

# What Were They Thinking?

Why Administrative Judges do what they do.



When you assume .....



# When you assume.....

- The EEOC Federal sector is not unlike other forums in that local rules may vary.
- Never assume that one judge has the same M.O. as another.
- Same judge – different day – make sure you know how the judge plans to proceed.

# Articulate!

- Non-selection cases
  - Offer specific reasons for employment action.
  - Be consistent.
  - Selection plans don't make selections – people do.
  - Be honest.
  - preselection

# Articulate!

- Performance appraisals
  - In an appraisal case, evidence will not rebut prima facie case of reprisal where neither of the rating officials could provide a clear explanation for the rating.
  - When performance issues are raised as legitimate, non-discriminatory reasons, the agency must provide some proof of the performance problem.

# Articulate!

- Discipline
  - A first time for everything?
  - Compare and contrast – the AJ will.

# Seriously?



Why do witnesses contradict their affidavits and undermine the Agency's LNDR for its actions?

Why do managers and complainants run afoul of the Rehabilitation Act in accommodation cases?

- Failure to interact!
- This is not the Department of Labor.
- This is not the VA.
- ADA AAA

Now Presenting  
"You'll be sorry"

or

"How to Snatch Defeat from the Jaws of Victory"

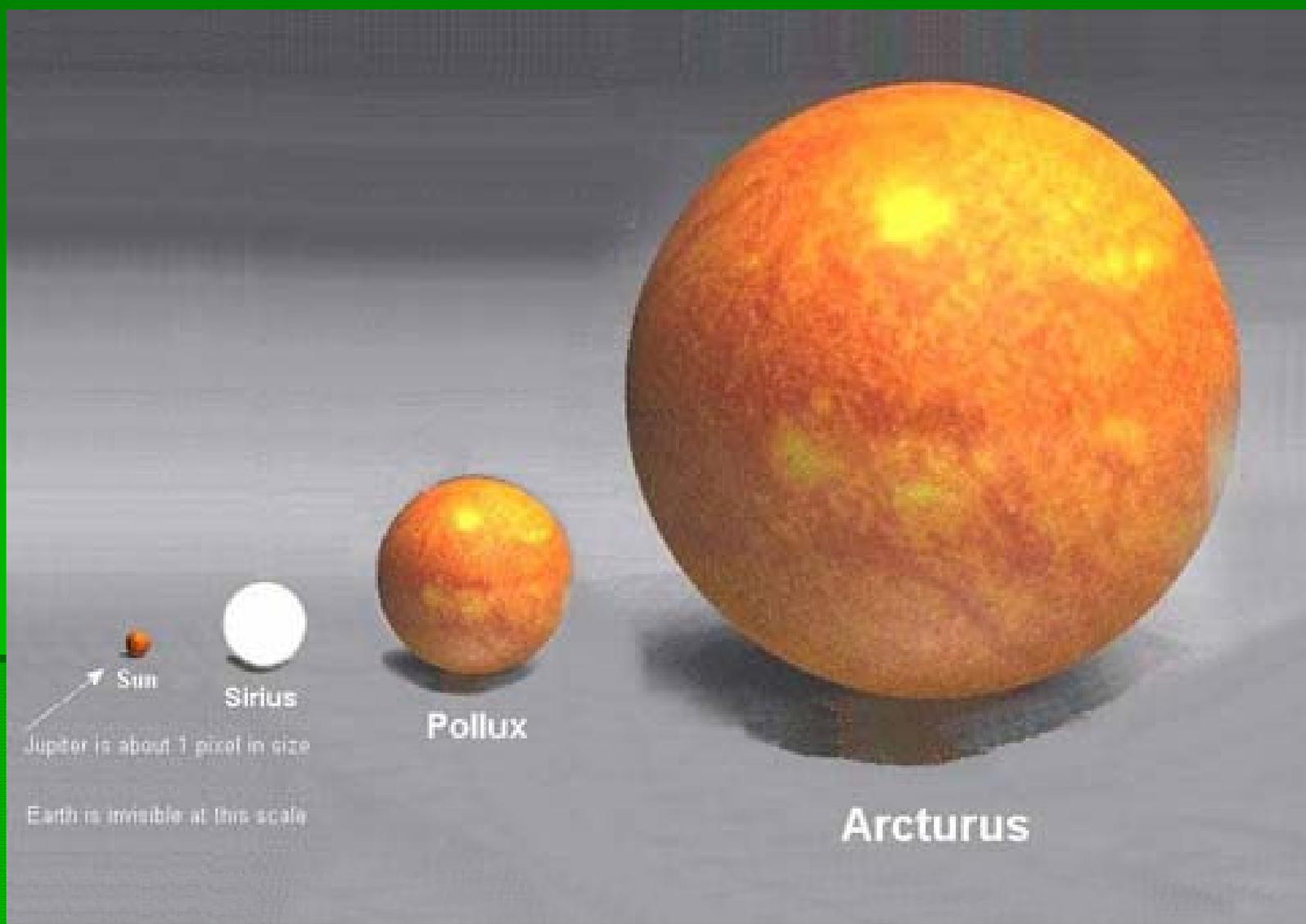
or

Retaliation Complaints

- negative comments about EEO complainants
- public displays of anger and rage that EEO matters were discussed by employees
- prohibition to a supervisor against contacting an EEO representative

Just step back for a moment...





Sun

Sirius

Pollux

Arcturus

Jupiter is about 1 pixel in size

Earth is invisible at this scale

Betelgeuse

Antares



# And look at the Big Picture.

- When an individual is accused of discrimination he or she has the opportunity to show that they are not a discriminator.
- No anger required.



# The Big Chill doesn't need to be big!

- Discussions regarding prior protected activity
- Employee removed from social committees etc.
- Other obvious different treatment (Supervisor no longer speaks to employee)
- Denial of duties known to be preferred
- **Subtle conduct will not be overlooked!**

# A final note on reprisal

- While disparate treatment is an inappropriate analysis in a claim of reprisal at prima facie stage, comparative evidence can be quite persuasive for purposes of establishing or disproving pretext argument.

# Elements of a Harassment Claim

- Conduct must be unwelcome.
- Conduct based on a protected basis.
- Conduct results in a tangible employment action (TEA) or creates a hostile work environment.

# Harassment case pitfalls

- The issue is not etched in stone. Be a Definer.
- Is the conduct severe or pervasive enough to create an environment that a reasonable person would find hostile, intimidating or abusive?
- Managers manage and supervisors supervise. This is not harassment.

# Harassment continued

- Don't wait – Investigate!
- “It was he said – she said.” Make credibility determinations!

# Questions?

- Chief Administrative Judge Fran Polito
- 215-440-2807
- [francis.polito@eeoc.gov](mailto:francis.polito@eeoc.gov)