

## Anne's EEO Journey

Charetta T. Harrington  
Supervisory Adm. Judge  
EEOC, Cleveland Field Office

Vicki M. Wright  
V. M. Wright & Associates

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## Meet Anne

Anne, who is 55 years old, works for the Department of the Army as an IT Specialist, GS-11, performing database management functions.

She has been in the job for 5 years.



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## Anne Applies for a Promotion

In May 2010, Anne applies for the position of IT Specialist (Lead), GS-12.

She is placed on the Best Qualified List, and interviewed for the position.

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## Anne's Interview

During the interview, Fred, the Director of Information Technology and Anne's third-level supervisor, describes the duties and responsibilities of the Lead Specialist position. He asks how Anne sees her experience, particularly her supervisory experience, fitting those requirements.

After the interview, the Director mentions up-coming management courses being offered at the agency which Anne may want to explore. He also notes that there is a seminar scheduled on planning for retirement.



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## The Bad News

Anne is notified, at the end of May, that she was not selected for the position in favor of Steve, who is 33 years old.



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## Anne Fights Back

June 3, 2010, Anne contacts an EEO Counselor about the nonselection. She subsequently files a formal complaint alleging that she was subjected to age and gender discrimination.

As a remedy, she asks for placement in the job, back pay, and \$300,000 in compensatory damages.



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## Where's the Beef?

How would you characterize Anne's claim?



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## Disparate Treatment

Anne's complaint presents the issue of whether the agency subjected her to disparate treatment on the bases of her age and gender.

EEOC Regulation 29 C.F.R. § 1614.101.

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## Disparate Treatment Standards: A Game of Serve and Volley

The Supreme Court stated, in *McDonnell Douglas Corp. v. Green*, that in order to establish a case of disparate treatment discrimination, a complainant must first make a basic *prima facie* case by presenting enough evidence to raise an inference of discrimination. (That's the "serve.")

The agency must then respond to (rebut) the *prima facie* case by articulating legitimate, nondiscriminatory reasons for its action. (That's the "volley.")

If the agency does so, the complainant must show, by a preponderance of the evidence, that the agency's reasons are a pretext for discrimination. (This is a tough return shot to make!)

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

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## The Basic Prima Facie Case

In order to establish a *prima facie* case of discrimination, Anne must first demonstrate that:

- She is a member of a protected class;
- She applied and was qualified for the position;
- She was not selected for the position and
- Someone outside of her protected groups was selected for the position. (younger and or male)

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996).

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## Does Anne Have a Case?

Is Anne a member of a protected class?

Yes, by virtue of her gender (female) and age (over 40).

Was she treated differently than others outside of her protected class?

Yes, she was not selected in favor of a younger male.



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## The Agency's Volley

When asked by the EEO Investigator, Fred stated that he chose Steve because he was the best qualified candidate for the position. He also noted that he was looking for a candidate with a "fresh perspective on how to motivate the team."

Did the agency articulate a legitimate, nondiscriminatory reason for Anne's nonselection?

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## The Agency Misses

What if Fred had stated only that Steve was “better suited for the position” than Anne?



Fullman v. USPS, EEOC Appeal No. 01A31036 (March 18, 2004).

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## Anne's Return

How might Anne establish that the agency's stated reason for her nonselection was really a pretext for age or gender discrimination?



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## Anne's Very Bad Year Continues

In the months following her nonselection and complaint, Anne experiences a run of bad luck.

On June 28, 2010, Anne receives a mid-year performance review. Her supervisor, Sam, notes a number of deficiencies, including poor performance on one project, and difficulty dealing with co-workers and management officials.

Anne has never had any performance problems in the past, and Sam did not cite any specific examples of instances in which co-workers or managers complained about interactions with her.

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## The Leave Request

On July 7, Anne submits a request for annual leave for her usual summer vacation in August. Sam denies her request, citing staffing issues. He says that too many other employees have already scheduled leave for the period Anne was requesting.



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## The Project

In mid-July, Anne's Branch is assigned a high profile project. Anne is not assigned to work on the project.

When asked, Sam states that they need someone with experience dealing with high-level officials in other Departments, and who is a "team player."



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## Other Incidents

Anne attends a staff meeting in on July 19, during which Sara, the Branch Chief and Anne's second-level supervisor, comments on the low morale in the Branch, and states that employees should follow the chain-of-command when addressing problems.

Anne later goes to see Sam, and overhears him talking to Sara about a proposal she had made for database enhancements. Sara comments that they need to be careful about criticizing Anne because "she will complain."

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## Anne Stays the Course

On July 28, Anne stops by the EEO Office to talk to the Counselor who was assigned to her previous case. She mentions the recent incidents, and states that she believes she is being retaliated against.



29 C.F.R. § § 1614.106(d) & 1614.606.

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## A Basic Case of Retaliation

Anne may establish a *prima facie* case of reprisal by showing that:

- She engaged in protected activity;
- The agency was aware of the protected activity;
- Subsequently, she was subjected to adverse treatment by the agency; and
- A connection exists between the protected activity and the adverse treatment.

Hochstadt v. Worcester Foundation for Experimental Biology, 425 F.Supp 318 (D.Mass), aff'd, 545 F.2d 222 (1st Cir. 1976); Coffman v. Department of Veterans Affairs, EEOC Request No. 05960473 (November 20, 1997).

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## Point to Remember

In cases of retaliation, adverse treatment need not qualify as an "ultimate employment action," or affect a term, condition, or privilege of employment. Adverse treatment will be found when an action is based on retaliatory motive and is **reasonably likely to deter protected EEO activity**.



"Chilling Effect"

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**Does Anne Have a Basic Case of Retaliation?**

Has Anne engaged in protected activity?  
She filed a complaint.

Was the agency aware of the activity?  
Sam and Sara both knew she filed.

Was there adverse treatment?  
Incidents plus comments of managers.

Was there a connection between the adverse treatment and the protected activity?  
Short period of time between the two.

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**What If?**

What if the only adverse treatment Anne experienced was an increased scrutiny of her work by Sam after she filed her complaint, including keeping a careful eye on her time and attendance, and giving her less favorable assignments as compared to the other IT Specialists?

Would she be able to establish a *prima facie* case of retaliation?

Anthony v. Department of the Interior, EEOC Appeal No. 01A20111 (March 10, 2004).

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**Steve Re-enters the Picture**

August 2. Anne is also assigned to a project for which Steve is serving as the Lead Analyst. During the project, Steve will be giving Anne assignments and directing her day-to-day work activities.

Steve approaches Anne and suggests that they have lunch together to talk about the project. Steve tells Anne that he would like to get to know her better. Steve says that, since she has been with the agency for several years, he believes that she can fill him in on the "office gossip."

Anne agrees to go to lunch with Steve on August 4, believing that Steve's invitation is purely professional.

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## Lunch Discussion

During lunch, Steve initially discusses the project, and asks for Anne's view of the office culture.

While discussing certain co-workers, Steve comments that he believes two employees in the Branch are dating.

Steve notes that he has previously dated women at work, all of whom were older than he was. Steve asks whether Anne is seeing anyone.



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## Lunchtime Postscript

After lunch, when leaving the restaurant, Steve reaches behind Anne, putting his arm around her, to pull out her chair. Steve also puts his hand on Anne's arm as they are walking out of the door.

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## Additional Encounters

A few days later, August 8, Steve again asks Anne to lunch, but she declines.

On August 10, Steve comments that the blouse Anne is wearing is pretty, and states that he once bought a similar one for an ex-girlfriend.

Steve also asks Anne to go out for drinks after work on August 12 with some of his friends, an offer which she refuses.



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## The Final Straw

The following week, on August 16, Steve comes to Anne's office with a memorandum he has written for the project and asks her to review it. Steve stands behind Anne's chair to look at the memo with her, and rests his hands on her shoulders. Anne quickly makes a few comments about the memo, hoping that Steve will leave her office. Instead, Steve massages her shoulders, and tells her that he is really glad she was assigned to the project. Steve also tells Anne that if they spend more "quality time" together, he will recommend her for an award at the end of the project.

Anne tells Steve to take his hands off of her, and rushes from the room.

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## Anne Seeks Help

After she collects herself, Anne goes to see Sara, the Branch Chief, and tells her that she believes she is being harassed by Steve. At Anne's request, Sara removes her from the project, and initiates an internal agency investigation of the harassment allegations. The Investigator takes statements from both Steve and Anne, but determines that there is no corroborating evidence for the harassment allegations.

Anne also telephones the EEO Office to relate the incidents to the Counselor.



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## Sexual Harassment

A violation of Title VII may be based on either of two types of sexual harassment:

- harassment that results in the employer taking a tangible employment action against the employee; or
- harassment that, while not resulting in the taking of a tangible employment action, creates a hostile work environment.



Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

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## Basic Case: Sexual Harassment

In order to establish a claim of sexual harassment, Anne must show that she:

- belongs to a statutorily protected class;
- was subjected to unwelcome conduct related to his or her gender, including sexual advances, requests for favors, or other verbal or physical conduct of a sexual nature;
- the harassment was based on sex;
- the harassment had the purpose or effect of unreasonably interfering with work performance and/or creating an intimidating, hostile or offensive working environment; and
- there is a basis for imputing liability to the employer.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

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## Anne's Case

Has Anne shown a basic case of sexual harassment?

Does she belong to a protected class?  
Yes, by virtue of her gender.

Was she subjected to unwelcome conduct, or other conduct of a sexual nature? Comments by Steve and his conduct, including touching.

Was the harassment based on sex?

Did the harassment have the purpose or effect of unreasonably interfering with Anne's performance and/or create a hostile environment?

Is there a basis for imputing liability to the agency?  
Steve was the Lead IT Specialist.

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## Agency's Liability: Supervisors

Employers are subject to vicarious liability for unlawful harassment by supervisors.

If the harassment does not result in a tangible employment action, an employer may avoid liability by establishing an affirmative defense that includes:

- the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and
- the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or otherwise avoid harm.

Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999).

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## Who is a Supervisor?

An individual qualifies as an employee's "supervisor" if:

- the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
- the individual has authority to direct the employee's daily work activities.

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## Is Steve a Supervisor?

Would Steve be considered Anne's Supervisor?

He is a Team Leader.

Steve gave Anne assignments, and was directing her day-to-day work activities.



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## Is the Agency Liable for Steve's Conduct?

Did the agency exercise reasonable care to prevent and promptly correct the harassing behavior?

Removed Anne from the project at her request, and initiated investigation.

Did the agency have an anti-harassment policy and procedures in place?

Were employees and supervisors trained in the anti-harassment policy and procedures?

Did Anne unreasonably fail to take advantage of preventative or corrective opportunities provided by the agency or otherwise avoid harm?

Anne reported Steve's conduct to Sara and to the EEO Counselor.

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## Agency's Liability: Co-workers

An agency is liable for harassment by a co-worker or non-employee if it knew of the harassment and failed to take immediate and appropriate corrective action.



Policy Guidance on Current Issues of Sexual Harassment,  
No. 915.050 (March 19, 1990); Owens v.  
Department of Transportation, EEOC Request No. 05940824  
(September 5, 1996).

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## Co-worker Harassment

Suppose Steve had not been in a supervisory position over Anne?

- Did harassment occur?
- Is the agency liable?

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## What If?

Co-worker Steve aggressively gropes Anne on several occasions. In addition, he mentions that he has a permit to carry a concealed weapon, which he keeps locked in his car.

Anne, being fearful of Steve, does not report the harassment. One year later, a female co-worker files an EEO complaint against Steve for sexual harassment and names Anne as a witness. When Anne is contacted by the Counselor, she relates her experience with Steve, and indicates that she also wishes to pursue a claim.

Diggs v. Department of the Army, EEOC Appeal No. 01A12480 (January 9, 2003).

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## The Plot Thickens

In August 2010, Anne begins to experience a stress-related condition. She becomes fearful whenever a man approaches, particularly if he comes up behind her. Aside from going to work, Anne does not leave her house, and stops interacting with her family and friends. She experiences nightmares and insomnia nearly every night.

Anne is diagnosed with depression, and Post Traumatic Stress Disorder. Anne's psychiatrist determines that her condition is related to her stressful working conditions. The doctor recommends that she attend therapy sessions once each week, and work at home as much as possible to reduce her exposure to stressors in the workplace.

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## Request for Time Off

On August 26 Anne asks Sam for four hours of leave without pay each week to attend her therapy sessions. She also asks to be allowed to work from home two days each week.

Sam asks for documentation regarding her condition. Anne provides a note from her doctor which includes the diagnosis and therapy recommendation. Sam denies Anne's request on August 31, stating that she has not provided sufficient information.



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## The Reasonable Accommodation Analysis

An agency is required to make a reasonable accommodation of a known physical or mental limitation of an otherwise qualified individual with a disability unless to do so would cause an undue hardship.

An employee must show a connection between the disabling condition and the requested accommodation.

29 C.F.R. § 1630.9; Wiggins v. USPS, EEOC Appeal No. 01953715 (April 22, 1997).

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## The Basic Case: Disability

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- In order to establish a *prima facie* case of disability discrimination for failure to reasonably accommodate, Anne must show that she is a qualified individual with a disability.

29 C.F.R. §§ 1630.2(g) & 1630.2(m).

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## Individual With a Disability

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An individual with a disability is one who:

- has an impairment which substantially limits one or more major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment.

29 C.F.R. § 1630.2(g).

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## Major Life Activities

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Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working and major bodily functions.



29 C.F.R. § 1630.2(i).

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## Is Anne a Qualified Individual with a Disability?

What is the major life activity?

Interacting with others, sleeping, concentrating.

Is she substantially limited?

Not interacting with family and friends. Does not leave her house except to go to work. Nightly sleep disturbances. Diagnosed with depression and PTSD.

Is she qualified?

Can she do the job with or without reasonable accommodation?

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## Sam's Request for Medical Documentation

Was Sam's request for medical documentation justified?

When an individual requests reasonable accommodation, an employer may ask for reasonable documentation about the disability and the individual's limitations.



Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (October 17, 2002).

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## Anne's Requested Accommodations

Were the accommodations Anne requested reasonable?

- LWOP
- Telework



U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

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## Undue Hardship

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To establish undue hardship, the agency must show that the specific accommodation would cause significant difficulty or expense. This takes into account the financial realities of the employer, but is not limited to financial difficulty. Undue hardship refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

Do the accommodations that Anne requested create an undue hardship?

Appendix to 29 C.F.R. § 1630.2(p).

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