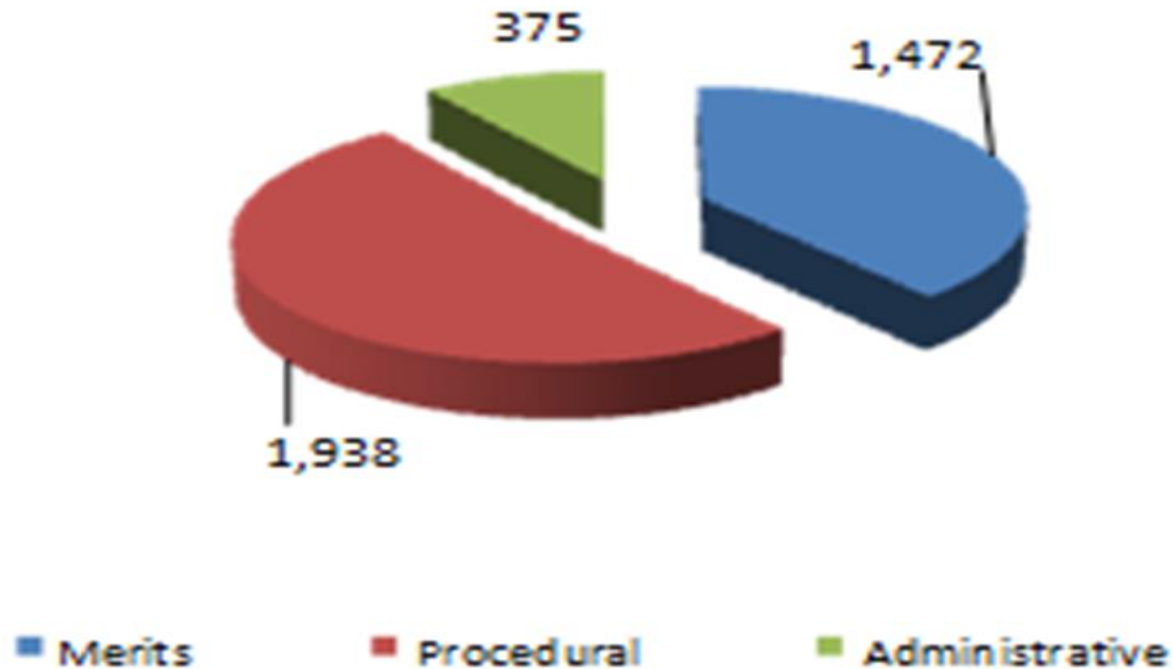


FEDERAL SECTOR CASE LAW UPDATE: APRIL 2017

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FY 2016 Closures (by Type)



Of the 3,751 appeals OFO resolved in FY 2016, 52% were procedural decisions; 39% were decisions on the merits; and 9% were administrative closures.

FINDINGS OF DISCRIMINATION

■ In FY 2016, there were **111** federal appellate findings of discrimination, the highest number of findings since FY 2007. This is **8%** of all OFO decisions on the merits.

■ **Composition of Findings by Basis:**

Disability	48%
Reprisal	36%
Sex	17%
Age	8%
Race	8%
Nat. Origin	5%
Color	2%
Religion	1%



FINDINGS OF DISCRIMINATION

■ Findings of Discrimination by Issue:

Harassment- 30%

Disability Accommodation- 28%

Promotion- 14%

Confidentiality Breached- 5%

Evaluation/Appraisal- 5%

Wages- 4%

Suspension- 3%

Assignments- 3%

Hiring- 2%

Awards- 2%

Time and Attendance- 2%



FINDINGS OF DISCRIMINATION: DISABILITY (REASONABLE ACCOMMODATION)

Faustino M. v. U.S. Postal Service: Ordering Complainant to return his computer monitor to the standard position instead of the position that lessened his back pain constituted a denial of reasonable accommodation.

Freddie M. v. Dep't of Defense: Agency failed to provide reasonable accommodation for Complainant's disability when it denied him an accessible parking space. Complainant's condition substantially limited the major life activity of walking, and Complainant's request for a designated parking space went unresolved for more than seven months.

FINDINGS: DISABILITY (DISPARATE TREATMENT)

- *Riley G. v. Dep't of Homeland Security:*
Supervisor's admission that she did not interview Complainant because of a psychiatrist's letter found in personnel file constituted direct evidence of discrimination, and the Commission noted that it was more likely than not that Complainant would have been selected for the job had the supervisor not read the letter.

FINDINGS: MEDICAL CONFIDENTIALITY

- *Buster D. v. Dep't of Agriculture:* Agency disclosed Complainant's medical diagnosis to the Chief Union Steward who did not have a need to know.
- *Haydee A. v. Dep't of Homeland Security:* Supervisor forwarded Complainant's email indicating she would see an orthopedic surgeon about knee surgery to two Deputy Associate Chief Counsels because the supervisor believed Complainant's absence might affect the assignment or processing of work.

FINDINGS: AGE

- ***Geraldine G. v. U.S. Postal Service:*** Selecting Official demonstrated direct evidence of age bias by asking another applicant about his years before mandatory retirement and commenting that he wondered if applicants close to retirement were motivated by a move to another location at the agency's expense and not the good of the agency. Complainant was better qualified for the position than the selectee because she had more experience, more upper-level experience and scored better on her application.
- ***Donna W. v. Dep't of Transportation:*** Agency's explanation pretextual where Complainant performed the functions of the position for 12 years; Complainant was placed into the position for two years, after which time a younger employee was selected for the subsequent two-year term; and Complainant had vastly superior qualifications.

FINDINGS: RELIGION (REASONABLE ACCOMMODATION)

- *Ronnie S. v. Dep't of Veterans Affairs*: Agency's suggestion that Complainant ask colleagues to swap schedules did not constitute a good faith effort to reasonably accommodate Complainant's religious beliefs because there was no evidence the Agency took any action to facilitate swaps.

FINDINGS: RELIGION (HARASSMENT)

- *Lashawna C. v. Dep't of Labor* (not yet in EEO Digest): Agency liable for religious harassment when supervisor sent an email to Jewish employee in which he said he had been “working like a Hebrew slave.”

FINDINGS: REPRISAL

- *Ivan V. v. Dep't of Veterans Affairs*: Supervisors pulling Complainant into an office and asking if he said that he planned to "play the Latino card" in the context of investigating a complaint from another employee constituted per se retaliation
- *Mitchell H. v. Dep't of Veterans Affairs*: Agency failed to articulate legitimate, non-discriminatory reasons for its actions when the evidence only addressed who authored the performance rating, instead of the reasoning for the rating.

FINDINGS: REPRISAL

- *Hannah C. v. Dep't of Justice*: Agency's explanation pretextual because of credible evidence that other employees were treated differently than Complainant was, and that management deviated from standard procedure in disciplining her.

FINDINGS: REPRISAL

- *Devon H. v. Dep't of Homeland Security (Dec. 3, 2015)*: It was not sufficient for the Agency to provide a ranking of the candidates considered for the promotion in which Complainant was ranked last without disclosing how it determined those rankings
- *Devon H. v. Dep't of Homeland Security (Dec. 18, 2015)*: Agency engaged in reprisal when it investigated Complainant for questioning the Selecting Official, telling the Official he had been treated differently than other employees, and asserted he would file an EEO complaint regarding his non-selection.

FINDINGS: SEX

- *Heidi B. v. Dep't of Health & Human Services*: Agency violated the Equal Pay Act (EPA) by paying Complainant at a lower grade than a male comparator who performed the same duties with the same amount of independence and authority
- *Scarlet M., Maxima R., & Sharolyn S. v. Dep't of the Navy*: Three female Complainants alleged sexual harassment when the Director at the location where the women worked installed a hidden video camera in the women's restroom.

FINDINGS: NATIONAL ORIGIN

- *Genny L. v. Dep't of Defense*: Agency discriminated against Complainant on the basis of national origin (Taiwanese) when, after a contractor complained of a "language barrier," the Agency required Complainant to communicate with the contractor through a supervisor or senior employee. This constituted direct evidence of national origin discrimination.

SANCTIONS

- *Glynda S. v. Dep't of Justice*: The EEOC's regulations provide that an agency shall issue its final decision within 60 days of receiving notification that a complainant has requested an immediate decision. In this case, the Agency waited over one year after the regulatory time frame to issue its final decision. The Agency issued the FAD 371 days late. The Commission determined that default judgment in favor of Complainant was warranted as a sanction in this case.

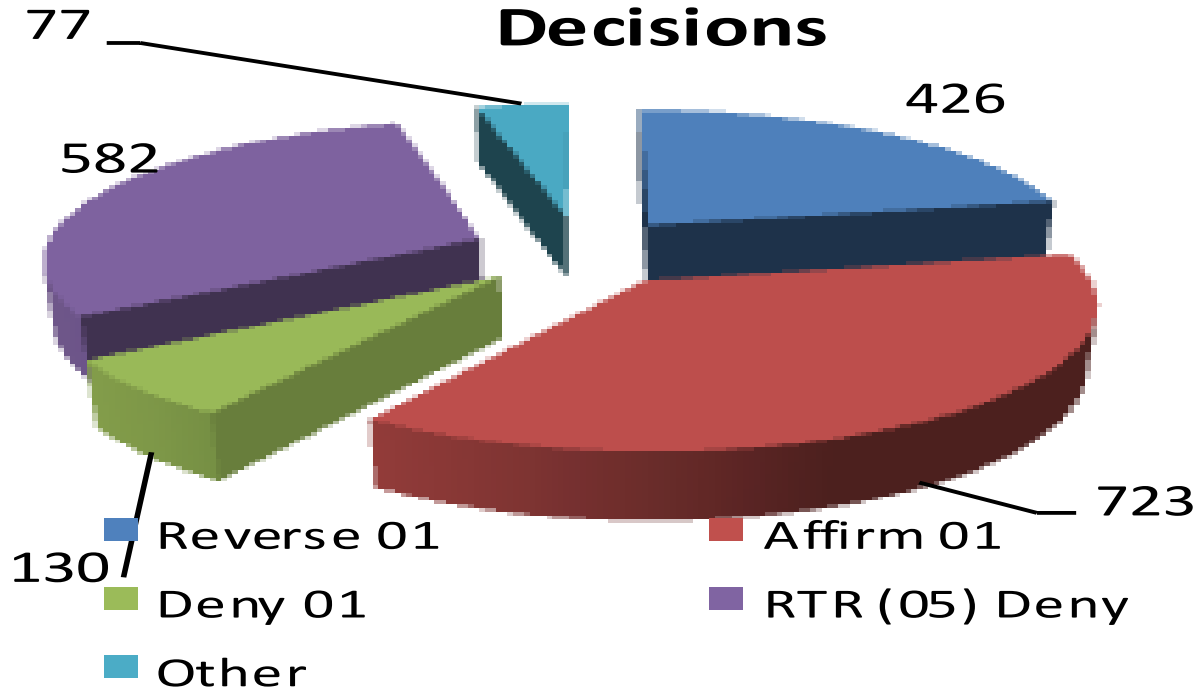
SETTLEMENT AGREEMENTS

- *Luanne L. v. Dep't of the Air Force:* Although Agency claimed it could not implement two provisions of agreement because Acting Director lacked authority to bind Agency, it failed to present evidence that the Acting Director lacked authority to bind the Agency to the terms of the settlement.

SETTLEMENT AGREEMENTS

- *Gia M. v. Dep't of the Army*: Agency provided Complainant with nothing more than that to which she was already entitled as an employee, and Complainant received no consideration, when agreement provided that Agency would search for a vacant, funded position for Complainant that she was qualified with or without an accommodation.
- *Branda M. v. Dep't of Veterans Affairs*: Draft settlement agreement was not binding because it was not signed by both parties.

Breakout of ARP Procedural Decisions



Of the 1,938 procedural decisions issued by OFO in FY 2016, 1,286 were from Agency dismissals. We reversed in 426 instances (33%); affirmed in 723 instances (56%); and denied consideration of appeals in 130 instances (10%). The remaining closures were 582 denials of requests for reconsideration of previous OFO decisions.

PROCEDURAL: STATING A CLAIM

- *Florentino S. v. U.S. Postal Service*: Complaint may state a claim where the complainant claims that an agency canceled a selection process under circumstances suggesting a deliberate intent to avoid selecting the complainant.
- *Isaiah R. v. Social Security Administration*: Claim of sex discrimination based on different standards of dress for male and female employees failed to state a claim.

PROCEDURAL: STATING A CLAIM

- *Alfonzo H. v. Dep't of State*: affirmed the Agency's dismissal of Complainant's complaint alleging that disparaging comments were posted about him on an internet blog frequented by Agency employees who were members of a professional association.
- *Zonia C. v. Dep't of Veterans Affairs*: Complainant's allegations that her supervisor yelled at her and removed her hand from her computer mouse stated a viable claim of retaliation.

PROCEDURAL: STATING A CLAIM

- *Alisa M. v. U.S. Postal Service*: Claim that a printout of an e-mail between managers referencing EEO activity was left at Complainant's workstation, in plain view of her co-workers and customers, states a claim.
- *Celine D. v. U.S. Postal Service*: Claim that personnel files had copies of Complainant's medical history and records states a claim.
- *Herb E. v. Dep't of the Army*: Without more, being identified as a responsible management official in an EEO complaint is not enough to serve as a basis for a claim of retaliation.

PROCEDURAL: UNTIMELY COUNSELOR CONTACT

- ***Devon H. v. U.S. Postal Service***: Because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it.
- ***Faustina L. v. Dep't of Defense***: Sufficient justification to excuse Complainant's untimeliness when Complainant said she was not aware of time limits, and the Agency did not show that it trained employees on EEO procedures or that it had the time limitations for EEO counseling posted during the relevant time period

PROCEDURAL: FAILURE TO COOPERATE

- *Genie S. v. U.S. Postal Service*: Agency's dismissal was improper where Complainant explained that she did not receive the request for an affidavit, Complainant provided sufficient information to permit the Agency to complete its investigation without the affidavit, and there was insufficient evidence to conclude that Complainant purposely engaged in delay or contumacious conduct.

THE CONVERSATION: QUESTIONS

THANK YOU!

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