



Department of Veterans Affairs Office of Inspector General

Administrative Investigation Failure to Comply with Americans with Disabilities Act and VA Policy Veterans Health Administration

Redacted



DEPARTMENT OF VETERANS AFFAIRS
Office of Inspector General
Washington, DC 20420

TO: Deputy Under Secretary for Health for Operations and Management

SUBJECT: Administrative Investigation, Failure to Comply with Americans with Disabilities Act and VA Policy, Veterans Health Administration (2013-02649-IQ-0154)

Summary

We concluded that a Veterans Health Administration (VHA) Medical Center Director failed to meet reasonable accommodations (RA) confidentiality requirements when she disclosed an employee's confidential medical information to unauthorized VA managers, medical staff, and other employees. Although she did not name the employee, she referred to the employee by position and identified medical condition, which was enough information to identify the employee. We also found that the Director improperly appointed herself Designated Management Official (DMO), substituted her medical judgment for that of an employee's physicians, delayed accommodating the employee while gathering additional, unnecessary medical information, and neglected to provide the employee avenues of redress when she denied the employee's RA request. We do not identify some individuals in this report in an effort to protect the employee's identity.

We also found that the VHA Medical Center Equal Employment Opportunity (EEO) Program Manager and Local Reasonable Accommodations Coordinator (LRAC) failed to implement the 2008 Americans with Disabilities Act Amendments and subsequent March 2011 Equal Employment Opportunity Commission (EEOC) guidance, after directed by the [REDACTED]. Further, we found that the LRAC violated confidentiality requirements when she consulted VHA physicians and revealed the nature of the employee's condition to the DMO and others. In addition, we found that the LRAC failed to follow VA policy when she composed an RA denial letter without providing avenues of redress for the VA employee. (b)(6)

Further, we found that a Regional Counsel Staff Attorney failed to provide proper advice to the LRAC concerning the employee's prospective RA, as she told the LRAC that RA guidelines did not recognize the employee's medical condition as a disability. Contrary to her initial advice, the Staff Attorney later told the Director to [REDACTED] with the employee, [REDACTED], due to the Director holding up the RA to obtain additional medical documentation.

Introduction

VA Office of Inspector General Administrative Investigations Division investigated allegations that a Director, LRAC, and other VA employees violated RA confidentiality requirements. In addition, we investigated whether the Director and LRAC violated Federal regulations and VA policy during the RA process. To assess these allegations, we interviewed the Director, LRAC, and other VA employees. We also reviewed Office of Resolution Management (ORM) EEO, email, and personnel records, as well as Veterans Integrated Service Network (VISN) Privacy Office investigative documents and reports. We investigated but did not substantiate another allegation and will not discuss it further in this report.

Background

VA Secretary's EEO Diversity and Inclusion and NO FEAR Policy Statement, dated May 31, 2013, committed VA to uphold EEO standards and maintain a high-performing workforce in service to our Nation's Veterans. It states that VA would vigorously enforce all applicable Federal EEO laws to ensure equal opportunity in the workplace for all VA employees and affirmed that the policy applied to all employment terms and conditions, including benefits.

VA's Office of Human Resources & Administration (HR&A) Office of Diversity and Inclusion (ODI) intranet website for disability accommodation procedures displayed Section 501 of the Rehabilitation Act, which required that agencies provide RA to qualified employees with disabilities. The website defined an RA as a change in the work environment or work processes that enabled an employee with a disability to enjoy equal employment opportunities and that the accommodation must effectively meet the needs of the individual and address the barrier created by the functional limitations. It also stated that VA should provide RA unless VA showed that the accommodations caused undue hardship on the operation of the program.

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ODI's website identified key EEO Specialists [REDACTED] and [REDACTED], stating that [REDACTED] was VA's [REDACTED], and [REDACTED] told us that [REDACTED] was the [REDACTED] and her assistant RA resource person. [REDACTED] told us that she processed nearly 120 RA requests for VA employees, and both [REDACTED] and [REDACTED] told us that they frequently counseled VA personnel on processing requests and also answered many accommodation-related questions.

VHA Medical Center Director

The Director told us that she completed an RA training session as part of an overall EEO training course, and [REDACTED] told us that training records reflected that the Director

completed an on-line version of the RA training in October 2010. The Director told us that she also attended the Regional Counsel's RA training for medical center leadership in 2012. She said that she was the self-appointed DMO at the medical center, decided RA requests, and her most recent RA training emphasized that medical information must be "very carefully protected."

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██████████ and ██████████ both told us that ODI guidelines prohibit VA medical center directors from being appointed to the DMO position to preserve the director's objectivity in deciding RA appeal cases, which was the director's key role in the appeal process. ██████████ emphasized the need for the director's neutrality in RA matters, since they were the responsible party in EEO rulings against a medical center.

EEO Program Manager and LRAC

One of the LRAC's performance reviews stated that she worked with uncommon RA issues and was "extremely resourceful" in dealing with employees. Further, records reflected, and she told us, that she was promoted into her current position and assumed LRAC responsibilities in 2009 and was the medical center's top RA resource person. At that time, the LRAC signed a Statement of Commitment and Understanding that committed her to safeguarding VA employees' personal information and acknowledged civil, criminal, and administrative penalties to which compliance failure subjected her.

ODI Annual Report

The FY 2012 ODI Diversity & Inclusion Annual Report reflected that VA processed and funded over 700 RA requests from employees with major life activity restricting disabilities. It also reflected an increased liability risk with a 45 percent rise in RA-related complaints between 2008 and 2012. In response, ODI trained nearly 500 VA managers during FY 2012.

Overview of RA Regulations and Guidelines

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██████████ told us that The Rehabilitation Act of 1973, as amended; Title I of the Americans with Disabilities Act of 1990 (ADA); The ADA Amendments Act of 2008 (ADAAA); and Equal Employment Opportunity Commission (EEOC) guidance governed RA requests and confidentiality of protected medical information obtained during the process. EEOC guidance reflected that President George W. Bush signed ADAAA into law on September 25, 2008, with the statutory effective date of January 1, 2009. To comply with original congressional intent regarding the ADA, as stated in U.S. House testimony, the 2008 Amendments Act broadened the definition of disability, included coverage to the maximum extent permitted by the ADAAA, and redefined the terms and conditions related to qualifying disabilities. Federal law covering Public Health and Welfare states that enactment of the ADAAA reduced the high standard of

proof for requestors of RA and asserts that covered entities do less extensive analysis in determining the existence of an employee's qualified disability. 42 USC, Chapter 126, Sec. 12101, Findings and Purpose of Pub L. 110-325(a).

EEOC guidance, published March 25, 2011, gave covered entities an interpretation of the ADAAA, and, in February 2012, EEOC adopted a FY 2012–2016 strategic plan that established equal employment law, to include the employee's specific condition, as a top national priority. EEOC guidelines additionally stated that impairments resulting from the employee's specific condition may be disabilities under the ADA and that an employer may have to provide an RA for a disability specific to the employee's condition, absent undue hardship, because the ADAAA made it much easier to show that a medical condition was a covered disability.

VA HR&A Guidance

On February 23, 2009, the acting Assistant Secretary for HR&A issued a Memorandum for Under Secretaries, Assistant Secretaries, Other Key Officials, and Field Facility Directors to assist in implementing the ADAAA within VA. The memo told recipients of the planned VA Handbook and Directive 5975.1 revisions and concluded that the ADAAA expanded disability protections, reversed restrictive Supreme Court rulings, and covered more VA employees. To facilitate interim ADAAA implementation, the memo provided ODI's interpretation of changes to VA management.

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██████████ sent us a June 2012 email, titled: "Medical Documentation Restrictions" that she sent to LRACs VA-wide containing ODI's interim RA guidance and linked recipients to the EEOC website for help implementing and interpreting ADAAA. The email clarified that the EEOC guidance defined impairments and assisted in determining which disabilities qualified for RA stating, "any disability not both transitory and minor is covered by ADAAA" and "by extension the Rehabilitation Act."

██████████ told us that to inform LRACs VA-wide of newly clarified RA disability information before ODI officially released the revised VA Handbook 5975.1 she sent updated guidelines in an email. For emphasis, her email addressed reported incidents of unnecessary requests for, and unauthorized disclosure of, RA medical information by LRACs. The email instructed that LRACs and alternates alone, decided the need for, and conducted review of, medical documentation when processing RA requests, and LRACs **NOT** (emphasis in original) share the information, or the name of the disability, with anyone including the DMO or the Reasonable Accommodation Committees (RAC) in VHA. The email prohibited VHA physicians from reviewing medical documentation submitted in the process and permitted LRACs to disclose to the DMO and the RAC only whether there was a covered disability and, if so, the functional limitations created by the disability. It further stated that these prohibitions reduced VA's liability in EEO cases arising from improper disclosure of, or decisions about, an employee's disability.

██████████ told us that she observed that VHA historically automatically sent RA requestors for health exams and that some medical centers wrote local guidelines that she deemed “hair-raising” (defined as extremely alarming), because they misunderstood the requirements. She said that they wanted them to instead use the official guidelines and not their own local policy. For example, the email cited a case in which the EEOC found VA liable in an RA case, because management requested duplicate medical information from an employee’s physician. The email told LRACS “keep the disability determination process simple” and directed LRACs to use the email message as guidance while waiting for publication of the revised VA Directive and Handbook.

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Results

Issue 1: Whether the Director and Others Improperly Disclosed an Employee’s Medical Information

Federal regulations that implement the Equal Employment Provisions of ADA state that, once obtained, medical documents must remain confidential. 29 CFR § 1630.14c. However, the Health Insurance Portability and Accountability Act (HIPAA), as well as the Privacy Act of 1974, exempt employers from the disclosure rules in cases involving employee health information obtained as employment records for “valid and routine uses.” HIPAA privacy rules define VHA as a “health plan” and state that a “health plan” is a covered entity which must protect medical or health plan records from disclosure only if the person is a patient or a member of the health plan and that they do not apply to an employee’s employment records. Federal regulations further state that, generally, the privacy rule applies to disclosures made by a healthcare provider, not to the questions of an employer. 45 CFR §§ 160.103 and 164.512(b)(1)(v); 5 USC § 552a(b); and *Doe v. DOJ*, No. 09-411, 2009 WL 3182904.

VA policy states that RA officials shall not obtain medical documents for every RA request, but they may obtain them if the information initially provided for the request was insufficient. They also state that under the Rehabilitation Act (of 1973 as amended) confidentiality rules regarding disability status apply to “all employees...whether or not they are determined to be individuals with disabilities,” and those who receive medical information during the RA process must keep it confidential. VA policy further states that violation of the Rehabilitation Act’s medical confidentiality requirements exposes the agency to liability, even if there was no other action taken against the individual who provided the disclosed medical information. It also states that processors shall not share the medical information or accommodations with an employee’s coworkers or other employees. VA Handbook 5975.1, Sections 11 and 12 (September 2010).

The medical center’s local policy states that LRACs must maintain the confidentiality of medical information obtained from an employee in a locked file cabinet and treat it as a confidential medical record. It also states that processors may disclose, to a manager or

supervisor, only necessary restrictions on the work duties of the employee, and necessary accommodations to make appropriate determinations on requests, but no more than necessary, meaning that an LRAC may not disclose the documentation or name of the disability with the DMO, or anyone else. 29 CFR § 1630.14(b)(1).

In a March 15, 2013, email from a medical center employee to the office secretary, the employee requested an RA to enable the employee to continue working during a medical-related condition. RA records reflected that the employee provided four separate medical documents to support the request. The first, dated March 12, 2013, titled Family Medical Leave Act (FMLA) Certificate of Health Care Provider for Employee's Serious Health Condition, confirmed the employee's March 6, 2013, emergency room visit for an identified medical emergency, signed by a physician, clearing the employee for normal activity after a 10-day bed rest. The second, dated March 13, 2013, was a note from a local private medical practice certifying that their physicians provided high-risk medical care for the employee. It did not identify the specific medical condition, but it reflected that a physician approved the employee for light duty under certain physical restrictions. The third was a letter from the same physician, releasing the employee for work on March 18, 2013. It provided a diagnosis and identified restricted and permitted physical activities. The fourth was from the same physician, and it answered 10 medical questions that the Director posed regarding the employee's medical condition. The Director sent the questions to the employee in a March 27, 2013, email and asked the employee to submit the additional questions to the employee's physician. The Director instructed the employee to return them to her via the LRAC, after the Chief of Surgery reviewed them.

The Director told us that she was uncomfortable approving the employee's RA, as the documentation the employee provided left the Director with questions. She said that she was concerned for the employee's health but that her main duty as a VA senior executive was to protect VA. She said "first and foremost, I'm an agent of the Federal government." She said that she suggested to the LRAC that they consult with a VA physician to ensure they took correct action in regards to the employee's condition.

The Director told us that they had a daily morning meeting in which key clinicians discussed the previous day's events. She said that in these meetings, there were about 30 employees physically present and others who participated by teleconference. Further, she said that these meeting had three segments, an early "huddle" with only select staffers participating, the 8:15 a.m. meeting for all participants, and a "second call" held between two or more parties to resolve lingering issues.

The Director and the LRAC told us that during the March 22, 2013, huddle they decided to consult the medical center's Chief of Surgery and another physician for opinions on the employee's medical condition. The Director said that she and the LRAC discussed the employee's RA during the morning huddle and that after the 8:15 a.m. meeting, she conducted the second call. The employee's supervisor, a Service Chief, told us that she met with the Director and the LRAC at the March 22, 2013, "pre-meeting," discussed

the employee's RA, the employee's medical condition and diagnosis, and decided that they needed to discuss the matter during the second call.

The Service Chief told us that she attended the 8:15 a.m. meeting with about 30 others and that the Director did not discuss the employee's RA during that time. However, she said that the Director asked the Chief of Surgery for an opinion on the employee's particular case during the second call and that after the 8:15 a.m. meeting, about half the meeting attendees remained in the room as the second call began. She said that she suspected others might have stayed on the teleconference lines as well. The Service Chief told us that during the second call, the Director asked the Chief of Surgery if the employee could still work with the employee's identified medical condition, referring to the employee by position and not by name; however, knowing the medical condition and position, in all likelihood identified the employee to all participants.

The Director told us that during the March 22 second call, she contacted the Chief of Surgery by phone, described the employee's medical condition and asked for her medical opinion about the employee remaining at work. She said that the Chief of Surgery told the Director that she would consult with physicians within identified medical specialties and call the LRAC with the results. The Director said that after speaking with the Chief of Surgery, she concluded that she did not have enough information to make a decision, so she asked the employee for additional medical documentation. The Chief of Surgery told us that the Director requested that VA physicians compile a list of questions for the employee's personal physician to answer to ensure the employee's safety. The Service Chief said that anyone in the room, hallway, or still on the phone during the conference call would be able to hear the conversation about the employee's medical condition.

The LRAC told us that she often attended the morning meetings to interact with Service Chiefs and other medical center and clinic leadership. She said the meetings took place in a large conference room with about 25 attendees present and others on a telephone conference call. She said that she and a VA physician briefly spoke about the employee's RA with the Director just after the March 22 huddle, but she did not attend the 8:15 a.m. meeting that day. She said that the Director later told her that there was a breach of privacy allegation made against the Director related to her discussion of the employee's medical condition during the March 22 morning meeting, and the Director asked the LRAC to write her account of events that day.

The Chief of Surgery told us that there was a second call after the March 22 morning meeting, but she said that she was unaware that it involved an RA matter. She said that the LRAC first called her on March 22 and inquired about an employee with an identified medical condition and that she told the LRAC that since she was not a specialist in that particular medical field, she would get an opinion from a staff specialist about whether an employee with that condition could continue to work. She further said that she told the LRAC, and subsequently the Director, during the March 22 second call, what the specialist recommended. She said that during a later meeting on March 27, the Director

said that she planned to deny the employee's RA, due to the employee's physician providing insufficient medical information.

The staff specialist told us that a surgery service administrative officer asked him to call the Chief of Surgery with a quick answer concerning whether a VA employee could continue to work with the identified medical condition and of any restrictions. In a March 27 email, the staff specialist returned the questions the Director compiled for the employee's physician and asked the staff specialist to review. The specialist told us that he told the Director that the VA employee should follow her personal physician's instructions. However, the Director still emailed the questions to the employee and asked the employee to submit them to the employee's personal physician.

The ODI interim RA guidance, email dated June 13, 2012, specifically told VHA managers to not consult VHA staff physicians on RAs. However, the Director told us that she had the authority to consult VHA physicians, because she was "the chief executive." She said that she based her actions on her years of service as a medical center director, a need to protect VA, and provide for the safety of the employee. The interim ODI email also reminded managers of the LRAC's prohibition against sharing medical details, specifically with the DMO, the Director's self-appointed role.

Email records reflected that the LRAC and the alternate LRAC (ALRAC) received the June 2012 email containing interim ODI guidance. The LRAC told us that she recalled receiving the email and that she sent it to the Staff Attorney and the ALRAC around that time. The Director said that she was not aware of the interim ODI RA guidance and that she did not recall if the LRAC received the email containing the guidance. The LRAC told us that she first sent the interim guidance to the Director in a June 18, 2013, email, a full year after receiving it. She further said that she did not implement the interim guidance upon receipt, because she was waiting for the publication of the revised Handbook and Directive 5975.1. These revisions still have not yet been released and are only available in draft form on an internal system.

VA Handbook 5975.1, dated September 17, 2010, requires the medical center director to provide proper training, funding and oversight to ensure effective implementation and management of the RA program. It states that the DMO, the Director, must know RA procedures and keep RA requests confidential, properly documented, disseminated to the LRAC, and provide timely RA to the requestor when granted. It also required the LRAC to ensure all RA records remained confidential.

The Service Chief told us, "Maybe they could have done a better job of limiting the number of people in the room" during the meeting and that the episode was a learning experience. She said that others, to include the acting Chief of Staff's administrative officer and possibly the medical center associate director, learned of the employee's medical condition during the meeting. She also said that the Director subsequently heightened security measures around the morning calls and that she apologized to the

employee for the improper disclosure. An April 5, 2013, email from the Director to medical center leadership, Subject: Importance of Privacy, she urged careful use of conference facilities when discussing sensitive information. The Director told us that she believed that she unintentionally violated the employee's privacy.

Conclusion

We concluded that the Director improperly disclosed an employee's identified medical condition, which was entrusted to the LRAC, during and after a teleconference meeting on Friday, March 22, 2013, when the Director began the call while earlier meeting attendees lingered and teleconferenced attendees were still on active lines. VA guidelines prohibit the DMO, a position the Director improperly delegated to herself, from learning RA medical information. Email records and testimony reflected that the Director not only knew details of the employee's medical condition but that she, albeit under the premise of protecting VA and the employee's safety, assumed responsibility incumbent with the LRAC alone. The Director failed to maintain confidentiality when she asked the LRAC to call VHA physicians for a medical opinion about the employee's ability to continue working with a specific condition and then improperly discussed the matter with the Chief of Surgery.

We also found that in following the Director's orders to consult VA staff physicians, the LRAC made an unauthorized disclosure, first to the Chief of Surgery's assistant. She should have instead told the Director of the prohibitions against that type of disclosure and associated agency risks. In a chain of events, the type [REDACTED] warned about in her June 12, 2012, email, this disclosure was exacerbated when the assistant conveyed the employee's medical condition and job title to staff physicians. In direct contravention of ODI interim guidance, which the LRAC received, ignored, and withheld, the LRAC deliberately violated EEOC confidentiality requirements and VA policy when she recognized the Director as the DMO, and she improperly shared with the Director the employee's name, position, and identified medical condition. The LRAC also failed to properly perform the duties of her position when she did not maintain the privacy of the employee's personal health information during the RA process. In doing so, she exposed VA to [REDACTED]. (b)(6)

Furthermore, we found that the Director continued to compromise the employee's privacy after the March 22 meeting when, 5 days later, on March 27, she discussed the employee's medical condition and identified the employee by position during a related conversation with the Chief of Surgery. If [REDACTED]'s interim RA guidance email revealing ODI's concern for LRACs inappropriately disclosing medical information, containing examples, and warning LRACs against lax security measures was properly disseminated, it may have averted the Director's numerous unauthorized disclosures.

Recommendation 1. We recommend that the Deputy Under Secretary for Health Operations and Management (DUSHOM) confer with the Offices of Human Resources (OHR) and General Counsel (OGC) to determine the appropriate administrative action to take, if any, against the Director.

Recommendation 2. We recommend that the DUSHOM confer with OHR and OGC to determine the appropriate administrative action to take, if any, against the LRAC.

Issue 2: Whether the Director and Others Failed to Follow Federal Regulations and VA Policy Governing Reasonable Accommodations

Federal regulations define fringe benefits to include a wide array of workplace advantages and “other terms, conditions, and privileges of employment,” the delivery of which shall not discriminate between men and women. 29 CFR § 1604.9(a)(b). Federal regulations implementing ADAAA 2008 define a “qualified” individual as an individual who satisfies the requisite skill, experience, education and other job-related requirements of the position and, with or without reasonable accommodation, can perform the essential functions of the position, except those engaged in drug use. 29 CFR §§ 1630.2(m) and 1630.3(a). Federal law implementing ADAAA further defines, and construes in favor of broad coverage, a disability as a physical or mental impairment that substantially limits one or more major life activities, including work; a record of such an impairment; or being regarded as having such an impairment. 42 USC § 12102.

VA policy states that VA shall provide RA to qualified individuals with disabilities to allow them to fully participate in the application process, perform essential job functions, and enjoy equal benefits and privileges of employment in accordance with all applicable laws, regulations, and VA policies, unless to do so would cause undue hardship to VA. VA Handbook 5975.1, Paragraph 2a (September 17, 2010). It further states that, where possible, within 13 calendar days of an initial request, management will make interim workplace adjustments until the final decision on the request. The interim workplace adjustment should enable the individual to perform the essential functions of the job or enjoy the benefits and privileges of employment without posing a direct threat to anyone’s health and safety. It also states that management shall provide a written explanation to the employee if an interim workplace adjustment is not possible. *Id.*, at Paragraph 9 and Appendix A (September 17, 2010).

VA policy also states that if the DMO cannot grant an RA, they must first consult the NRAC or designated RA attorney. They must then complete VA Form VA0857g, VA Denial of Reasonable Accommodation, notify the employee of the denial in writing, provide details on the specific reason for the denial, and inform the employee of possible avenues of redress within 27 days of the initial request. Finally the LRAC must provide a copy of the denial form to the NRAC. *Id.*, at 15(6)b, and 20g. VA policy allows for the denial of an RA if the expected effects of the condition are to last less than 6 months. *Id.*, at Paragraph 4h.

Federal regulations relating to labor, as articulated by EEOC's interpretation of ADAAA 2008, emphasized removal of the 6-month rule for the "actual disability" prong or the "record of" prong of the regulation. It states that the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether impairment "substantially limits" a major life activity should not demand extensive analysis. 29 CFR, § 1630.2. Congressional intent on ADAAA 2008 and EEOC guidance eliminated a 6-month or less duration and called the 6-month standard "a more stringent standard than the EEOC had previously required." The Commission declined to provide for a 6-month durational minimum for showing disability under the first or second prong of the definition. *Federal Register*, Vol. 76, No. 58, page 16982.

The Director and the LRAC told the employee, in an April 5, 2013, letter, that the employee "did not meet the criteria for a reasonable accommodation...as such the agency is not legally required to offer an accommodation." However, they offered the employee a "workplace adjustment" which listed five measures to assist the employee, but only one of the five measures partially met the original accommodations the employee's physician recommended. [REDACTED] reviewed this letter, and she told us that it did not comply with Policy in VA Handbook 5975.1, since it failed to explain the reason for denial. She said that the letter was unclear as to whether the condition did not meet the criteria for an RA or if it denied the actual request. [REDACTED] also said that the letter did not provide the employee the required avenues of redress after the denial and that to deny a request, VA Form 0857g should have been used, since it complied with VA policy for RA denials. (b)(6)

Medical center local policy on processing RAs for employees and applicants with disabilities, published March 1, 2012, and signed by the Director, stated that if the LRAC determined to deny an RA, they must notify the employee in writing. The content of their denial notice mirrored VA Handbook 5975.1, except the local policy did not require the use of VA Form 0857g.

The Director told us that she followed the RA denial procedures according to their local policy, and she said that if they judged an employee eligible to apply for an RA, but denied the accommodation, they had to follow RA procedure steps. However, if the employee was not eligible under the criteria, then they were verbally informed, "You aren't eligible for reasonable accommodation." The Director said that they did not deny the accommodation of the employee in question, but provided the employee a workplace adjustment. She further said that the employee was never eligible for an RA in the first place. [REDACTED] said that there was no provision in the Rehabilitation Act for a workplace adjustment. VA and local policy only allowed for an interim workplace adjustment during the determination process to avoid unnecessary delay implementing the accommodation and not as a final solution. However, the Director's reliance on local

policy for the denial was contrary to ADAAA guidance on defining a disability. ADAAA states that covered entities should opt in favor of broad coverage and that deciding if an individual had a disability should not demand such extensive analysis.

In addition, EEOC received several comments on proposed revisions to the ADA, seeking an explanation of whether the employee's specific condition was considered a disability. EEOC responded that, although the condition itself was not an impairment, and not a disability, the specific condition-related impairment "that substantially limited a major life activity was a disability" under the first prong of the definition. Alternatively, the employee's specific condition may constitute a "record of" a substantially limiting impairment, or be covered under the third "regarded as" prong, if it was the basis for a prohibited employment action and was not "transitory and minor."

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██████████ told us that VA Regional Counsel Staff Attorneys were not always up to date on the "Rehab Act." We asked the Staff Attorney that the Director and the LRAC consulted about the employee's RA denial, and the Staff Attorney told us that she advised the LRAC that she (the LRAC) should provide the employee a "workplace adjustment" instead of an RA, due to the employee's condition ending at some point.

██████████ told us that she noticed VA had a tradition for each facility to write local procedures. She said that ODI wanted all VA to use the official document based on the Rehabilitation Act of 1973, as amended and not use locally written policy or guidance. She further said that ODI saw local policy examples that were extremely alarming and said, as an example, the field "would never dream of writing their own facility based handbook on accounting." She said ODI approved local cover memoranda identifying local RA players, but the pending updated Handbook 5975.1 prohibited VA organizations from compiling local procedures.

The FMLA medical certification the employee submitted (Document One), dated March 12, 2013, prescribed, and the employee's attendance records confirmed, that the employee took 10 days of leave for a doctor's recommended bed rest, from March 7 to 17, 2013, and returned to work March 18 and 19, 2013. In an email dated March 15, 2013, sent from the employee's personal email account to the office secretary, the employee requested, "light-duty" stating, the employee's "issue hasn't completely resolved itself" and asked for further instructions. The secretary forwarded the email to the employee's supervisor and the LRAC and asked for RA forms. The LRAC told us that the employee's initial request for RA came from the employee's supervisor in an email requesting her to send RA documents. EEOC guidance considered such informal requests sufficient to constitute an initial request for RA purposes and for meeting required deadlines.

The employee's time and attendance records reflected that the employee reported for duty Monday, March 18, 2013. In an email sent that day, the employee attached VA Form VA0857a, Written Confirmation of Request for Accommodation, and told the LRAC that

the employee would deliver the FMLA paperwork to support the RA request. The LRAC told us that the employee provided her the FMLA form and a web printout defining the employee's specific medical condition. She told us that when she met with the employee she pointed out that the employee's medical provider indicated there would be no further recurring complications of the employee's medical condition, to which, the employee protested that was not correct, and that the employee needed light duty. The LRAC said she told the employee that the employee would need additional medical documentation.

In a March 18, 2013, email the LRAC solicited a VA Occupational Health Nurse Practitioner's opinion on the sufficiency of the FMLA form as support for the RA request and stated her belief that the employee needed additional medical documentation; a permitted consultation according to [REDACTED]. In a March 19 email, the ALRAC told the LRAC that she told the employee that the employee needed additional medical documentation to support the request before returning to work. Time and attendance records reflected that, after being notified, the employee did not report to work for 18 calendar or 13 business days, returning on Monday April 8.

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[REDACTED], the [REDACTED], examined the employee's FMLA request (Document One) and noted that the employee's medical provider answered "no" to the question, "Will the condition cause episodic flare-ups periodically preventing the employee from performing her job functions?" [REDACTED] told us the provider's response justified the LRAC's request for further medical documentation and that the form only confirmed a specific medical condition, which required 10 days' bed rest, but did not describe the reason or type of accommodation needed for the employee to return to work. She said that the form was acceptable, though not typically used, to support a RA request.

The employee provided us Document Two, a certificate confirming medical care for the employee's condition, signed by a physician on March 13, 2013. However, we found no evidence that the employee submitted that document to her supervisor, the LRAC, or the Director. Though it released the employee for work, the document did not describe the RA the employee needed, and after reviewing it, [REDACTED] told us that a physician authorizing light duty was not an RA. She also said that the certificate was not sufficient medical support for an RA, because the employee's condition was not a disability affording an RA. She suggested the need for additional documentation.

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The employee provided us Document Three, a letter from a physician, dated March 20, 2013. The letter diagnosed the employee with a specific medical condition and released the employee for work on March 18, with specified accommodations. The LRAC told us that she received the letter, showed it to the Director, who requested that the LRAC consult VA physicians for their opinion on the employee's condition. [REDACTED] reviewed this document, and she told us that the March 20 letter from the employee's physician constituted sufficient medical documentation to process the RA. The June 13, 2012, ODI interim guidance specified that only the LRAC and ALRAC could decide to

request and review medical documentation, and it prohibited LRACs from sharing the documentation and the name of the disability with the DMO, the Director.

The Chief of Staff told us that the Director requested that the Chief of Staff and other VA physicians compile a set of questions for the employee's personal physician to answer to gather additional information about the employee's medical condition. In a March 27, 2013, email, 7 days after the employee provided the March 20, 2013, medical documentation, the Chief of Staff sent a list of medical questions to the Chief of Surgery and another VA physician for review, and told them, the Director "indicated that she would like to have these completed by noon today." The VA physician replied, "If the physician wants to give [the employee] work restrictions, like limited standing, lifting or repetitive movements then those recommendations should be followed."

The Director told us that they determined that the employee's RA request did not fall into the RA "realm," because the particular medical condition was not a disability. She said that she acted to protect the health and safety of the employee and others at the medical center. She further said that she did not rely on the ODI guidance but relied on VA Handbook 5975.1 and the LRAC's knowledge and expertise. The LRAC told us that, as LRAC, she used the 6-month rule to determine that the employee did not suffer from a qualified disability and, as such, denied the employee's request for RA. The Director acknowledged that the employee provided medical documentation, but said, "It did not address the full extent of the questions I needed answered." The Director said that she did not know if the LRAC received the interim ODI guidance for RA, but said, "I trusted her to tell me what I needed to know so that we could make an informed decision and assist the employee."

(b)(6)

On March 27, 2013, the Director sent an email to the employee's personal email account (Document Four) and requested that the employee submit the attached medical questions to the employee's personal physician and then return them to the LRAC, who in turn would give them to the Chief of Staff. The Director told the employee that the Chief of Staff would then review the answered questions and provide advice to the Director. ██████████ told us that this effort was "invasive and unnecessary."

Records reflected that the employee's physician responded to the questions, modified the original restrictions, signed the document, and returned it to the employee. The new restrictions matched those the Director put into the April 5, 2013, notification of RA denial letter sent to the employee. ██████████ told us that ODI highly dissuaded medical center directors from being DMOs during the RA process and that if there was ever an EEO finding of discrimination, the director would ultimately be accountable and could be disciplined. She said that directors were typically not this specifically involved in any case, and ODI recommended that first line supervisors "always" act as DMO. She said, "we highly...do not recommend the Directors being the DMO-ever." She also said that it was "absolutely not" proper or correct for the DMO to submit follow up questions to the employee's personal physician. ██████████ told us that the Director and the LRAC

already had enough medical information in the March 20, 2013, document to confirm the diagnosis and accommodations needed, and as a former LRAC, she would never request that level of documentation.

The LRAC told us that she reviewed the ODI interim guidance she received on June 13, 2012, but she decided it was not applicable. Therefore, she did not put the guidance into place or pass it along to the Director, the DMO. The Director told us that she did not know of the interim ODI guidance, even though VHA released ADAAA guidance in February 2009 and EEO disseminated their interpretation of ADAAA 2008 in their final regulations in March 2011.

The Staff Attorney told us that the LRAC consulted her about the employee's prospective denial while processing the employee's request for RA. She said that, at that time, she agreed with the denial because RA guidelines did not recognize the employee's medical condition as a disability for RA. She further said that she told the LRAC that the employee's condition was temporary and did not meet RA criteria. However, contrary to her initial advice, the Staff Attorney told us that she examined a later [REDACTED] (b)(6) and the Staff Attorney told the Director to [REDACTED].

The Staff Attorney told us that she told [REDACTED], due to the Director holding up the RA approval for additional medical documents and EEOC frowned upon an "over-paternalistic" approach to processing RA requests. In an email dated July 8, 2013, the Staff Attorney told the Director, in reference [REDACTED] saying another "agency subjected the complainant to unlawful discrimination when it denied her light duty request based on its unsupported determination that allowing her to work would create a safety risk to the employee." *Stewart v. U.S. Postal Service*, 97 FEOR 3067, EEOC No. 05960071 (EEOC 1996).

The Staff Attorney said that the VA employee's medical condition could implicate ADAAA, and suggested VA [REDACTED] processing the employee's request. Further, she said that a third party could find that VA discriminated against the employee and that the Director "substituted our medical judgment for that of the employee's treating physician." Records reflected that the Director [REDACTED]

[REDACTED] The Staff Attorney told the Director in the July 8, 2013, email that EEOC made the new law difficult to interpret but that VA management would "be damned if you do; or damned if you don't."

VISN Privacy Investigation

The Director and the Chief of Surgery told us that they received an anonymous letter alleging they violated the employee's privacy rights by discussing the RA request and the employee's personal health information during the March 22, 2013, morning meeting. The Director said that she reported the allegation to the VISN Director and the VISN Privacy Officer (PO). She said that she told the PO that she never used the employee's name (as mentioned in Issue 1 above) and that the VISN subsequently conducted an investigation. The PO told us that she gathered statements from other involved parties and that she opened a case in the VA Privacy Security Events System (PSETS). Records reflected that the PO concluded that the Director did not mention the employee's name during the morning meeting; therefore, there was not a privacy violation. The PO said that she documented the no violation finding, and a VHA Office of Health Information Privacy Specialist told the Director that she should make changes to heighten security during conference calls and apologize to the employee. The Director told us that she sent a memo to prospective medical center conference call attendees urging greater care in protecting privacy and that she apologized to the employee. Records reflected that the PO summarized the event and investigation, and conveyed the "unsubstantiated" outcome in a memo to the VHA Central Office Correspondence Management Analyst (10B1) and directed the issue closed.

Conclusion

We concluded that the Director failed to follow Federal law established in ADAAA 2008, as interpreted by EEOC, March 2011, and VA interim policy implementing ADAAA, when she denied the employee's RA, substituted her own medical judgment for that of the employee's personal physician, and improperly substituted "workplace adjustments" in place of RAs. We also found that the Director failed to manage and properly follow VA policy when she neglected to provide appropriate oversight of the local RA program. Further, she usurped the LRAC's duly assigned obligations and responsibilities and exercised an "overly paternalistic" control of the RA process when she directed the LRAC to consult VHA physicians against the ODI [REDACTED] directive, and when she submitted additional questions to the employee's physician after she already obtained sufficient medical documentation. EEOC guidance clearly states that the disability determination should not require such intense scrutiny; however, the Director applied intense scrutiny of the RA disability determination process. She inserted herself into the RA process far beyond what her "Director" role necessitated, and against VA policy, she appointed herself as DMO, imposed her view that the employee should have a workplace adjustment, rather than an RA, as a final arrangement. (b)(6)

Further, we found that the LRAC failed to perform her duty as LRAC when she ignored the ODI interim guidance directing all LRACS to adhere to the ADAAA 2008 and not wait for formal release of the updated VA Handbook 5975.1 in processing RA requests.

As the LRAC, she denied the employee an RA based on the obsolete 6-month rule. We found that after the June 2012 ODI [REDACTED] notification, which supplied LRACs an EEOC link for interim guidance on the ADAAA, had the LRAC implemented that guidance, she would have learned that the 6-month rule no longer applied and that RA-specified work-related medical condition issues were an EEOC top priority. The LRAC's own testimony and emails revealed that she did not implement the new regulations. If she had, she may have [REDACTED] and subsequent [REDACTED]. Moreover, we found that as the LRAC, she failed to tell the Director beforehand that she would violate the 2008 ADAAA if she requested additional RA employee medical information and VA guidelines if she consulted VHA physicians about the employee's medical condition. The LRAC's mandatory pre-denial consultation with the Staff Attorney failed to elicit timely and relevant counsel, which could have [REDACTED].

(b)(6)

We also found that when the Staff Attorney gave legal advice to the LRAC, she was not current on RA guidelines and told the LRAC that since the employee's condition was temporary, it did not meet the criteria for an RA disability. However, after the employee [REDACTED], the Staff Attorney advised the Director to [REDACTED], [REDACTED], due to the Director holding up the RA approval. If the Staff Attorney had researched the most recent RA guidelines prior to giving RA advice, she could have [REDACTED].

Recommendation 3. We recommend that the DUSHOM confer with OHR and OGC to determine the appropriate administrative action to take, if any, against the Director.

Recommendation 4. We recommend that the DUSHOM confer with OHR and OGC to determine the appropriate administrative action to take, if any, against the LRAC.

Recommendation 5. We recommend that the DUSHOM confer with OGC and OHRI to determine and execute a plan to provide all VHA employees involved in the RA process, as well as Regional Counsels who provide them advice, the most up to date RA training and guidance, and direct all VHA employees to process RA requests in accordance with applicable Federal laws and regulations and VA policy.

Comments

The Acting Deputy Under Secretary for Health for Operations and Management was responsive, and his comments are in Appendix A. We will follow up to ensure that the recommendations are implemented.

A handwritten signature in black ink, reading "James J. O'Neill". The signature is written in a cursive style with a large initial "J" and "O".

JAMES J. O'NEILL
Assistant Inspector General for
Investigations

Deputy Under Secretary Comments

**Department of
Veterans Affairs**

Memorandum

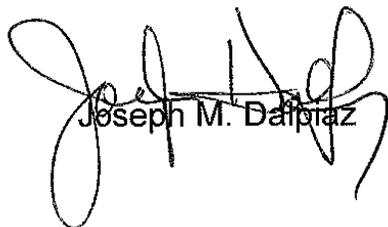
Date: March 31, 2014

From: Acting Deputy Under Secretary for Health for Operations and Management

Subject: **Administrative Investigation, Failure to Comply with Americans with Disabilities Act and VA Policy, VHA**

To: Assistant Inspector General for Investigations

1. I have reviewed the findings and recommendations contained in the above captioned Administrative Investigation report.
2. We will confer with the appropriate parties to determine appropriate action as detailed in the attached report.



Joseph M. Dalpraz

Deputy Under Secretary's Comments to Office of Inspector General's Report

The following Deputy Under Secretary's comments are submitted in response to the recommendation(s) in the Office of Inspector General's Report:

OIG Recommendation(s)

Recommendation 1. We recommend that the Deputy Under Secretary for Health Operations and Management (DUSHOM) confer with the Offices of Human Resources (OHR) and General Counsel (OGC) to determine the appropriate administrative action to take, if any, against the Director.

Comments: Following receipt and review of the evidence, the Office of the DUSHOM will confer with OHR and OGC to determine the appropriate administrative action.

Target Completion Date: 90 days from the publication of the OIG Report. Following receipt and review of the evidence, an appropriate administrative action will be initiated.

Recommendation 2. We recommend that the DUSHOM confer with OHR and OGC to determine the appropriate administrative action to take, if any, against the LRAC.

Comments: Following receipt and review of the evidence, the Office of the DUSHOM will confer with OHR and OGC to determine the appropriate administrative action.

Target Completion Date: 90 days from the publication of the OIG Report. Following receipt and review of the evidence, an appropriate administrative action will be initiated.

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Recommendation 4. We recommend that the DUSHOM confer with OHR and OGC to determine the appropriate administrative action to take, if any, against the LRAC.

Comments: Following receipt and review of the evidence, the Office of the DUSHOM will confer with OHR and OGC to determine the appropriate administrative action.

Target Completion Date: 90 days from the publication of the OIG Report. Following receipt and review of the evidence, an appropriate administrative action will be initiated.

Recommendation 5. We recommend that the DUSHOM confer with OGC and OHRI to determine and execute a plan to provide all VHA employees involved in the RA process, as well as Regional Counsels who provide them advice, the most up to date RA training and guidance, and direct all VHA employees to process RA requests in accordance with applicable Federal laws and regulations and VA policy.

Comments: Various training and guidance opportunities are ongoing to ensure those who are involved in the RA process including Regional Counsel(s) and their staff, consistently obtain and disseminate the most up to date information and processes. Following receipt and review of the evidence, the DUSHOM will confer with OGC and OHR to obtain guidance regarding the status of current training and guidance opportunities and whether and how such opportunities may be improved upon.

Target Completion Date: September 30, 2014

OIG Contact and Staff Acknowledgments

OIG Contact	For more information about this report, please contact the Office of Inspector General at (202) 461-4720.
Acknowledgments	William Tully

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