (diabetes)? If you were Mr. Atkins' Manager, what would you have done?

Ms. White requested not to work on Sundays so that she could attend daylong religious services. Her employer denied the request saying to do so would cause an undue burden on their operations. Was Ms. White discriminated against based on her religion when the agency failed to accommodate her? As a manager or supervisor, what would you do?

Mr. Smith sought advice at the EEO Office. When he returned to work his supervisor questioned him about going to EEO and told him that from now on he had to go through him when he wanted to make an appointment with the EEO Office. Has Mr. Smith's supervisor done anything wrong?

Ms. Jones is an Army Intern. She alleged that her supervisor kissed her, hugged her, and requested photographs of her in a bathing suit. The supervisor claims she is not an employee and therefore cannot file a complaint. What do you think? If she filed a complaint, what would her Title VII basis be?

Ms. Tittle stated that her supervisor asked her for the password for her computer and then used her email account to send a sexually offensive email to a female co-worker. Do you think Ms. Tittle has grounds for a complaint?

### So, here is what happened:

In *Atkins v. Department of the Interior*, it was determined that an agency may remove an employee from a position if his/her medical condition poses a direct threat to safety. However, the agency must first conduct an individualized assessment that allows the employee to present evidence of their ability to safely perform the job. To act without this assessment puts the agency at risk for a Rehabilitation Act/Americans with Disabilities Act EEO complaint.

In *White v. Defense Commissary Agency*, it was determined that an agency may only deny a religious accommodation that imposes an undue hardship on its operations. An agency cannot make an undue hardship claim without first making a good-faith effort to find a way to grant the accommodation request. Some things that should be considered include voluntary substitution/shift swaps, flexible scheduling, and lateral transfers.

In *Smith v. Department of the Navy*, it was determined that a supervisor exposes his agency to liability when he becomes involved in an employee's EEO activities, either by asking about EEO contact, or by seeking to arrange EEO appointments for them. Reprisal claims continue to plague federal agencies. The ruling in Smith shows that the EEOC is serious about its position that management must maintain a distance from an employee's EEO activity.

## 2010 Case Law Update (Continued)

In *Jones v. Department of Defense*, it was determined that an intern is considered an employee for purposes of filing an EEO complaint, under the common law of agency test. The agency selected her for hire, set a schedule, designated assignments, provided workspace and equipment, monitored her, and also paid her. She was found to have been subjected to sexual harassment and the supervisor was punished accordingly.

In *Tittle v. Department of Justice*, it was determined that under certain circumstances, alleged conduct can be so severe that a single incident may state a claim of a hostile work environment. Even though the actions were not directed at the complainant, the actions put the complainant at risk of harm.



## Proving EEO Claims: Understanding Evidence

EEO cases are proven by any combination of three types of evidence: Circumstantial, Direct, and Statistical.

Circumstantial evidence is evidence that does not prove discrimination on its own. It may infer discrimination, especially when combined with other pieces of evidence. This is the most frequently used type of evidence to prove whether discrimination occurred.

Direct evidence is evidence that can prove discrimination without having to use any supporting evidence. For employment discrimination, direct evidence would be an action or statement that clearly shows the intent to discriminate. This type of evidence is quite rare.

Statistical evidence is developed by a numerical analysis of the workforce. That means looking at employment actions and linking them with protected classes (race, national origin, age, gender, disability, religion, color, genetics) Obtaining this type of evidence is generally reserved for cases of disparate impact – showing the agency applied a facially neutral policy but it had a negative impact on a protected group.

Anytime an EEO complaint is filed the burden rests on the complainant to prove their allegation of discrimination. Failing to provide the types of evidence noted above will result in a finding of no discrimination.

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## Training Corner

### EEO for Supervisors and Managers

This training is critical for the agency to ensure that managers and supervisors know how to maintain a workplace free from harassment and discrimination. Leaders set the tone and enforce the agency's zero tolerance policy. This course provides detailed instruction on how to meet this requirement.

#### DESIRED OUTCOME

Supervisors gain an understanding of their role regarding supervisory authority and prohibited personnel practices outlined in Title VII.

#### WHEN/WHERE

\* **13 Apr:** 0900, 1100, 1400 - McMahon Theater  
 \* **15 Jun:** 0900, 1100, 1400 - McMahon Theater  
 \* **29 Jun:** 1400 - GMC, Bldg 1118  
 \* **3 Aug:** 1400 - GMC, Bldg 1118  
 \* **7 Sep:** 1400 - GMC, Bldg 1118  
 \* **14 Sep:** 0900, 1100, 1400 - McMahon Theater

### Reasonable Accommodation (RA) Process Training

This training will cover the policies and laws that define an individual with a disability and focuses on the reasonable accommodation request procedures. The course provides detailed instruction on how to process an employee's RA request. This class is open to supervisors and interested employees.

#### DESIRED OUTCOME

Educate the workforce on the RA process; leave with the understanding of what is a disability, legal requirements, and employee's and supervisor's responsibilities in the interactive accommodation process.

#### WHEN/WHERE

\* **29 June:** 1300, 1500 - GMC, Bldg 1118  
 \* **3 Aug:** 1300, 1500 - GMC, Bldg 1118  
 \* **7 Sep:** 1300, 1500 - GMC, Bldg 1118

### Anti-Harassment/EEO Annual Training for Civilian Employees

DA requires that all civilian employees and all managers of civilian employees receive EEO training annually to address anti-harassment/prevention of harassment in the workplace. This training used to be known as "POSH (Prevention of Sexual Harassment)" but has been expanded to address all forms of illegal harassment.

#### DESIRED OUTCOME

Employees recognize appropriate and professional workplace behavior; know how to address issues in the workplace; and where to turn for assistance.

#### WHEN/WHERE

\* **13 Apr:** 0800, 1000, 1300 - McMahon Theater  
 \* **15 Jun:** 0800, 1000, 1300 - McMahon Theater  
 \* **14 Sep:** **0800, 1000, 1300** - McMahon Theater

### Save The Drive!

The Anti-harassment course is also available online through LMS at:  
<https://lms.carson.army.mil>

\*(GMC = Garrison Main Conference Room 219)  
 \*McMahon Theater is located on Wetzel Ave across from the Commissary