

# **AFGE's Guide to**

## **Fighting Discrimination**

The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO representing approximately 600,000 employees of the United States federal government and the government of the District of Columbia.

Under the leadership of the National Vice President for Women's and Fair Practices, the Women's and Fair Practices Departments are devoted to promoting the civil, human, women's and workers' rights of federal and D.C. government workers.

If you would like more information regarding equal employment opportunity related issues, please contact:

**The American Federation of Government Employees  
Women's and Fair Practices Departments**

**202-639-4006(Phone)**

**202-347-4235 (Fax)**

**[www.afge.org/wfp](http://www.afge.org/wfp)**

**(2015)**

**This publication is provided for informational purposes only and does not constitute legal advice or legal opinions. If additional guidance or advice is needed please contact our office.**



# Table of Contents

<b>What is Discrimination.....</b>	<b>1</b>
<b>What is Equal Employment Opportunity? .....</b>	<b>1</b>
<b>Federal Statutes .....</b>	<b>1</b>
Title VII of the Civil Rights Act.....	1
The Age Discrimination in Employment Act .....	1
The Equal Pay Act .....	2
The Rehabilitation Act, ADA and ADAAA .....	2
The Pregnancy Discrimination Act.....	4
The Genetic Information Non-Discrimination Act.....	4
<b>Protected Statutes .....</b>	<b>5</b>
<b>Theories of Discrimination.....</b>	<b>8</b>
Disparate Treatment Cases .....	8
Disparate Impact Cases.....	9
Harassment Cases .....	9
Failure to Accommodate Cases .....	11
Retaliation/Reprisal Cases .....	12
<b>Where can an EEO Claim Be Heard?.....</b>	<b>12</b>
Chart: Where Should I Bring My Complaint?.....	14
Forum Selection Questions.....	15
Overview of the EEO Complaint Process.....	16
<b>Stages of the EEO Complaint Process .....</b>	<b>17</b>
<b>I. Informal Stage.....</b>	<b>17</b>
Initial Counselor Contact .....	17
Pre-Complaint Counseling.....	18
The Agency ADR Process .....	19
If there is No Resolution at the Informal Stage .....	19
<b>II. The Formal Stage.....</b>	<b>20</b>
Drafting the Formal Complaint.....	20
Letter of Acceptance of Claims .....	21

<b>III.</b>	<b>The Investigation Stage .....</b>	<b>22</b>
	Authority of Investigator.....	22
	Responsibilities of Federal Employees .....	22
	At the Completion of the Investigation .....	23
	How to Request a Hearing .....	23
	How to Request a Final Agency Decision .....	23
<b>IV.</b>	<b>The Hearing Stage.....</b>	<b>24</b>
	The Acknowledgment Order .....	24
	Discovery .....	25
	Types of Discovery Requests.....	25
	Preparing Discovery Requests .....	26
	Responding to Discovery Requests .....	26
	Objections .....	27
	Failure to Respond to Discovery Requests .....	28
	Settlement and Offers of Resolution.....	29
	Summary Judgment/Decision Without Hearing .....	30
	Prehearing .....	31
	Hearing .....	32
<b>V.</b>	<b>Final Action Stage.....</b>	<b>33</b>
	Request for Immediate Final Agency Decision .....	33
	FAD Following a Decision by the AJ .....	33
<b>VI.</b>	<b>Appeals to the Commission Stage .....</b>	<b>34</b>
	Requesting an Appeal .....	34
	Standard of Review for the Appeal.....	34
	Request for Reconsideration .....	35
<b>VII.</b>	<b>Right to Civil Action Stage.....</b>	<b>35</b>
	<b>Burdens of Proof .....</b>	<b>36</b>
	Disparate Treatment.....	38
	Disparate Impact .....	39
	Harassment/Hostile Work Environment .....	39
	Failure to Provide Reasonable Accommodation.....	44
	Retaliation .....	46

**Additional information.....48**

Class Action Claims.....48  
Damages.....49  
Back Pay .....49  
Attorney Fees .....49  
Injunctive Relief.....49  
Front Pay .....49  
Compensatory Damages .....50  
Post-Judgment Interest.....51  
Punitive Damages .....51  
Settlements .....52  
Nonmonetary Relief.....52

**Additional Protections .....53**

The No Fear Act.....53  
Management Directive 715.....53  
Executive Orders.....53  
Mixed Case Complaints and Appeals .....55  
  
Appendix A: Full Text of Part 1614 .....57  
Appendix B: Sample Discovery Forms .....113  
Appendix C: Sample Settlement Agreement .....140  
Appendix D: Sample Motion for Sanctions.....146  
Appendix E: Sample MSJ Response .....151



## **What is Discrimination?**

Discrimination in the context of employment law means when an individual or group is treated less favorably than another individual or group because of their individual characteristics.

## **What is Equal Employment Opportunity?**

Equal Employment Opportunity is the concept that employment decisions are required to be based on valid job related requirements without regard to protected status. This concept is embodied in various laws that are used to protect employees from employment decisions based on an individual's protected status. The laws listed below set out the various protected statuses (or protected classes) for employees.

### **Federal Statutes**

Federal employees (and applicants to federal employment) generally are protected by the following civil rights statutes:

#### **1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-16**

Title VII was passed by Congress in 1964 and made applicable to federal employees in 1972. Title VII prohibits discrimination on the basis of race, color, religion, national origin, and sex in federal employment practices. Additionally, employers are required to reasonably accommodate the known bona fide religious needs of their employees and applicants. The law also prohibits reprisal or retaliation against employees and applicants who have engaged in covered civil rights activities.

#### **2. The Age Discrimination in Employment Act of 1963 (ADEA), 29 U.S.C. § 633**



The Age Discrimination in Employment Act was enacted in 1963 and made applicable to federal employees in 1974. It prohibits age discrimination and applies to persons who are 40 years of age or older. Under the ADEA, a person who believes he or she has been discriminated against because of his or her age (40 and over) does not have to exhaust his or her administrative remedies. Thus, if a person files an informal complaint of discrimination with an agency EEO

counselor and the complaint is not resolved, the person can choose to proceed through the administrative process or to file a lawsuit in federal court. *See* 29 C.F.R. Part 1614.408.

ADEA claims **do not allow for the Complainant to recover attorney's fees and compensatory damages**. The law itself prohibits the Complainant from that recovery.

### 3. **The Equal Pay Act of 1966 (EPA), 29 U.S.C. Section 206**

The Equal Pay Act was applied to the federal sector workforce by the Fair Labor Standards Act amendments of 1974. The EPA prohibits paying men and women different wages for "equal work" when the performance of such work requires equal skill, effort, and responsibility, and the work is performed under equal working conditions. *See* 29 C.F.R. §1614.408 (available in Appendix A).

### 4. **The Rehabilitation Act, Americans with Disabilities Act and Americans with Disabilities Act Amendments Act (ADAAA).**

The **Rehabilitation Act of 1973**, as amended, protects qualified employees and applicants with disabilities in the federal government from employment discrimination based on disability. The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by federal agencies, in federal employment, in programs receiving federal financial assistance, and in the employment practices of federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act. The Rehabilitation Act requires that each federal agency develop an affirmative action plan "for the hiring, placement and advancement of handicapped individuals." The Rehabilitation Act not only prohibits discrimination against "qualified handicapped individuals," it also requires that federal agencies grant reasonable accommodation where appropriate, under the Americans with Disabilities Act (ADA) and its amendments, as discussed further below.

The **Americans with Disabilities Act of 1990 (ADA)** 42 U.S.C. Section 12111, et seq., was passed in 1990 to protect workers from private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. In 1992, the substantive employment standards of the **ADA**, were made applicable to the Federal Government through the Rehabilitation Act.

The ADA defined an individual with a disability as a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;



- Has a record of such an impairment; or
- Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

However, there were a lot of problems with implementing the ADA, where Agencies and employers would often litigate whether or not the individual even had a disability, rather than focusing on providing an accommodation to the individual.

In 2008, the **ADA Amendments Act of 2008** (ADAAA) was enacted and became effective on January 1, 2009. The ADAAA made a number of significant changes to the definition of “disability” in an attempt to focus more on reasonable accommodations and less on whether or not someone is an individual with a disability. Complainant v. Department of Transportation, EEOC Appeal No. 0120081003 (EEOC 2014).

A disabled employee or applicant is either an:

- Individual with a physical or mental impairment which **substantially limits one or more major life activities**;
- Individual who **has a record** of physical or mental impairment; and/or
- Individual who **is regarded as** an individual with a physical or mental impairment.

The regulations identify examples of specific impairments that should easily be concluded to be disabilities including: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia. 29 C.F.R. 1630.2(j) (3).

Major life activities limited by other mental or physical impairments differ from person to person. For some people, impairments can restrict major life activities such as learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working. Sleeping, eating, reading, bending and communicating, bodily functions such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions are also major life activities that may be limited by impairments.

Some other important changes instituted by the ADAAA:

- Mitigating measures are not to be considered in assessing if the person has a disability, except for eyeglasses and contacts.
- Episodic and in remission impairment can be a disability if substantially limits major life activity when active.
- To be regarded as disabled, one no longer needs to show that s/he is perceived to be substantially limited in a major life activity, just that s/he is perceived to be disabled.
- Alcoholism is considered a handicapping condition, and therefore warrants reasonable accommodation. The employee may be referred to employee assistance counseling and may be granted leave if he or she enters a rehabilitation program. However, there is no obligation to provide accommodation to an employee who raises alcoholism as an excuse for misconduct or poor performance that warrants removal.
- Drug addiction is not regarded as a disability if illegal drugs are being used.

#### **5. The Pregnancy Discrimination Act of 1978, 42 U.S.C. Section 2000e(k)**

The Pregnancy Discrimination Act was an amendment to Title VII of the Civil Rights act of 1964, and as such was immediately applicable to federal employees. It requires an agency to treat pregnant employees the same as a non-pregnant employees. However, neither the Pregnancy Discrimination Act nor the Rehabilitation Act requires an agency to give preferential treatment or accommodations to pregnant women solely because of their pregnancy. Pregnancy discrimination is litigated as a sex discrimination claim.

#### **6. Genetic Information Nondiscrimination Act of 2008 (GINA) 42 U.S.C. Chapter 21F**

The Genetic Information Nondiscrimination Act (GINA) became effective November 21, 2009 to protect the public from discrimination and allay concerns about the potential for discrimination, allowing individuals to take advantage of genetic testing, technologies, research, and new therapies. GINA makes it illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs - referred to as "covered entities") from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information. GINA may be litigated in conjunction with a violation of the Rehabilitation Act/Americans with Disabilities Act Amendments Act.

## **PROTECTED STATUSES**

After examining the laws above, we are able to identify nine protected statuses<sup>1</sup>: Race, color, national origin, sex, religion, retaliation, disability, age and genetic information.

### 1. RACE

- Race discrimination involves treating someone (an applicant or employee) unfavorably because that individual is of a certain race.
- According to the Census Bureau, there are seven racial categories used in the 2010 Census<sup>2</sup>: Caucasian, Black or African-American, American Indian or Alaskan Native, Asian, Native American and Other Pacific Islander; ‘Other Race’ (for individuals not able to identify individually with the first five categories), and ‘Two or More Races (for individuals who identify with more than one racial category).

### 2. COLOR

- Color discrimination involves treating someone (an applicant or employee) unfavorably because of skin color or complexion.

### 3. NATIONAL ORIGIN

- National origin discrimination involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background, or if they are married to or associated with an individual of a certain national origin group.

### 4. SEX

- Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex or non-conformance with gender stereotypes.
- Sex discrimination also can involve treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex.
- Discrimination against an individual because that person is transgender is discrimination because of sex in violation of Title VII. This is also known as gender identity discrimination.

---

<sup>1</sup> Definitions based partially on the Equal Employment Opportunity Commission’s Website: <http://www.eeoc.gov/laws/types> (Last visited 5/1/2015).

<sup>2</sup> <http://www.census.gov/2010census/data/> (Last visited 5/21/15).

- In addition, lesbian, gay, and bisexual individuals may bring sex discrimination claims. These may include, for example, allegations of sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person's non-conformance with sex-stereotypes.
- Sex based discrimination can also stem from an individual's pregnancy. Most recently in Young v. United Parcel Service, Docket No. 12-1226, (March 25, 2015) the Supreme Court found that a woman denied a light-duty assignment, while other male employees, in similar situations were granted light-duty assignments, could bring suit due to pregnancy discrimination.
- On April 20, 2012, the EEOC issued a decision extending Title VII protections to transgender employees. In Macy v. Holder, EEOC Appeal No. 0120120821 (EEOC Apr. 20, 2012), the EEOC held that discrimination against transgender individuals constitutes sex discrimination against an individual.
- In 2013 the 5<sup>th</sup> Circuit issued a decision in EEOC v. Boh Brothers, 731 F.3<sup>rd</sup> 444 (5<sup>th</sup> Cir. 2013) which expanded gender identity/sexual stereotyping as a basis for same sex harassment claims.

## 5. RELIGION

- Religious discrimination involves treating a person (an applicant or employee) unfavorably because of his or her religious beliefs. The law protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious beliefs including atheists.
- Religious discrimination can also involve treating someone differently because that person is married to (or associated with) an individual of a particular religion or because of his or her connection with a religious organization or group.

## 6. RETALIATION

- Title VII of the Civil Rights Act, the Rehabilitation Act (ADA and ADAAA), the EPA and the ADEA all make it illegal to fire, demote, harass, or otherwise "retaliate" against people (applicants or employees) because they opposed discrimination or somehow participated in the statutory complaint process.

## 7. DISABILITY

- Disability discrimination occurs when an employer or other entity covered by the ADA, as amended, or the Rehabilitation Act, as amended, treats a qualified individual with a disability who is an employee or applicant unfavorably because of the disability.
- Disability discrimination also occurs when a covered employer or other entity treats an applicant or employee less favorably because the employee has a history

of a disability, or because the employee is regarded as having a physical or mental impairment.

- The ADAAA also prohibits employers from discriminating against employees in a close familial relationship with a person who has a disability. (i.e. child, spouse, etc.).
- The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer "undue hardship".

## 8. AGE

- The Age Discrimination in Employment Act (ADEA) only forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40.
- The ADEA is always interpreted to favor the older worker. General Dynamics Land Sys. Inc. v. Cline, 540 U.S. 581 (2004). This means, for example, that if a federal employee is 42 years old and is not selected for a promotion, but the selectee is 45, the non-selected employee does not have a claim under the ADEA.
- The United States Supreme Court in Gomez-Perez v. Potter, 553 U.S. 474 (2008), held that a federal employee who filed a charge of age discrimination under the ADEA may assert a retaliation claim under the federal-sector provision of the ADEA.
- Older employees cannot use insignificantly younger workers (i.e. complainant is 68 and comparator is 65) to justify a claim of age discrimination.

## 9. GENETIC INFORMATION

- Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs - referred to as "covered entities") from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.
- For example, an agency cannot ask for a family medical history or for results of an individual's genetic test of the employee or an employee's family member.



## **THEORIES OF DISCRIMINATION**

In all discrimination cases, the Complainant carries the burden of proof, which is to say that the Complainant must show through evidence that he/she was discriminated against by an agency. The evidence can be direct in nature or indirect. How this burden is satisfied depends on the theory of discrimination.

There are five theories of discrimination that are covered below:

### **1. Disparate Treatment Cases**

Definition:

- Disparate treatment (intentional discrimination) cases are the most common types of EEO cases.

Disparate Treatment

- **disparate treatment** occurs when a supervisor intentionally treats a member of a protected group differently (with respect to the terms and conditions of employment) than the supervisor treats an individual not of the same protected group.

**Example:** Elle was given a five day suspension for reporting to work late. Elle believes that she was suspended because she is a woman. Her supervisor, Sally, tells Elle that her lateness is the only reason that she was given her suspension. Elle, however, points out that Peter is 20 minutes late, or more, every day and that Sally has never disciplined Peter.

## 2. Disparate Impact Cases

Definition:

Disparate Impact

- **disparate impact** happens when an agency's facially neutral rule or policy has an adverse effect on a particular protected group.

**Example:** An agency located in an area where workers of Italian decent are employed out of high school, recently implemented a rule that for all new vacancies, even for low-graded entry level positions, the applicant must have a bachelor's degree. After implementing the new rule, no individuals of Italian descent have been promoted or hired to any positions in the agency.

## 3. Harassment/Hostile Work Environment Cases

Harassment

- **harassment** is unwelcome conduct that is based on race, color, religion, sex, national origin, protected activity, age, disability or genetic information . It is unlawful when enduring the conduct becomes a condition of continuing employment, or the conduct is severe and pervasive enough to create a work environment that is hostile, offensive, intimidating or abusive.

Harassment occurs when: (1) a supervisor commits a harassing action (based on one of the nine protected classes listed above) that results in a negative employment action such as termination, failure to promote or hire, and loss of wages or when (2) a supervisor or co-worker subjects the employee to repeated actions (based on one of the nine protected classes above that a reasonable person would find intimidating, offensive, hostile, or abusive.

The Agency will be liable when: 1) it failed to reasonably try to prevent and promptly correct the harassing behavior; and 2) the employee took advantage of any preventive or corrective opportunities provided by the employer.

There are two main categories of harassment: non-sexual harassment and sexual harassment.

## **A. Non-Sexual Harassment**

In non-sexual harassment, the actions committed by the harasser must be directly related to the Complainant's claimed protected status.

**Example:** Li, an Asian employee, works in an office with several other co-workers in an open concept floor, where all the co-workers can see in the cubicles of the other co-workers. On one of the co-worker's walls is anti-Asian propaganda. Li complained to his supervisors about the propaganda. The co-worker then began to use racist Asian epithets conversationally in the presence of Li. Li complained to his supervisors again about the conduct, to which they replied that there was nothing they could do, "freedom of speech and all that."

## **B. Sexual Harassment**

The EEOC defines illegal sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to such conduct is made a term or condition to an individual's employment, submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or when the conduct has the purpose of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, offensive or abusive working environment.

Sexual harassment is not limited to harassment by men against women. Both men and women can be sexual harassers, and both men and women can be sexually harassed.

### **Two Types of Sexual Harassment**

**i. Quid Pro Quo Sexual Harassment:** An individual's submission to or rejection of sexual advances, or conduct of a sexual nature is used as the basis for employment decisions affecting the individual, or the individual's submission to such conduct is made a term or condition of employment.

**Example:** Marcus was approached by his female supervisor, Marlene. She informed him that if Marcus didn't sleep with her, he would never be promoted to the position for which he recently applied. Marcus rejected his supervisor's advances, and subsequently was turned down for the promotion.

**ii. Harassment/Hostile Work Environment:** An employee is subjected to unwelcome sexual conduct based on sex that is so pervasive or severe that it creates an intimidating, hostile, offensive or abusive work environment.

**Example:** Kate is repeatedly subjected to sexual solicitation from a co-worker, Kurt, at work. Kate has repeatedly informed her management about Kurt requesting sexual favors during work time, that she finds the behavior unwelcome, and that it is distracting to have to find different ways to avoid Kurt. The managers have repeatedly informed Kate that they will take care of it.



Despite the promises of the managers, the behavior persists every day that Kurt and Kate are in the same building.

### **More Information**

For more information on sexual harassment, see **AFGE's Women's and Fair Practices Departments' Sexual Harassment Workbook** available both electronically and in hard copy.

## **4. Failure to Accommodate Cases**

### **A. Religious Accommodation**

Title VII requires an employer, once on notice that a religious accommodation is needed, to reasonably accommodate an individual who's sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship. Accommodations can also happen when an individual's *bona fide* religious beliefs conflicts with an employment requirement.

**Example:** Tim is Roman Catholic and employed at the EPA. His usual lunch hour is from 1pm to 2pm, with another employee taking lunch between 12 noon and 1pm. The two swap lunch hours from time to time. One week prior to Ash Wednesday, Tim requests that his lunch time be swapped with the other employee's time so that he can attend service scheduled for noon, at the church around the corner from the office. The supervisor denies the request. When asked for a reason, the supervisor says "I don't need a reason, the answer is just no."

### **B. Disability Accommodation**

The Rehabilitation Act, the ADA and ADAAA require employers to provide reasonable accommodations for the physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose undue hardship on the operation of its business.

A disability is defined as a physical or mental impairment that substantially limits one or more of an individual's major life activities. An employee must have a disability to qualify for a reasonable accommodation, not merely be regarded as having a disability.

The Rehabilitation act also requires agencies to reasonably accommodate the needs of qualified federal employees and applicants with a known physical or mental impairment. This means that the agency may need to change the workplace to enable the disabled individual to perform the essential functions of his or her job. For more detailed information, consult **AFGE's Guidebook on Disability Rights** available both in printed form and electronically.

## **What Are Reasonable Accommodations?**

In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

There are three general categories of reasonable accommodations; they are modifications or adjustments to: (1) a job application process, (2) to the work environment or circumstances of work, or (3) employment benefits or privileges.

**Example:** Mike is HIV positive and must take medication on a strict schedule, every morning at 9:00am. The medication causes extreme nausea for about 45 minutes. Mike asks that he be allowed to alter his starting time and core work hours to start at 10:00am.

## **5. RETALIATION CASES**

According to the EEOC's guidance on retaliation<sup>3</sup>, an employer may not fire, demote, harass or otherwise "retaliate" against an individual for bringing informally incidents alleged as discrimination, participating in a discrimination proceeding (i.e. complainant, witness, representative, etc.), requesting reasonable accommodations, or opposing discrimination.

**Example:** Charlie filed an EEO complaint against the Department of Navy, where he is employed as a Program Analyst. Charlie had requested reasonable accommodations from the agency, but the agency denied his request. One week after filing his formal complaint of discrimination, Charlie's manager Martin called Charlie in for a meeting. He told Charlie, "Here, you wanted an accommodation so bad, here's a five day unpaid vacation, for our resident troublemaker." Martin had handed Charlie a five day suspension.

## **WHERE CAN AN EEO CLAIM BE HEARD?**

When you discuss where you should bring your complaint this is a discussion of "jurisdiction." The laws that govern discrimination cases establish where you can bring your claim of discrimination. An EEO complaint can typically be heard in one of the following forums:

### **Equal Employment Opportunity Commission (EEOC)**

Claims of discrimination in an employment action or harassment based on race, color, sex, national origin, religion, disability, age, genetic information, and retaliation can be brought before the Equal Employment Opportunity Commission. In order to file a complaint with the Commission, Federal Employees must contact their agency's EEO office within 45 days of the alleged discrimination. After contacting the EEO office, the individual will receive some form of informal counseling or ADR, file a formal complaint, and participate in an investigation regarding the alleged discrimination prior to either requesting a hearing before an EEOC

---

<sup>3</sup> <http://www.eeoc.gov/policy/docs/retal.html> (last viewed 5/21/15).

Administrative Judge, or requesting that the Agency issue an immediate final decision. (For more information, see Stages of the EEO Complaint Process beginning on page 17.

### **Merit System Protection Board (MSPB)**

An employee can file an appeal with the MSPB within 30 days of an adverse action. If the adverse action is a result of discrimination, then the MSPB can hear that claim as well, it is called a mixed-case complaint.

Pursuant to 5 U.S.C. Section 7512 the MSPB has jurisdiction over:

- Removal
- Suspension for more than 14 days
- Reduction in grade
- Reduction in basic pay, or
- Furlough of 30 days or less

For more details regarding the Merit Systems Protection Board and mixed case complaints, see 29 C.F.R. §1614.302 and §1614.303 provided in Appendix A.

### **Grievance/Arbitration**

An employee can file a claim of employment discrimination using the negotiated grievance procedure. The time to file a grievance varies according to the negotiated grievance procedure stated in your collective bargaining agreement.

For more details regarding the processing of discrimination complaints via negotiated grievance procedure, see 29 C.F.R. §1614.301 provided in Appendix A.

**Practice Point:** While several forums exist, you can select only one. In general, the first selection you make in writing will control the forum. Always consult your collective bargaining agreement for the process specific to you and your agency.



What	Where	How	When
<p>Employment action or hostile work environment based on:</p> <ul style="list-style-type: none"> <li>• Race</li> <li>• Color</li> <li>• Sex, including: <ul style="list-style-type: none"> <li>○ sexual harassment</li> <li>○ pregnancy</li> <li>○ transgender</li> </ul> </li> <li>• National Origin</li> <li>• Religion</li> <li>• Retaliation for protected EEO Activity</li> <li>• Age</li> <li>• Disability</li> <li>• Genetic Information</li> </ul>	EEOC	EEO Complaint	Contact the agency's EEO office within 45 days of the event
<p>Contract violation:</p> <ul style="list-style-type: none"> <li>• Any CBA violation</li> <li>• Any other violation of law</li> </ul>	Arbitration	Negotiated Grievance Procedure	Varies depending on the collective bargaining agreement.
<p>Adverse actions, including:</p> <ul style="list-style-type: none"> <li>• Removal</li> <li>• Termination</li> <li>• Suspension for <b>more</b> than 14 days</li> <li>• Reduction in grade or pay</li> <li>• Furlough without pay for up to 30 days.</li> </ul>	MSPB	MSPB Appeal	File within 30 days of the adverse action

## Forum Selection Exercises



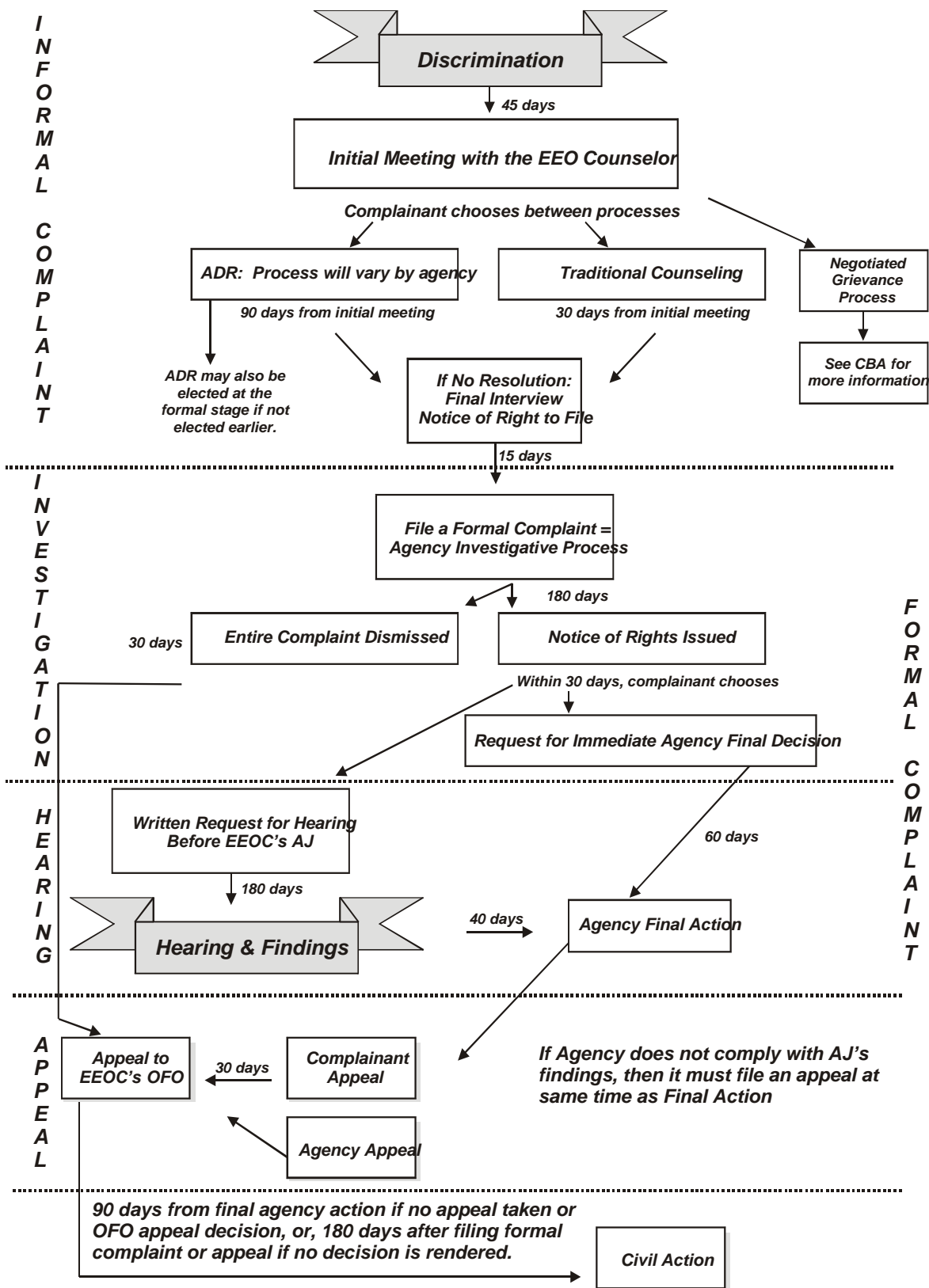
(1) Supervisor schedules a mandatory staff meeting on the same day individuals of the Baha'i faith celebrate the Birth of Baha'u'llah. An employee tells the supervisor that he cannot attend because he is Baha'i and therefore obligated to celebrate the holiday. The supervisor excuses the employee after stating, "Baha'i, what is that, is that even a religion?" This is the only meeting the employee missed the entire year. On the employee's next evaluation, the supervisor criticized the employee's "poor attendance" at staff meetings. What forum(s) could the employee use to address the situation, if any?

(2) Supervisor fires a male employee for passing a note while at work to a female employee that says, among other things, "Only women who wear modest clothing go to heaven." What forum(s) could the employee use to address the situation, if any?

(3) Supervisor at a federal agency refuses to promote any individual whose tongue is pierced, or whose eyebrows are pierced. What forum(s) could the employee use to address the situation, if any?

(4) Two employees, one Caucasian, one African-American, have been absent from work without approved leave on three occasions in the last month. Neither employee has ever been absent from work without approved leave before. As a result, the Caucasian employee is suspended without pay for 14 days. The African-American employee is suspended without pay for 15 days. What forum(s) could the employee use to address the situation, if any?

# Overview of the EEO Complaint Process



## **Stages of the EEO Complaint Process**

Since 1992, the EEOC has been hearing complaints under the administrative process codified at 29 C.F.R. Part 1614 (“Part 1614”) (*See Appendix A*). Below is an outline of the information found in Part 1614.

In general, the process described in Part 1614 has seven distinct stages:

- I. The Informal Stage**
- II. The Formal Stage**
- III. The Investigative Stage**
- IV. The Hearing Stage**
- V. The Final Action Stage**
- VI. The Appeal Stage**
- VII. The Federal Court Stage**

### **I. THE INFORMAL STAGE**

#### **A. Initial Counselor Contact**

- A federal employee claiming discrimination must first contact the agency’s EEO counselor and seek to resolve the disputes informally.
  - The employee can contact the counselor via telephone, in writing, or in person.
  - Your union local or the agency’s Human Resources Department can tell you how to contact the facility’s EEO counselor.
  - You must contact an EEO Office with your agency to begin the process.
- The initial contact between the employee and the counselor **must** occur within **45 calendar days** of either:
  - the date of the alleged discrimination,
  - the effective date of the personnel action, or
  - the date the employee knew or reasonably should have known of the discrimination or personnel action.

**Practice Point:** The employee should send a confirming e-mail to the individual in the EEO Office with whom he/she has made contact, in order to keep a record of the fact that the contact was timely made. The employee should include in the e-mail the date the employee first tried to meet the counselor and then the date the contact took place.

## **B. Pre-Complaint Counseling**

The EEO counselor has 30 days from the date of initial contact to complete his or her obligations, unless the employee agrees in writing to extend this period for no more than a total of 90 days.



### **The Employee's Rights and Responsibilities**

- The employee has the right to remain anonymous during the counseling phase, unless he or she consents otherwise in writing.
- The EEO counselor will likely share facts with the management/ supervisors in an effort to resolve the case, so it is possible that an anonymous employee could be identified by the specific information given to the agency.
- The employee must be very specific and provide a complete account of all discriminatory events during the initial contact. Failure to include a discriminatory event at this point may prevent the employee from raising the issue later, which means that the individual may not be able to obtain a hearing on the excluded issue.
- The employee may bring a representative, including his or her union representative, to this meeting.
- The EEO counselor is an employee of the agency, and he or she is not the employee's representative.

### **The EEO Counselor's Responsibilities**

- The EEO counselor is responsible for advising the employee in writing of his or her rights and responsibilities relating to the EEO process, including information related to:
  - The negotiated grievance process (if the employee chooses this, EEO processing ends);
  - The traditional agency EEO process; or
  - The agency's ADR process
- The EEO counselor should give the employee literature and documents that will further explain the EEO process.
- The EEO counselor will conduct a limited inquiry.



- The EEO counselor should attempt to resolve the issue(s) brought before him/her.
- The EEO counselor should frame the issues in the informal complaint. **AND**
- The EEO counselor should prepare a report documenting the counseling efforts taken.

### **C. The Agency ADR Process**

- Agencies are required to have an Alternative Dispute Resolution (ADR) process in place.
- Agencies are allowed to make case-by-case decisions regarding whether or not ADR is appropriate in a given case.
- The employee may choose to pursue the agency's ADR program at any time, if offered, but once that process is chosen, the EEO counselor has up to 90 days to discharge their duties and issue a Right to File Formal Complaint letter.
- Agencies should have an official at the ADR session with full authority to resolve the dispute.
- At the end of the ADR process, if no resolution has been reached, the employee may file a formal complaint.

### **D. If There is No Resolution at the Informal Stage**

If the EEO counselor is unable to resolve the dispute within 30 days from the date the employee contacted the EEO office, or, if the parties' participation in the ADR process did not resolve the issue within 90 days, then the employee will meet or speak with an agency EEO counselor for a final interview within the time period allotted for resolution.

At the final interview, the counselor is required to:

- Notify the employee of the right to file a formal complaint with the agency and how to do so.
- If the employee files a formal complaint the agency will have 180 days to investigate the employee's claims and the individual will have a right to request a hearing from the EEOC or request an immediate final decision from the Agency.
- Prepare a report. The report's content will vary based whether or not ADR occurred.

**Practice Point:** Demand your right to meet in a timely manner.

**Practice Point:** If the EEO counselor does not set up a final interview within a reasonable time, contact the EEO counselor in writing and ask for a final interview.

**Practice Point:** Keep copies of everything you have submitted to the EEO counselor and all of your contact with that individual.

## **II. THE FORMAL STAGE**

If the employee wants to file a formal complaint of discrimination, he or she must do so within 15 days of receiving a notice of right to file a formal complaint.

### **A. Drafting the Formal Complaint**

The complaint must:

- Be in writing [use Agency complaint form];
- Identify the protected status that forms the basis of the EEO claim;
- State the actions or practices that gave rise to the event;
- Include a chronology of events (when applicable);
- Identify the Responsible Management Officials (RMOs);
- Specify the resolution sought;
- Be signed by the employee (now called the “Complainant”); and
- Contain contact information for the Complainant and the Complainant’s representative (if applicable).

Where to file a formal complaint:

- The EEO counselor should specify in the notice of right to file where the formal complaint should be filed.
- If this information is missing, file with the local agency EEO office.
- It is also best to provide a copy of the formal complaint to the agency’s EEO Officer to ensure prompt processing of the formal complaint.
- Keep a record that you have sent the formal complaint or confirmation that you submitted it.

## **B. Letter of Acceptance of Claims**

The Agency, upon receipt and review of the formal complaint will send a letter reflecting the claims accepted (and potentially those dismissed) by the Agency. The letter will also include the date on which the claim was filed, and which EEOC Office should receive the Complainant's request for hearing, after the investigation.

The Agency may have rephrased claims from the way the Complainant wrote the claim on the formal complaint form. The Complainant should immediately inform the Agency if these claims are incorrectly stated.

The Agency may have dismissed certain allegations or even the entire complaint. Reasons for dismissal can include:

- A failure to state a claim under which relief can be granted, or stating a claim that is pending before or has been decided by the Agency or Commission;
- A complainant failed to make contact with the EEO office within 45 days of the discriminatory event;
- An action alleged by the agency is a proposal to take action, or is some preliminary step towards an action;
- An action raised in an appeal to the MSPB;
- A pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination;
- An allegation addresses issues already pending before, or previously decided by, the Agency;
- The complaint was not filed within 15 days of the receipt of notice of final interview;
- The complaint is the subject of a pending lawsuit in another case;
- The complaint is a spin-off complaint, *i.e.* a second complaint alleging dissatisfaction with the processing of a previously filed complaint;
- The complaint is part of a clear pattern of abuse of the EEO process;
- The Complainant elected to pursue the matter under a negotiated grievance procedure; and/or

- The Complainant failed to respond to a written request to provide relevant information within 15 days of receiving the request, provided that the request included a notice of proposed dismissal.

### **III. THE INVESTIGATION STAGE**

Once the Agency accepts one or more of Complainant's claims, the investigative process begins.

- Allegations that are accepted by an agency must be investigated within 180 days from the date of the formal complaint.
- A complaint can be amended to include like or related claims by contacting an agency's EEO office.
- Any amendments made to the complaint must be investigated within 180 days from the last amendment to the complaint, but in any event may take no longer than 360 days from the date the initial complaint was filed.
- The parties may agree to extend the 180 day time limit for investigation, but cannot extend it for more than 90 additional days.

#### **Authority of Investigator**

- During the investigation the agency investigator has the authority to administer oaths and to require statements from witnesses and/or management officials.
- The Agency or investigator may use an exchange of letters, memos, interrogatories, investigations, fact-finding conferences, or any other method to investigate the matter(s) at issue.
- The investigator is not required to include every piece of evidence provided.
- The investigator is employed/contracted by the Agency, and is not a representative of the Complainant.

#### **Responsibilities of Federal Employees**

- Federal employees, including the Complainant, are required to cooperate with the investigation.
- Failure to cooperate on part of the Complainant could result in the Agency dismissing the complaint.

**Practice Point:** Turn over all relevant evidence to the investigator, but make sure you keep a copy in case the investigator does not include it in the Report of Investigation, and you wish to use it later.

**Practice Point:** Make sure that you request that the investigator ask for relevant documents to be turned over and that all relevant witnesses be interviewed. It can often help to notify the investigator in writing why those documents and witnesses are relevant to the case.

### **At the Completion of the Investigation**

- Once the investigation is complete, the agency must provide the complainant a copy of the investigative file, which is called the Report of Investigation (ROI).
- At the same time, the agency must also provide the complainant a notice of the right to request either a hearing from the Commission (EEOC) or to request an immediate final decision from the agency.

### **How to Request a Hearing**

- 1) To request a hearing before an Administrative Judge, the Complainant must send a written request directly to the EEOC Office identified in the Notice of Right to Hearing within 30 days of receipt of the Report of Investigation.
- 2) If 180 days have expired since the Complainant filed a formal complaint and the Agency has not yet provided a copy of the ROI to the Complainant, the Complainant may send a written request for a hearing to the nearest EEOC field office. **See Appendix D for a Sample Motion for Sanctions to include with the request.**
- 3) The Complainant is required to also send a courtesy copy of the hearing request to the agency's EEO office, listed in the Notice of Right to Hearing

**Practice Point:** **If you do not choose a hearing within the time limit, the default will be a final agency decision.**

**Practice Point:** Once requested, or chosen by default, a complainant **cannot rescind a request for final agency decision**. However, a complainant **can rescind a request for hearing** and request a final agency decision.

### **How to Request a Final Agency Decision**

If a complainant wishes to request a final agency decision, the complainant should send notice to the address listed on the Notice of Right to Hearing. The Agency then will have 60 days to produce a final agency decision to the Complainant.

If you select Final Agency Decision, skip ahead to Section V. located on page 33.

**Practice Point:** Send your hearing request “Certified Mail: Return Receipt Requested”. If the Request for Hearing somehow is lost between where you sent it and the EEOC District office, you will need evidence to show you timely requested your hearing.

**Practice Point:** If the 180 days to investigate the claim have passed, request the hearing directly from the proper EEOC District Office for your location. You can request that information from your Agency’s EEO Office or check the EEOC’s website. Also, file a Motion for Sanctions against the Agency for failing to meet their timeline regarding the ROI. See Appendix B for a template on how to draft a Motion for Sanctions.

## **IV. THE HEARING STAGE**

The Hearing Stage will only be applicable to those who timely requested a hearing.

### **A. The Acknowledgment and Order**

When a complainant requests a hearing within the allotted time, the AJ will issue:

- An Acknowledgment and Order outlining the process;
- Set deadlines for the parties to conduct discovery;
- Set deadlines for a motion to reinstate any claims dismissed previously by the Agency or to amend the case;
- Make decisions on motions to compel discovery;
- Review any motions filed, including motions for summary judgment (also called motion for decision without hearing); and
- Hold a closed hearing and issue findings of fact and conclusions of law on the complaint.

In jurisdictions that are participating in EEOC’s pilot program, complainants will first receive an order setting an initial conference. At the initial conference, the AJ will discuss the case, potential settlement, necessity for discovery, and all other matters regarding the case listed in the AJ’s order.

**Practice Point:** It is very important to review the Acknowledgment and Order for deadlines and other responsibilities, as some deadlines occur within just 20 days of receipt. Note the date you received the Acknowledgment and Order, and read every line.

**Practice Point:** Most Acknowledgment and Orders will set forth deadlines regarding requests for discovery, responding to discovery, and motions to compel. Be sure to meet these deadlines,

as the Complainant may miss the opportunity to participate in discovery, suffer sanctions, or have a case dismissed for a failure to meet a deadline.

**Practice Point:** If more time is necessary, a party may submit a motion to the Administrative Judge to extend the deadline before the deadline expires, but the AJ is not required to grant the request.

**Practice Point:** Unless otherwise stated, the term “days” means calendar days, not just weekdays/workdays.

## **B. Discovery**

Discovery is a formal process when parties to a lawsuit ask each other for information that the other side may have about the case. This process is an excellent opportunity to collect information that may have been left out of the Report of Investigation (ROI). Although the discovery process is governed entirely by the AJ’s orders, discovery requests are made directly by each party to the other party.

### **Types of Discovery Requests**

#### **Requests for Interrogatories**

- ❖ Requests for Interrogatories are requests for answers to a set of written questions submitted to the opposing party in order to receive information about the case, during the discovery process.

#### **Requests for Documents**

- ❖ A request for documents is a request submitted to the opposing party in order to receive written or electronic information relevant to the case.

#### **Requests for Admissions**

- ❖ A request for admission is a request submitted to the opposing party in order to receive a voluntary acknowledgment, confession or concession of the existence of a fact.

#### **Depositions**

- ❖ A Deposition is sworn out-of-court testimony from a party or witness during the discovery process in an official legal proceeding before trial.
- ❖ Generally, the party requesting the deposition pays for the court reporter to attend, but parties are separately responsible for the cost of their own transcript.

**Practice Point:** Check the Acknowledgement and Order for all the details regarding when to initiate and when to respond to discovery requests. The Order will also have the date on which discovery is to close.

**Practice Point:** Even if the discovery period is closed, if a party receives new information responsive to a discovery request, that party must supplement their discovery response to include the new information.

**Practice Point:** In order to take a deposition, the party requesting the deposition must provide written notice, including when and where the deposition is to take place. The deposition must take place during the discovery period.

### **Preparing Discovery Requests**

When preparing a discovery request:

- Read through the Report of Investigation before you draft any requests for discovery, as you need to know what information is missing.
- Tailor your questions to ensure that you receive the information that will allow you to meet your burden of proof for your specific type of case. See the burden of proof section at page 36 for details.
- Be as clear as possible in order to ensure that the Agency will answer with the information you seek, what may be clear to you could be confusing to others who have not thought about the events in the case for a long time.

**Practice Point:** Remember that the individual reading the request may not initially have any knowledge regarding the case, or may not have thought about the facts involved in the case in years. What may be clear to you could be confusing to someone else.

**Practice Point:** Consult the Sample Discovery attached in **Appendix B** in the back of this workbook for assistance in drafting discovery requests.

**Practice Point:** Only serve your discovery requests to the other party, do not serve the requests to the AJ unless you are specifically required to do so.

### **Responding to Discovery Requests**

When responding to a discovery request:

- The Complainant must provide an answer or objection to each request.
- The Complainant may answer and cite to a specific tab and/or page in the ROI.



- The Complainant can request additional time from the Agency to respond, but provide a date certain for answering and the reasons why the delay is needed.
- If the other party fails to answer or object to an Admission request, that could result in the request being admitted.

**Practice Point:** Remember, when answering requests for admissions, a party must respond in writing, stating that they “admit” or “deny” or “admit in part and deny in part”.

**Practice Point:** Only serve your discovery responses to the other party, do not serve the responses to the AJ unless you are specifically required to do so.



### **Objections:**

Some common potential objections to discovery include but are not limited to:

- **Privilege** -- The party may object if the request calls for privileged information. However, the objecting party must state that the information is privileged, why the information is privileged, and may be required to turn over a privilege log, which is a document that provides basic information for the other side to be aware what communications the party alleges are privileged.
- **Not Relevant** – The party may object to discovery requests that are not relevant, or in other words, requests that are not reasonably calculated to lead to the discovery of admissible evidence.

- **Unduly Burdensome** – The party may object to discovery requests that are unduly burdensome if those requests would create an extreme hardship on the party to provide the information requested.
- **Exceeded Allowable Number** – The party may object to discovery requests that exceed the allowable number contained in the AJ’s order regarding discovery.
- **Asked and Answered** – The party may object to discovery requests that have been asked once, and already answered.
- **Vague** – The party may object to discovery requests that are vague if the request is worded such that the party cannot understand what information is requested.

**Practice Point:** The party is not required to sign a general waiver for health information, etc. Rather, the party should request the Agency to identify specifically what medical information is sought and provide that medical information directly

### **C. Failure to Respond to Discovery Requests**

If a party fails to fully respond to the opposing party’s discovery requests within the time limit imposed by the Acknowledgement and Order:

- 1) The requesting party **must** make informal attempts, such as sending a reminder letter/e-mail or calling opposing counsel, to obtain the requested information, within the deadlines set forth in the Acknowledgment Order.
- 2) If the informal attempts are unsuccessful, the requesting party may file a motion to compel discovery.
  - The motion to compel contains:
    1. a certification that a copy was served on the opposing party,
    2. a statement that the party attempted to resolve the discovery dispute with the opposing party, and
    3. a copy of the disputed questions and answers (if submitted).
- 3) The opposing party will have an opportunity to respond to the motion to compel.

The Administrative Judge (AJ) will then make a decision on the motion to compel and response.

The decision may include:

- An order requiring the party to produce the requested discovery responses within a certain time.
- An “order to show cause” why sanctions should not be imposed on the non-responsive party.
- A denial of the motion.

If the AJ grants the motion to compel and the objecting party fails to implement the AJ’s order, the AJ may then impose sanctions, usually after the requesting party files a motion for sanctions. The Administrative Judge may draw adverse inferences against the objecting party, exclude other evidence, issue a decision against the objecting party, or take any other appropriate action.

**Practice Point:** Always keep track of any efforts taken to settle discovery disputes. The Administrative Judge may want evidence of your efforts beyond a statement.

**Practice Point:** Samples of written discovery requests, responses, a sample protective order and a sample motion to compel are found in **Appendix B** of this workbook. The samples need to be tailored to your individual case. You cannot submit the samples as they appear in the Appendix.

## **D. Settlement and Offers of Resolution**

A settlement is a resolution between parties, which resolves a case or cases. Generally, an Acknowledgment and Order requires the parties to engage in settlement discussions before the hearing. A complainant must make a good faith effort to resolve the complaint. Sometimes, the Administrative Judge may require more specific types or methods of settlement discussions. Always check the order for the details about this process.

There is a sample Settlement Agreement located in **Appendix C**.

### **Offers of Resolution**

It is important to distinguish **offers of resolution** from ordinary settlement discussions. An **offer of resolution** is a written settlement offer that an agency can propose from the time a case is first filed until 30 days before a hearing.

The “offer of resolution” includes a notice to the complainant explaining the possible consequences of failing to accept the offer, which can include the inability to collect attorney’s fees. If a complainant wins at hearing, but the AJ’s award is less than what was offered in the “offer of resolution” the complainant can only receive attorneys fees up to the date of the expiration of the “offer of resolution”.

**Practice Point:** Sample language for an “offer of resolution” can be located in MD 110, Ch.6, Section XIV.

## **E. Summary Judgment or Decision without a Hearing**

A Motion for Summary Judgment (MSJ) or Motion for Decision without Hearing is a request by a party in the case for the Administrative Judge to make a decision on the record without holding a hearing.

Sometimes, the AJ will issue a “notice of intent to issue summary judgment” without either party filing a motion. When the AJ issues such a notice, the notice must give both parties an opportunity to respond.

A summary judgment will be granted if the Administrative Judge finds that there are no genuine issues of material fact. A genuine issue of material fact exists if an AJ could find for the non-moving party when the AJ views the facts in the light most favorable to the nonmoving party. A summary judgment decision can dismiss all or part of the claims in a complaint.

### **How to oppose a MSJ:**

- The party opposing the motion must file an opposition to the motion within the timeframe specified in the Acknowledgment and Order. The party seeking the summary judgment then is allowed to file a reply. Generally no additional opposition is permitted.
- Identify each material fact in dispute.
- Use facts and documents included in the Report of Investigation, additional documents obtained during discovery, or additional witness affidavits.
- Send the opposition to the AJ and serve a copy on the Agency.
- If the case is dismissed, the complainant can appeal once the agency issues a final action, or once 40 days have passed from the receipt of the AJ’s order of dismissal. See Appeals on page 34.

**Practice Point:** If you are relying on documents not in the Report of Investigation, make sure to attach them to your opposition motion.

**Note:** There is a **Sample Response to Agency Motion for Summary Judgment** located in **Appendix E**.

## **F. The Prehearing**

If the case is not dismissed, the AJ will issue a scheduling order. This order will require that the parties exchange prehearing reports and attend a prehearing conference or prehearing conference call. Look at your scheduling order for directions.

The AJ will issue a Prehearing Order containing both what was discussed at the conference and what the AJ ordered as a result of the conference.

### **Witnesses**

Potential witnesses for hearing can include: (1) eyewitnesses to events/actions; (2) friends and/or coworkers who have seen the effect the incident had on you; (3) medical professionals from whom you have sought treatment/care; (4) witnesses to management's actions regarding comparable employees; (5) management officials; and/or (6) any other individual with information relevant to the claims of discrimination.

At the hearing, the Agency is required to produce all approved witnesses currently employed by the federal government. EEOC's Administrative Judges cannot require individuals not currently employed by the federal government to attend the hearing, even if those individuals were once government employees. Former federal employees are therefore not required to attend the hearing. However, any witness approved by the Judge who is willing to come to the hearing may provide testimony.

**Note:** EEOC Administrative Judges do not have the power or authority to subpoena individuals to a hearing.

### **Exhibits**

Potential exhibits for hearing can include: (1) documentation received during discovery regarding the incidents/actions; (3) medical documentation regarding the treatment/care you have received and its costs; (4) documentation of any out of pocket expenses incurred because of the discrimination; (5) affidavits of witnesses unavailable for the hearing; and (6) any other documentation relevant to the claims of discrimination.

**Practice Point:** When listing witnesses in the prehearing report, remember to list all relevant witnesses, including management officials, as the Agency may fail to list them as potential witnesses in its report.

**Practice Point:** Make sure that when listing witnesses and exhibits in the prehearing report to also explain why that witness or that exhibit is necessary to be included in the hearing.

**Note:** For many pre-hearing reports, the AJ will require the complainant and the agency to list all the facts the party intends to prove at trial and a list of facts that the parties are willing to stipulate to.

## G. The Hearing

- 1) AJ's Introductory Statement: The AJ generally gives an introductory statement on the record highlighting the procedures to be followed for the hearing.
- 2) Parties' Opening Statements: Unless otherwise directed, each party is allowed to make an opening statement. While these opening statements can be helpful to frame the case, they are not evidence. In most cases, the Complainant gives the first opening statement, followed by the Agency. Either party may decide to forego or waive their opening statement.
- 3) Presentation of Evidence: The Complainant has the burden of proving discrimination and that the Complainant is entitled to relief. The Complainant presents evidence first.
- 4) Witnesses: Only witnesses approved by the AJ are permitted to testify at the hearing. The AJ will administer oaths to the witnesses directing them under penalty of perjury to testify truthfully. The party calling a witness examines the witness first. The opposing party may then cross-examine the witness. The AJ may also question the witness.
- 5) Exhibits: Before the hearing, unless otherwise directed by the AJ, each party should mark for identification with sequential numbering any documents the party intends to offer into evidence (*e.g.*, Complainant's Exhibit No. 1). These exhibits are often required to be a part of the parties' prehearing reports. Even if you have previously provided a copy in the pre-hearing report, make sure that you bring copies of all exhibits for the AJ, witness, court reporter and to the agency representative. The ROI is automatically admitted into evidence and does not need to be entered separately at the hearing.
- 6) Objections: The Agency or the Complainant may object to any question asked of a witness or any document offered into evidence. The AJ will rule on each objection.
- 7) Closing Statements: Usually, each party is allowed to give a closing statement, either orally or written, that summarizes the evidence and points of law they want the AJ to consider. The Administrative Judge does determine the type of statement (oral or written) and the length of statement allowed. However, like opening statements, closing statements are not evidence themselves, and may be waived at the party's discretion.

**Practice Point:** Do not object to any questions posed by the Administrative Judge.



## **V. FINAL ACTION STAGE**

### **A. Request for Immediate Final Agency Decision (FAD)**

- When a Complainant requests an immediate final decision, the Agency shall take final action within 60 days of receipt of the Complainant's request.
- When a Complainant fails to elect a hearing, then the agency shall take final action within 60 days of the end of the 30-day period during which the Complainant had the right to reply.
- The final decision from the Agency must include notice of the right to appeal to the Commission, or to file a civil action, the name of the party to be served along with the applicable time limits for appeals and civil actions, and the appeal form for an appeal to the Commission.

### **B. FAD Following a Decision by the AJ**

- Once the AJ issues a decision granting summary judgment or after a hearing, the agency has 40 days from receipt of the decision to take final action on the complaint by issuing a "final order."
- The FAD will notify the employee:
  - whether or not the agency will fully implement the AJ's decision; and
  - of the complainant's right to appeal to EEOC's Office of Federal Operations.
- If the agency decides not to (fully) comply with the AJ's decision, then the agency must file an appeal of the decision with the EEOC at the same time the Agency issues the final order.
- If either party wants to appeal it must submit any statement or brief in support of the appeal within 30 days of filing the appeal. (See Section VI.).

**Note: Interim relief can be granted pending the resolution of the appeal either through a request to the AJ or through the AJ's discretion.**

## VI. APPEALS TO THE COMMISSION STAGE

### A. Requesting an Appeal

The Complainant must file a notice of appeal within 30 days of receipt of the FAD. The notice of appeal must be filed with the Office of Federal Operations at the address listed on the FAD. Additionally, the notice must also be filed with the Agency at the address listed on the FAD.

Any statement in support or brief submitted by the Complainant must be submitted within 30 days of the filing the notice of appeal. The statement or brief should be sent to the same locations as the notice of appeal. The Agency then has 30 days to file an opposition to the appeal.

A Complainant can request an appeal when:

- The entirety of the complaint has been dismissed and the Agency has issued a FAD;
- The Agency has issued a FAD;
- If the Complainant loses at the hearing, and the Agency has issued a FAD; or
- If the Complainant loses at the hearing and the Agency has not issued a Final Order within 40 days from the receipt of the AJ's decision;

### B. Standard of Review for the Appeal

- No new evidence will be considered on appeal unless there is a showing that the evidence was not readily available before the decision being appealed was rendered.
- In an appeal from a FAD where no AJ has issued a decision, OFO will use the *de novo* standard. OFO will evaluate the evidence as if the OFO were the judge.
- OFO will review summary judgment decisions *de novo*.
- An appeal from a decision after a hearing by the AJ will be subject to two separate standards of review.
  - For findings of facts based on testimonial or documentary evidence, OFO will uphold the AJ's decision if the decision is supported by "substantial evidence" in the record.
  - Conclusions of law, however, will be reviewed *de novo*.



**Note:** OFO gives more deference to an AJ’s decision and will uphold the decision if it is supported by “substantial evidence” in the record.

**Note:** If the Complainant chose to go to MSPB for a mixed case, the EEOC can still review the final decision made by MSPB on appeal, in regards only to the part of the MSPB action that involves claims of discrimination in an employment action or harassment based on race, color, sex, national origin, religion, disability, age, genetic information, and retaliation. See 29 C.F.R. §1614.303

### **C. Request for Reconsideration**

- Once OFO rules on an appeal, the decision is binding unless either party asks OFO to reconsider its decision.
- A party asking for reconsideration must do so within 30 days from receipt of the OFO decision and show that:
  - OFO’s decision involved a clearly erroneous interpretation of material fact or law; or
  - OFO’s decision will have a substantial impact on the policies, practices or operations of the agency
- An opposing party may file an opposition in writing and explain why the requesting party did not meet either of the above requirements for the OFO to grant reconsideration.

## **VII. RIGHT TO FILE CIVIL ACTION STAGE**

After exhausting the administrative process, a federal employee has the right to file a discrimination complaint in a federal district court.

An individual may file a civil action under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act<sup>4</sup> or the Rehabilitation Act (29 C.F.R. Part 1614):

- Within 90 days of receipt of the final action where no administrative appeal has been filed;
- After 180 days from the date of filing a formal EEO complaint if an administrative appeal has not been filed and final action has not been taken,
- Within 90 days of receipt of EEOC's final decision on appeal, or
- After 180 days from the filing of an appeal with EEOC if there has been no final decision

---

<sup>4</sup> Individuals suing under the ADEA may proceed directly to federal court after giving the EEOC notice of intent to sue, and can bypass the administrative process.



## **BURDENS OF PROOF**

The Complainant bears the responsibility for proving that they have been discriminated against. If the cannot show the action was based on one of the protected statuses (race, color, age, sex, religion, disability, national origin, genetic information, or retaliation) then the Complainant will not prevail.

This is typically done through a shifting burdens approach. Initially, the Complainant must show that the Complainant has met what is known as a *prima facie case*. This initial burden is to prove that there are enough facts evident in the case so as to warrant a presumption of discrimination.

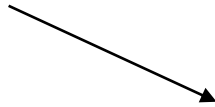
The burden then shifts to the Agency to provide something called a Legitimate Non-Discriminatory Reason (or LNDR). This LNDR is merely a burden for the Agency to rebut the presumption of discrimination established at the *prima facie* case provided by the Complainant. Finally, the Complainant must establish that the Agency's LNDR is untrue, or is a pretext for discrimination; and must also prove that the Agency did in fact discriminate against the Complainant.

## BURDEN SHIFT

### Complainant's Burden

### Employer's Burden

Prima Facie Case



Legitimate Non-Discriminatory Reason for Action



Pretext

### Demonstrative Cases:

This burden shifting approach was established/refined in three seminal cases: McDonnell Douglas v. Green, 411 U.S. 792 (1973), Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). While there are many other cases that explain the burden-shifting approach, these three cases form the basis of that approach.

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 505 (1993), further clarified that the Complainant must not only disprove the opposing party's Legitimate Non-Discriminatory Reason, but also prove illegal employment discrimination.

# 1. **DISPARATE TREATMENT**

## **Proving Disparate Treatment**

In order to establish a *prima facie* case of disparate treatment, the Complainant must show:

- 1) Membership in one of the protected statuses listed above;
- 2) Complainant was subjected to an adverse employment action with negative results; and
- 3) A similarly situated individual of a different protected status was treated more favorably.

The burden then shifts to the Agency to articulate a Legitimate Non-Discriminatory reason (LNDR) for the employment action.

The burden shifts back to Complainant to prove that the LNDR is pretext for discrimination.

In order to prove pretext, a Complainant must show that:

- 1) The Agency's LNDR is unworthy of belief;
- 2) The Agency action is not supported by evidence or is inaccurate;
- 3) The Agency action is inconsistent with other instances; and
- 4) The true reason was because of protected status.

### **Demonstrative Cases:**

Calloway v. Dep't of Veteran's Affairs, EEOC Appeal No. 0120080458 (2009). The Complainant was not selected to the position of Prosthetic Representative. The Complainant was able to show discrimination based on race and sex due to his plainly superior qualifications for the position, and that the selectee's managerial expertise was irrelevant for a non-managerial position.

Bingham v. U.S. Postal Service, EEOC Appeal No. 0720060083 (2007). The Complainant was denied a permanent schedule change due to race (African-American) when the Agency granted a similar change for a Caucasian co-worker, and could not articulate a legitimate non-discriminatory reason for the decision.

## 2. DISPARATE IMPACT

### Proving Disparate Impact

In order to prove a *prima facie* case of disparate impact the Complainant must show:

- 1) The agency has a facially neutral policy or rule; and
- 2) The policy or rule disproportionately effects a particular protected status in an adverse manner;

Possible LNDR:

- 1) The job requirement is a bona fide occupational qualification (“BFOQ”); and
- 2) The requirement is consistent with business necessity.

Complainant’s Pretext:

In order to prove pretext, the Complainant must show that:

- 1) the agency refused to adopt an alternative policy or rule that would satisfy the agency’s legitimate interests; and
- 2) the alternative practice does not have a disproportionate adverse impact on a protected class.

**Practice Point:** Use statistical evidence showing that an employer's practices have a discriminatory impact on a protected group, even if the employer did not intend to discriminate.

#### Demonstrative Case:

Barela v. Secretary of State EEOC Appeal No. 01965017 (1997). The Complainant alleged that the Foreign Service Exam (FSE) was designed in a way that discriminated against the Complainant’s race and national origin (Native American, Hispanic). The EEOC ruled that the Agency did not prove that the FSE was job related and consistent with business necessity.



### **3. HARASSMENT/HOSTILE WORK ENVIRONMENT**

#### **Requirements for Establishing a Hostile Work Environment/Harassment Based on Protected Status**

In order to prove a *prima facie* case of harassment based on protected status the Complainant must show:

- 1) Membership in a protected status;
- 2) The Complainant was subjected to harassment in the form of unwanted or unwelcome verbal or physical conduct;
- 3) The harassment was because of membership in a protected status;
- 4) The harassment affected a term or condition of complainant's employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, offensive, or abusive work environment; and
- 5) There is a basis for imputing Agency liability.
  - a. There is a tangible employment action; **OR**
  - b. There is no tangible employment action; **AND**
  - c. The Agency exercised reasonable care to prevent and promptly correct behavior of supervisor/co-worker **AND**
  - d. Employee failed to take advantage of the preventive and corrective measures offered by the agency.

Agency's LNDR:

- 1) The agency was unaware the harassment occurred; **OR**
- 2) The Complainant failed to take offered preventative or corrective measures; **AND/OR**
- 3) The agency took immediate and effective corrective action against the alleged harassing individual; **AND**
- 4) The harassing actions ceased.

### Complainant's Pretext:

- 1) Prove that the agency knew or should have known of the harassment;
- 2) Prove that the agency did not offer any preventative or corrective measures;
- 3) Prove that the agency did not take immediate and effective corrective action;
- 4) Prove that the harassing actions continued despite agency action.

### Demonstrative Cases:

Vance v. Ball State, 133 S.Ct. 2434 (2013): The Supreme Court held that an employee is a supervisor if the employer has empowered that employee to "take tangible employment actions against the victim, i.e. to effect a significant change in employment status such as hiring, firing, failure to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." The Court held that an employer will be held liable for the hostile work environment harassment of a non-supervisor, if the employer was "negligent in failing to prevent harassment from taking place."

Tootle v. Department of the Navy, EEOC No. 07A40127 (2006). A single incident where a "hangman's noose" was placed in the work area of an African-American employee was severe and enough on its own to constitute harassment. A single comment or action, if severe enough can form the basis of a harassment claim.

### **Requirements for Establishing a Prima Facie Sexual Harassment Case**

In order to prove a *prima facie* case of sexual harassment the Complainant must show:

- 1) The harasser was a member of management, or a co-worker over whom the employer has control;
- 2) The harasser subjected the employee to unwelcome sexual conduct;
- 3) The harassment affected a term or condition of complainant's employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and
- 4) There is a basis for imputing Agency liability.
  - a. There is a tangible employment action; **OR**
  - b. There is no tangible employment action; **AND**
  - c. The Agency exercised reasonable care to prevent and promptly correct behavior of supervisor/co-worker; **AND**
  - d. Employee failed to take advantage of the preventive and corrective measures offered by the agency.

Agency's LNDR:

- 1) The agency was unaware the harassment occurred; **OR**
- 2) The Complainant failed to take offered preventative or corrective measures; **OR**
- 3) The agency took immediate and effective corrective action against the alleged harassing individual; **AND**
- 4) The harassing actions ceased;

Complainant's Pretext:

- 1) Prove that the agency knew or should have known of the harassment;
- 2) Prove that the agency did not offer any preventative or corrective measures;
- 3) Prove that the agency did not take immediate and effective corrective action;
- 4) Prove that the harassing actions continued.

### **Demonstrative Cases:**

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986): The Supreme Court held that hostile environment sexual harassment is a form of sex discrimination actionable under Title VII if it is severe or pervasive enough to alter the conditions of employment and create an abusive working environment.

Harris v. Forklift Systems Inc., 510 U.S. 17 (1993): The Supreme Court held that a hostile environment caused by sexual harassment does not have to cause psychological harm to be hostile or abusive, because such an environment can detract from an employee's job performance.

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998): The Supreme Court held that same-sex sexual harassment is covered under Title VII of the Civil Rights Act.

Couch v. Dep't of Energy, EEOC Appeal No. 0120131136 (2013): The EEOC found that the Complainant was subjected to harassment based on both sexual stereotype and reprisal when co-workers would repeatedly call a co-worker "fag" and "rat", and where the Complainant's Supervisors admitted that they treated him differently after they received his EEO Notice.

Complainant v. Department of Defense, EEOC Appeal No. 072013009 (2014): The EEOC found that the Agency created a hostile work environment based on sex when the Complainant was subjected to persistent questions from her supervisor because she was a mother of young children.



## Requirements for Establishing a Prima Facie Quid Pro Quo Sexual Harassment Case

In order to prove a *quid pro quo* case of harassment the Complainant must show

- 1) The harasser was a member of management;
- 2) The harasser made unwelcome requests for sexual favors or unwelcome sexual advances towards the employee;
- 3) The Harasser stated or implied that the employee must comply to receive or keep a job benefit; and
- 4) The employee suffered a tangible employment action.

Agency's LNDR:

- 1) The agency was unaware the harassment occurred; **OR**
- 2) The Complainant failed to take offered preventative or corrective measures; **OR**
- 3) The agency took immediate and effective corrective action against the alleged harassing individual; **AND**
- 4) The harassing actions ceased;

Complainant's Pretext:

- 1) Prove that the agency knew or should have known of the harassment;
- 2) Prove that the agency did not offer any preventative or corrective measures;
- 3) Prove that the agency did not take immediate and effective corrective action;
- 4) Prove that the harassing actions continued.

**Note:** Agency is strictly liable if harassment is by a supervisor and the harassment results in a tangible employment action.

### **Demonstrative Cases:**

Faragher v. City of Boca Raton, 524 U.S. 775 (1998);

Burlington Industries Inc. v. Ellerth, 524 U.S. 742 (1998): The Supreme Court joined these cases and issued a joint ruling. The Court held that (A) a quid pro quo situation where the employee did not suffer an undesired job consequence might still be illegal if the harassment created a hostile environment. The Court also held that (B) employers are “vicariously liable” (or liable for the actions of their employee) if the harassment led to a “tangible loss” (i.e. an undesired job consequence). If the harassment did not lead to a tangible loss, employers are not liable if they can prove that (1) the employee did not take advantage of the preventative or corrective measures offered by the Agency and (2) the employer exercised reasonable care to prevent and promptly correct the behavior.

## **4. FAILURE TO PROVIDE REASONABLE ACCOMMODATION**

### **Requirements for Establishing a Failure to Accommodate Case (Religion)**

In order to prove a *prima facie* Case of Failure to Accommodate (religion) the Complainant must show:

- 1) Complainant has a sincerely held religious belief that conflicts with an employment requirement;
- 2) Supervisor was informed of need for an accommodation;
- 3) Adverse employment action was taken against complainant for failure to comply with employment requirement.

Agency’s LNDR:

- 1) Providing an accommodation may be an undue hardship. (cost of accommodation, nature of accommodation, etc.).

Complainant’s Pretext:

- 1) Establish accommodation would not cause undue hardship.

**Demonstrative Cases:** Trans World Airlines Inc. v. Hardison, 432 U.S. 63, 84, 97 S. Ct. 2264 (1977). Agencies may deny accommodation for religious reasons if that accommodation is an undue hardship. An accommodation is an undue hardship when “it would impose upon an employer more than a *de minimis* cost.”

## **Requirements for Establishing a Failure to Accommodate Case (Disability)**

In order to prove a *prima facie* case of Failure to Accommodate (disability) the Complainant must show that:

- 1) Complainant is a qualified individual with a mental or physical impairment that substantially limits one or more major life activity which interferes with the Complainant's ability to perform his/her position;
- 2) The agency was aware of the disability;
- 3) The Complainant requested and was denied a reasonable accommodation.

Agency LNDR:

- 1) Reasonable accommodation would cause an undue hardship on the agency (agency's program size; type of operation; and, nature and cost of accommodation); **OR** agency offered alternative accommodation that would have accommodated complainant.

Complainant's Pretext:

- 1) Establish the agency's reasons are insufficient to establish undue hardship, **OR** agency's offered accommodation would not have accommodated the complainant.

### **Demonstrative Cases:**

Sabbers v. General Services Administration, EEOC Appeal No. 0120063209 (2008): When an employee makes a statement about her abilities, contrary to the restrictions on the employee's reasonable accommodation, the employer has a right to request detailed updated medical information. The refusal to provide that information resulted in a termination of the accommodation, which was upheld by the EEOC.

Complainant v. Department of Housing and Urban Development, EEOC Appeal No. 0720130029 (2015): Telework is an available accommodation for positions which can feasibly be done outside the office environment. The Agency may have the duty to reasonably accommodate an employee with an inability to commute by granting a significant amount of days for telework.

**Practice Point:** If the Agency failed to engage in the interactive process, then the Agency may be liable for compensatory damages.

**Note:** For more information, consult AFGE's Guide on Disability Discrimination.

## 5. RETALIATION

### Requirements for Establishing a Retaliation Case

In order to prove a *prima facie* case of retaliation the Complainant must show that:

- 1) Complainant previously engaged in protected EEO activity: bringing informally incidents alleged as discrimination, participating in a discrimination proceeding (i.e. complainant, witness, representative, etc.), requesting reasonable accommodations, or opposing discrimination;
- 2) The responsible management official was aware of the protected EEO activity;
- 3) Adverse treatment or conduct occurred that would likely deter a reasonable person from engaging in EEO activity; and
- 4) The adverse treatment followed the protected EEO Activity within such a short period of time that a retaliatory motive can be inferred.

The Agency then has the obligation to establish a Legitimate Non-Discriminatory reason for the employment action.

After the Agency identifies its LNDR, the Complainant's burden is to prove that the LNDR is pretext for discrimination.

In order to prove pretext, a Complainant can show that:

- 1) The agency's LNDR is unworthy of belief;
- 2) The agency's action is not supported by evidence, or is inaccurate;
- 3) The agency's action is inconsistent with other instances; and
- 4) The true reason was because of the protected EEO activity.

**Note:** Most retaliation cases rely on a timeline of the relevant actions to allow the AJ or other decision maker to draw an inference of retaliation. The less time elapsed between the protected EEO activity (or the date on which the agency and/or Responsible Management Official (RMO) became aware of such activity) and the date of the adverse action, the stronger the inference of retaliation. The EEOC often dismisses cases when more than six months have elapsed between a complainant's protected activity and the adverse action.

What kinds of action constitute retaliation?

- Not just employment-related retaliatory actions, but also any employer conduct that is materially adverse and that might have dissuaded a reasonable employee from making or supporting a charge of discrimination against the employer. This is referred to as a “chilling effect.”
- Some examples of actionable retaliation:
  - Downgrading employee on the employee’s evaluation;
  - Refusing, contrary to policy, to investigate a death threat against an employee;
  - An employer filing false criminal charges against an employee;
  - Supervisor stating to a group of employees: “...and some of you have stuck up for each other who have filed, and that's good, but what you guys have done here goes both ways, and I want you to know, that what comes around, goes around.”

**Demonstrative Cases:** Burlington Northern v. White, 126 S.Ct. 2405 (2006): The Supreme Court found that changing the employee's duties to include dirtier, harder, and less prestigious work, even though the duties were still within the employee’s job description was retaliation for Complainant’s prior protected activity.

Thompson v. North American Stainless, 131 S.Ct. 863 (2011): The Supreme Court extended the scope of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 (Title VII) to an individual harmed by retaliation, even if that person had not himself filed a charge of discrimination.

Jackson v. Department of Army, EEOC Appeal No. 0120070289 (2007): The EEOC found that a comment by the EEO Counselor that the Complainant had already filed too many complaints, and that she could not file another one was sufficient enough to raise a claim of retaliation.

Henderson v. USPS, EEOC Appeal No. 0120083298 (2008): The EEOC found that the Complainant was subjected to reprisal when her Supervisor approached a co-worker and requested that the co-worker use her influence over the Complainant to get the Complainant to drop her Complaint.

## **ADDITIONAL INFORMATION**

### **A. Class Action Claims**

To bring a class action claim in EEO, complainants must prove that the agency has a regular, systematic practice of discriminating against a certain protected group. A class representative is chosen, whose allegations of discrimination is representative of the discrimination amongst the class of complainants.

What is required to show that a complaint should proceed as a class action?

- 1) **Numerosity:** The affected class must be so numerous that a joinder of all of the claims would be impractical (while there is no case that establishes a minimum number, usually when there are more than 50 people).
- 2) **Commonality:** There must be questions of fact and law common to all of the individuals' complaints.
- 3) **Typicality:** The claims and defenses of the named complainant ("class representative") are typical of the other un-named class members' claims and defenses.
- 4) **Adequacy of representation:** The class representative fairly and appropriately represents un-named class members.

29 CFR Part 1614 specifically allows for class action complaints and permits a complainant to move for class action at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint.

Class actions before the EEOC are difficult to establish and litigate, not every situation is right for a class action. Before filing a class action complaint, the complainant and his or her representative should first consider whether it would be better to file a class action or use some other method of bringing multiple cases of discrimination forward, such as consolidating similar cases together for a single hearing.

### **B. Damages**

In EEO, damage awards from an Administrative Judge aim to return the complainant to the position he or she would have occupied had the illegal discrimination not occurred.

The following are types of damages that can be awarded to Complainants if successful on their claims. Not every claim will result in the ability to recover every category of damage award. For instance, if the Complainant suffered no loss of pay, then the "back pay" remedy may be inappropriate for that particular case.

## **1. Back Pay**

Back Pay is an award that compensates a complainant for a wrongful or discriminatory personnel action that resulted in a loss of pay and/or benefits which the complainant would have received had the agency not acted illegally.

Back pay may be appropriate in cases of failure-to-promote, denial of a within-grade pay raise, suspension, and termination. Back pay may also include overtime salary to complainants who are able to prove that had the agency's discriminatory conduct not occurred, they would have been eligible to receive overtime. If back pay is awarded, interest is calculated and added to the award.

A complainant has a duty to mitigate his or her back pay damages, for example, a Complainant should attempt to obtain other employment after being fired. Absent a good faith effort at minimizing damages, a back pay award may be reduced.

## **2. Attorney Fees**

Reasonable attorney's fees may be awarded for legal expenses incurred by a lawyer on behalf of a complainant in cases where the Complainant has prevailed on one or more claims. However, Attorney's fees are not required to be awarded for the work done by a complainant's non-attorney representative.

Typically, after an Administrative Judge establishes that a complainant has prevailed in a case, the attorney is required to submit a request for reasonable attorney's fees and costs. Under 29 CFR Part 1614, the EEOC AJ reviews the submission and issues the award.

## **3. Injunctive Relief**

Injunctions are legal orders requiring agencies to perform or to stop performing a specific action or set of actions. Although the complainant may benefit financially from an injunction, injunctions are considered non-monetary relief. Some examples of injunctive relief include promotion, hiring, reinstatement, a return of benefits, granting a reasonable accommodation, an order to stop an agency from continued use of an illegal policy, and removal of a negative performance evaluation.

## **4. Front Pay**

Front pay is the compensation and benefits judged necessary to make up for the lost pay and benefits that the employee would have earned in the future absent the discrimination. The amount of front pay depends on how long the court determines it will take the employee to return to the same level of pay that he or she received at termination. Front pay is not considered part of the compensatory damages category and, therefore there is no cap on amount of front pay a complainant can receive.

Front pay is rarely awarded in the federal sector and is generally only appropriate when the employee cannot be returned to his or her previous position due to extreme hostility in the workplace and there is no comparable position in which the employee can be placed.

## **5. Compensatory Damages**

Compensatory damages is a category of damages meant to compensate for losses suffered through intentional discrimination. They may be recovered by federal employees at the administrative level and in district court.

There are limitations on the availability of compensatory damages. The total amount of compensatory damages that can be awarded to a complainant are a maximum of \$300,000.00. In cases where the AJ has found that the agency had a mixed motive for its action (where there are both discriminatory and valid reasons for the action) and in cases where the claims are solely under the ADEA, compensatory damages are unavailable.

Compensatory damages are divided into two separate types: Pecuniary and Non-Pecuniary.

### **a. Pecuniary Losses**

Pecuniary losses are typically thought of as out-of-pocket losses. They can include: moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses directly caused out of the discriminatory conduct.

### **b. Non-Pecuniary Losses**

Damages are available for the intangible injuries of emotional harm such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Some other non-pecuniary losses could include injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health, so long as those losses were caused or made worse by the discriminatory conduct.

Non-pecuniary losses are much more difficult to prove than out of pocket losses. Emotional harm will not be presumed simply because the complaining party is a victim of discrimination. This is often a mistaken belief of complainants. The existence, nature, and severity of emotional harm must be proved.

Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, headaches, or any other physical manifestation that can be directly attributed to the stress of the discrimination.

An award for non-pecuniary damages only happens when there is sufficient evidence of a causal connection between the Agency's actions and the Complainant's injury.



A claim of emotional harm will be seriously undermined if the emotional harm preceded the discrimination. However, if the complainant had emotional harm prior to the discrimination and the complainant's emotional health gets worse, or exacerbates, as a result of the discrimination, then the exacerbation could provide a basis for an award on emotional harm.

### **What Must be Proven for Compensatory Damages?**

- Complainant must prove that he or she suffered injuries and the agency's discriminatory conduct caused those injuries.
- A Complainant must provide "objective evidence" of pecuniary (or out-of-pocket) losses (i.e. billing statements, invoices).
- To recover damages for non-economic losses, a complainant must prove that the agency's discriminatory conduct adversely affected the complainant's physical and/or emotional health. Examples: inability to sleep, general agitation, lethargy, frequent crying, social withdrawal, recurring nightmares, damaged social relationships (including marriage), diminished pleasure in activities, loss of libido, digestive problems, aggravation of asthma, less confidence on the job, concern for job or physical safety, physical pain such as head- or stomachaches, lowering of self-esteem, etc.).
- Common methods of proving non-pecuniary damages include:
  - Questioning witnesses such as the individual Complainant, his or her friends, family members, co-workers, and union representatives.
  - Presenting documents such as personnel files, disciplinary records, work records, medical records and bills, and income tax records.
  - Comparing the Complainant's career path with that of his or her colleagues to show that the complainant's career was damaged by the agency's discrimination.
  - Identifying specific career opportunities the Complainant was deprived of as a result of the agency's discrimination.

### **6. Post-Judgment Interest**

When a successful complainant is awarded damages, the agency is typically required to pay the complainant within a given time frame. If the payment is not made within this period, the complainant may be entitled to post-judgment interest to compensate for the delay.

### **7. Punitive Damages**

Punitive damages are not available to federal or DC government employees in discrimination cases.

## 8. Settlements

If the Complainant is able to resolve the EEO case through a settlement agreement, and the Agency does not meet its obligations under the settlement agreement, the complainant must notify the agency of the alleged noncompliance, and give the agency an opportunity to cure. The specifics of which are usually contained within the signed and executed settlement agreement. Within 30 days of the Complainant's receipt of an agency's determination on an allegation of noncompliance, or 35 days after the Complainant serves the agency with an allegation of noncompliance, the complainant can file an appeal directly with the Office of Federal Operations (OFO).

## 9. Non-monetary Relief

- Hiring
- Reinstatement
- Promotion
- Transfer
- Reasonable Accommodation
- Restoration of Leave
- Removal of disciplinary entry from personnel file
- Corrective or preventive measures
  - minimize chance of reoccurrence
  - discontinue practice
- Post notices addressing the violations
  - advising employees of their rights under EEOC laws
  - right to be free from retaliation



## **C. Additional Protections**

### **1. The No FEAR Act of 2002**

On May 15, 2002, President Bush signed the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (No FEAR) into law (Pub. L. No. 107-174). The No Fear Act, with an effective date of October 1, 2003, requires that federal agencies be more accountable for violations of anti-discrimination and whistleblower protection laws.

### **2. Management Directive 715**

MD 715 provides policy guidance and standards for establishing and maintaining effective affirmative programs of equal employment opportunity under Section 717 of Title VII and effective affirmative action programs under Section 501 of the Rehabilitation Act. The Directive also sets forth general reporting requirements

### **3. Executive Orders**

#### **a. Sexual Orientation, E.O. 13087**

Sexual orientation is not directly protected under the clear text of Title VII of the 1964 Civil Right Act (or any federal law). Though, the EEOC has found that when discrimination against individuals is based on gender or sexual stereotypes, claims regarding sexual orientation do have a basis in Title VII. See, *Veretto v. United States Postal Service*, EEOC DOC 0120110873 (July 1, 2011) (accepting Title VII sex discrimination claim alleging that supervisor harassment was motivated by sexual stereotype that men should only marry women); *Castello v. United States Postal Service*, EEOC DOC 0520110649 (December 20, 2011) (accepting Title VII sex discrimination claim alleging that supervisor harassment was motivated by sexual stereotype that having relationships with men is an essential part of being a woman); *Complainant v. Dep't of Homeland Sec.*, EEOC DOC 0120110576 (August 20, 2014) (reaffirming prior findings that federal employees discriminated against on the basis of sexual orientation can establish violations of Title VII based on the sex stereotyping theory).

On May 28, 1998, President Clinton ordered that Executive Order No. 11478 be amended to prohibit discrimination on the basis of sexual orientation in the federal workplace. As a result, discrimination on the basis of sexual orientation is illegal -- but there is no EEO process by which to enforce this protection. Enforcement of one's right to be free from sexual orientation discrimination is most readily available through your union contract, or in certain circumstances through the Office of Special Counsel.

#### **b. Parental Status, E.O. 13152**

On May 2, 2000, President Clinton ordered that Executive Order No. 11478 be amended to prohibit discrimination in the federal government on the basis of an individual's parental status.

An example of discrimination on the basis of parental status is a supervisor who will not promote an employee with a young child because of the supervisor’s belief that the employee will not stay late as needed due to the employee’s family responsibilities

Similar to discrimination on the basis of sexual orientation and genetic discrimination, discrimination on the basis of parental status is illegal—but there is no EEO process by which to enforce one’s right. Enforcement is available through your union contract or through MSPB if the discriminatory conduct is used as the basis of a removal or suspension of greater than 14 days. Additionally, this Executive Order may be relied upon when advocating for family friendly protections that exceed existing family friendly leave policies.

**c. Facilitate Accommodations for the Disabled, E.O. 13164**

On July 26, 2000, President Clinton ordered that agencies establish effective written procedures to facilitate the provision of reasonable accommodation for people with disabilities. Specifically, the procedures are required to describe how to initiate an accommodation request, the agency process for determining an accommodation request, and set forth processing time limits.

**d. Increasing Federal Employment of Individuals with Disabilities, E.O. 13548**

President Obama issued E.O. 13548 requiring Federal agencies to develop plans to hire 100,000 workers with disabilities by 2015.



#### 4. Mixed Case Complaints and Appeals

A "mixed case complaint" is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or retaliation related to or stemming from an action that may be appealed to the MSPB. It may contain both claims of employment discrimination in an adverse action and other claims that could normally be brought before the MSPB. There is no right to a hearing before an EEOC Administrative Judge on a mixed-case complaint.

##### Mixed Case Procedure Outline

EEOC regulations provide for processing discrimination complaints on claims that are otherwise appealable to the MSPB. Two determinations must be made to decide if the mixed case regulations apply. First, the employee must have standing to file such an appeal with the MSPB. Second, the claim that forms the basis of the discrimination complaint must be appealable to the MSPB.

##### Standing:

The following employees generally have a right to appeal to the MSPB and therefore to initiate a mixed case complaint or appeal:

- 1) Competitive service employees not serving a probationary or trial period under an initial appointment<sup>5</sup>;
- 2) Career appointees to the Senior Executive Service;
- 3) Non-competitive service veterans preference eligible employees with one or more years of current continuous service (i.e. postal employees, attorneys with veteran's preference, etc.);
- 4) Non-preference eligible excepted service employees who have completed their probationary period or with two or more years of continuous service (i.e. attorneys).

##### Appealable Actions:

Most appealable actions fall into the following six categories:

- 1) Reduction in grade or removal for unacceptable performance;
- 2) Removal, reduction in grade or pay, suspension for **more than** 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service;

---

<sup>5</sup> However, in some rare circumstances, such as VEOA and USERRA claims, probationary employees may be able to bring an appeal to MSPB.

- 3) Separation, reduction in grade, or furlough for more than 30 days when the action was effected because of a reduction-in-force;
- 4) Reduction-in-force action affecting a career appointee in the Senior Executive Service;
- 5) Reconsideration decision sustaining a negative determination of competence for a general schedule (GS) employee; and
- 6) Disqualification of an employee or applicant because of a suitability determination.

### **Election to Proceed**

The regulations provide that a covered individual may raise claims of discrimination in a mixed case either as a direct appeal to the MSPB or as a mixed-case EEO complaint with the agency, but not both. 29 C.F.R. § 1614.302(b).

- 1) Whatever action the individual files first is considered an election to proceed in that forum. §1614.302(b).
- 2) Where an employee files a MSPB appeal and timely seeks counseling, counseling may continue at the option of the parties. §1614.105
- 3) In any case, counseling must be terminated with the notice of rights, pursuant to §1614.015(d), (e) or (f).

### **Processing Mixed Case Complaints Filed at the Agency**

If an employee elects to file a mixed case complaint, the agency must process the complaint in the same manner as it would any other discrimination complaint, except:

- 1) Upon the filing of a complaint, the agency must advise the complainant that if a final decision is not issued within 120 days of the date of filing the mixed case complaint, the complainant may appeal to the MSPB at any time after the 120 days; or the complainant may file a civil action as specified in §1614.310(g), but that the complainant cannot elect to do both;
- 2) Within 45 days following completion of the investigation, the agency must issue a final decision without hearing.
- 3) Upon issuance of the agency's final decision on a mixed case complaint, the agency must then advise the complainant of the right to appeal the claim to the MSPB within 30 days of receipt of the decision and of the right to file a civil action as provided in §1614.310(a), but that complainant cannot elect to do both.

# APPENDIX A





## 29 CFR PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

### List of Contents

#### **Subpart A—Agency Program To Promote Equal Employment Opportunity**

- §1614.101 General policy.
- §1614.102 Agency program.
- §1614.103 Complaints of discrimination covered by this part.
- §1614.104 Agency processing.
- §1614.105 Pre-complaint processing.
- §1614.106 Individual complaints.
- §1614.107 Dismissals of complaints.
- §1614.108 Investigation of complaints.
- §1614.109 Hearings.
- §1614.110 Final action by agencies.

#### **Subpart B—Provisions Applicable to Particular Complaints**

- §1614.201 Age Discrimination in Employment Act.
- §1614.202 Equal Pay Act.
- §1614.203 Rehabilitation Act.
- §1614.204 Class complaints.

#### **Subpart C—Related Processes**

- §1614.301 Relationship to negotiated grievance procedure.
- §1614.302 Mixed case complaints.
- §1614.303 Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.
- §1614.304 Contents of petition.
- §1614.305 Consideration procedures.
- §1614.306 Referral of case to Special Panel.
- §1614.307 Organization of Special Panel.
- §1614.308 Practices and procedures of the Special Panel.
- §1614.309 Enforcement of Special Panel decision.
- §1614.310 Right to file a civil action.

#### **Subpart D—Appeals and Civil Actions**

- §1614.401 Appeals to the Commission.
- §1614.402 Time for appeals to the Commission.
- §1614.403 How to appeal.
- §1614.404 Appellate procedure.
- §1614.405 Decisions on appeals.
- §1614.406 Time limits. [Reserved]
- §1614.407 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.
- §1614.408 Civil action: Equal Pay Act.
- §1614.409 Effect of filing a civil action.

**Subpart E—Remedies and Enforcement**

- §1614.501 Remedies and relief.
- §1614.502 Compliance with final Commission decisions.
- §1614.503 Enforcement of final Commission decisions.
- §1614.504 Compliance with settlement agreements and final action.
- §1614.505 Interim relief.

**Subpart F—Matters of General Applicability**

- §1614.601 EEO group statistics.
- §1614.602 Reports to the Commission.
- §1614.603 Voluntary settlement attempts.
- §1614.604 Filing and computation of time.
- §1614.605 Representation and official time.
- §1614.606 Joint processing and consolidation of complaints.
- §1614.607 Delegation of authority.

**Subpart G—Procedures Under the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act)**

- §1614.701 Purpose and scope.
- §1614.702 Definitions.
- §1614.703 Manner and format of data.
- §1614.704 Information to be posted—all Federal agencies.
- §1614.705 Comparative data—all Federal agencies.
- §1614.706 Other data.
- §1614.707 Data to be posted by EEOC.

## **Subpart A—Agency Program To Promote Equal Employment Opportunity**

### **§1614.101 General policy.**

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age, disability, or genetic information and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.*), the Equal Pay Act (29 U.S.C. 206(d)), the Rehabilitation Act (29 U.S.C. 791 *et seq.*), or the Genetic Information Nondiscrimination Act (GINA) (42 U.S.C. 2000ff *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

[74 FR 63984, Dec. 7, 2009]

### **§1614.102 Agency program.**

(a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall:

- (1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation;
- (2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives;
- (3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;
- (4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, age, disability, or genetic information, and solicit their recruitment assistance on a continuing basis;

(5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(6) Take appropriate disciplinary action against employees who engage in discriminatory practices;

(7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;

(8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program;

(9) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(10) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;

(11) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(12) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and

(13) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

(b) In order to implement its program, each agency shall:

(1) Develop the plans, procedures and regulations necessary to carry out its program;

(2) Establish or make available an alternative dispute resolution program. Such program must be available for both the pre-complaint process and the formal complaint process.

(3) Appraise its personnel operations at regular intervals to assure their conformity with its program, this part 1614 and the instructions contained in the Commission's management directives;

(4) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal

Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head;

(5) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(6) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation; and

(7) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

(c) Under each agency program, the EEO Director shall be responsible for:

(1) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in §1614.101 and the agency program;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and to improve the agency's program for equal employment opportunity;

(4) Providing for counseling of employees and for the receipt and processing of individual and class complaints of discrimination; and

(5) Assuring that individual complaints are fairly and thoroughly investigated and that final action is taken in a timely manner in accordance with this part.

(d) Directives, instructions, forms and other Commission materials referenced in this part may be obtained in accordance with the provisions of 29 CFR 1610.7 of this chapter.

(e) Agency programs shall comply with this part and the Management Directives and Bulletins that the Commission issues. The Commission will review agency programs from time to time to ascertain whether they are in compliance. If an agency program is found not to be in compliance, efforts shall be undertaken to obtain compliance. If those efforts are not successful, the Chair may issue a notice to the head of any federal agency whose programs are not in compliance and publicly identify each non-compliant agency.

(f) Unless prohibited by law or executive order, the Commission, in its discretion and for good cause shown, may grant agencies prospective variances from the complaint processing procedures prescribed in this Part. Variances will permit agencies to conduct pilot projects of proposed changes to the complaint processing requirements of this Part that may later be made permanent through regulatory change. Agencies requesting variances must identify the specific section(s) of this Part from which they wish to deviate and exactly what they propose to do instead, explain the expected benefit and expected effect on the process of the proposed pilot project, indicate the proposed duration of the pilot project, and discuss the method by which they intend to evaluate the success of the pilot project. Variances will not be granted for individual cases and will usually not be granted for more than 24 months. The Director of the Office of Federal Operations for good cause shown may grant requests for extensions of variances for up to an additional 12 months. Pilot projects must require that participants knowingly and voluntarily opt-in to the pilot project. Requests for variances should be addressed to the Director, Office of Federal Operations.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37655, July 12, 1999; 67 FR 35735, May 21, 2002; 74 FR 63984, Dec. 7, 2009; 77 FR 43504, July 25, 2012]

## **§1614.103 Complaints of discrimination covered by this part.**

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the employee is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of disability), the Equal Pay Act (sex-based wage discrimination), or GINA (discrimination on the basis of genetic information) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102;

(2) Executive agencies as defined in 5 U.S.C. 105;

- (3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority;
- (4) All units of the judicial branch of the Federal government having positions in the competitive service, except for complaints under the Rehabilitation Act;
- (5) The National Oceanic and Atmospheric Administration Commissioned Corps;
- (6) The Government Printing Office except for complaints under the Rehabilitation Act; and
- (7) The Smithsonian Institution.

(c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

(d) This part does not apply to:

- (1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section:
- (2) Employees of the General Accounting Office;
- (3) Employees of the Library of Congress;
- (4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or
- (5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37655, July 12, 1999; 74 FR 63984, Dec. 7, 2009; 77 FR 43504, July 25, 2012]

## **§1614.104 Agency processing.**

(a) Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provisions contained in §§1614.105 through 1614.110 and in §1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives.

(b) The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue decisions that are consistent with

acceptable legal standards, to explain the reasons for its decisions, and to give complainants adequate and timely notice of their rights.

## **§1614.105 Pre-complaint processing.**

(a) Employees who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An employee must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b)(1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with §1614.108(f), election rights pursuant to §§1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to §1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the claims raised in precomplaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the employee informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(2) Counselors shall advise employees that, where the agency agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph (c) of this section.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an employee, the Counselor shall submit a written report within 15 days to the agency office that



has been designated to accept complaints and the employee concerning the issues discussed and actions taken during counseling.

(d) Unless the employee agrees to a longer counseling period under paragraph (e) of this section, or the employee chooses an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the employee within 30 days of the date the employee contacted the agency's EEO office to request counseling. If the matter has not been resolved, the employee shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the employee may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the employee chooses to participate in an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be 90 days. If the claim has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the employee from filing a complaint. The Counselor shall not reveal the identity of an employee who consulted the Counselor, except when authorized to do so by the employee, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37656, July 12, 1999; 74 FR 63984, Dec. 7, 2009]

## **§1614.106 Individual complaints.**

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by §1614.105 (d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be employee or that person's attorney. This statement must be sufficiently precise to identify the employee and the agency and to describe generally the action(s) or practice(s) that form the basis of the

complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

(d) A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a complainant may file a motion with the administrative judge to amend a complaint to include issues or claims like or related to those raised in the complaint.

(e) The agency shall acknowledge receipt of a complaint or an amendment to a complaint in writing and inform the complainant of the date on which the complaint or amendment was filed. The agency shall advise the complainant in the acknowledgment of the EEOC office and its address where a request for a hearing shall be sent. Such acknowledgment shall also advise the complainant that:

(1) The complainant has the right to appeal the final action on or dismissal of a complaint; and

(2) The agency is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period. When a complaint has been amended, the agency shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, except that the complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37656, July 12, 1999]

## **§1614.107 Dismissals of complaints.**

(a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:

(1) That fails to state a claim under §1614.103 or §1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(2) That fails to comply with the applicable time limits contained in §§1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with §1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(4) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and

§1614.301 or §1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory, unless the complaint alleges that the proposal or preliminary step is retaliatory;

(6) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(7) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available;

(8) That alleges dissatisfaction with the processing of a previously filed complaint; or

(9) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination. A clear pattern of misuse of the EEO process requires:

(i) Evidence of multiple complaint filings; and

(ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or

(iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system.

(b) Where the agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in paragraphs (a)(1) through (9) of this section, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated, and shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37656, July 12, 1999; 77 FR 43504, July 25, 2012]

## **§1614.108 Investigation of complaints.**

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to §1614.107. By written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, or where a complaint was amended, within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing and decision from an administrative judge or may request an immediate final decision pursuant to §1614.110 from the agency with which the complaint was filed.

(g) If the agency does not send the notice required in paragraph (f) of this section within the applicable time limits, it shall, within those same time limits, issue a written notice to the complainant informing the complainant that it has been unable to complete its investigation within the time limits required by §1614.108(f) and estimating a date by which the investigation will be completed. Further, the notice must explain that if the complainant does not want to wait until the agency completes the investigation, he or she may request a hearing in accordance with paragraph (h) of this section, or file a civil action in an appropriate United States District Court in accordance with §1614.407(b). Such notice shall contain information about the hearing procedures.

(h) Where the complainant has received the notice required in paragraph (f) of this section or at any time after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing by submitting a written request for a hearing directly to the EEOC office indicated in the agency's acknowledgment letter. The complainant shall send a copy of the request for a hearing to the agency EEO office. Within 15 days of receipt of the request for a hearing, the agency shall provide a copy of the complaint file to EEOC and, if not previously provided, to the complainant.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37656, July 12, 1999; 77 FR 43505, July 25, 2012]

## §1614.109 Hearings.

(a) When a complainant requests a hearing, the Commission shall appoint an administrative judge to conduct a hearing in accordance with this section. Upon appointment, the administrative judge shall assume full responsibility for the adjudication of the complaint, including overseeing the development of the record. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances.

(b) *Dismissals.* Administrative judges may dismiss complaints pursuant to §1614.107, on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.

(c) *Offer of resolution.* (1) Any time after the filing of the written complaint but not later than the date an administrative judge is appointed to conduct a hearing, the agency may make an offer of resolution to a complainant who is represented by an attorney.

(2) Any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the agency may make an offer of resolution to the complainant, whether represented by an attorney or not.

(3) The offer of resolution shall be in writing and shall include a notice explaining the possible consequences of failing to accept the offer. The agency's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief. With regard to monetary relief, an agency may make a lump sum offer covering all forms of monetary liability, or it may itemize the amounts and types of monetary relief being offered. The complainant shall have 30 days from receipt of the offer of resolution to accept it. If the complainant fails to accept an offer of resolution and the relief awarded in the administrative judge's decision, the agency's final decision, or the Commission decision on appeal is not more favorable than the offer, then, except where the interest of justice would not be served, the complainant shall not receive payment from the agency of attorney's fees or costs incurred after the expiration of the 30-day acceptance period. An acceptance of an offer must be in writing and will be timely if postmarked or received within the 30-day period. Where a complainant fails to accept an offer of resolution, an agency may make other offers of resolution and either party may seek to negotiate a settlement of the complaint at any time.

(d) *Discovery.* The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(e) *Conduct of hearing.* Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(f) *Procedures.* (1) The complainant, an agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the administrative judge deems necessary. The administrative judge shall serve all orders to produce evidence on both parties.

(2) Administrative judges are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(g) *Summary judgment.* (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and

referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue a decision without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

(h) *Record of hearing.* The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the agency representative for reproduction.

(i) *Decisions by administrative judges.* Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a decision, an administrative judge shall issue a decision on the complaint, and shall order appropriate remedies and relief where discrimination is found, within 180 days of receipt by the administrative judge of the complaint file from the agency. The administrative judge shall send copies of the hearing record, including the transcript, and the decision to the parties. If an agency does not issue a final order within 40 days of receipt of the administrative judge's decision in accordance with 1614.110, then the decision of the administrative judge shall become the final action of the agency.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37657, July 12, 1999; 77 FR 43505, July 25, 2012]

## **§1614.110 Final action by agencies.**

(a) *Final action by an agency following a decision by an administrative judge.* When an administrative judge has issued a decision under §1614.109(b), (g) or (i), the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission,



the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal in accordance with §1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 573 shall be attached to the final order.

(b) *Final action by an agency in all other circumstances.* When an agency dismisses an entire complaint under §1614.107, receives a request for an immediate final decision or does not receive a reply to the notice issued under §1614.108(f), the agency shall take final action by issuing a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The agency shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision. The final action shall contain notice of the right to appeal the final action to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573 shall be attached to the final action.

[64 FR 37657, July 12, 1999]

## **Subpart B—Provisions Applicable to Particular Complaints**

### **§1614.201 Age Discrimination in Employment Act.**

(a) As an alternative to filing a complaint under this part, an employee may file a civil action in a United States district court under the ADEA against the head of an alleged discriminating agency after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, at P.O. Box 77960, Washington, DC 20013, or by personal delivery or facsimile within 180 days of the occurrence of the alleged unlawful practice.

(b) The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

(c) When an individual has filed an administrative complaint alleging age discrimination that is not a mixed case, administrative remedies will be considered to be exhausted for purposes of filing a civil action:

(1) 180 days after the filing of an individual complaint if the agency has not taken final action and the individual has not filed an appeal or 180 days after the filing of a class complaint if the agency has not issued a final decision;

(2) After final action on an individual or class complaint if the individual has not filed an appeal; or

(3) After the issuance of a final decision by the Commission on an appeal or 180 days after the filing of an appeal if the Commission has not issued a final decision.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37658, July 12, 1999; 74 FR 3430, Jan. 21, 2009]

### **§1614.202 Equal Pay Act.**

(a) In its enforcement of the Equal Pay Act, the Commission has the authority to investigate an agency's employment practices on its own initiative at any time in order to determine compliance with the provisions of the Act. The Commission will provide notice to the agency that it will be initiating an investigation.

(b) Complaints alleging violations of the Equal Pay Act shall be processed under this part.

### **§1614.203 Rehabilitation Act.**

(a) *Model employer.* The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.

(b) *ADA standards.* The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated in a complaint alleging nonaffirmative action employment discrimination under this part shall be the standards applied under Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in the Commission's ADA regulations at 29 CFR part 1630.

[67 FR 35735, May 21, 2002]

### **§1614.204 Class complaints.**

(a) *Definitions.* (1) A *class* is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age, disability, or genetic information.

(2) A *class complaint* is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class;

(iv) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

(3) An *agent of the class* is a class member who acts for the class during the processing of the class complaint.

(b) *Pre-complaint processing.* An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with §1614.105. A complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. If a complainant moves for class certification after completing the counseling process contained in §1614.105, no additional counseling is required. The administrative judge shall deny class certification when the complainant has unduly delayed in moving for certification.

(c) *Filing and presentation of a class complaint.* (1) A class complaint must be signed by the agent or representative and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent.

(2) The complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint.

(3) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.

(d) *Acceptance or dismissal.* (1) Within 30 days of an agency's receipt of a complaint, the agency shall: Designate an agency representative who shall not be any of the individuals referenced in §1614.102(b)(3), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or agency to submit additional information relevant to the complaint.

(2) The administrative judge may dismiss the complaint, or any portion, for any of the reasons listed in §1614.107 or because it does not meet the prerequisites of a class complaint under §1614.204(a)(2).

(3) If the allegation is not included in the Counselor's report, the administrative judge shall afford the agent 15 days to state whether the matter was discussed with the Counselor and, if not, explain why it was not discussed. If the explanation is not satisfactory, the administrative judge shall dismiss the allegation. If the explanation is satisfactory, the administrative judge shall refer the allegation to the agency for further counseling of the agent. After counseling, the allegation shall be consolidated with the class complaint.

(4) If an allegation lacks specificity and detail, the administrative judge shall afford the agent 15 days to provide specific and detailed information. The administrative judge shall dismiss the complaint if the agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the administrative judge shall advise the agent how to proceed on an individual or class basis concerning these allegations.

(5) The administrative judge shall extend the time limits for filing a complaint and for consulting with a Counselor in accordance with the time limit extension provisions contained in §§1614.105(a)(2) and 1614.604.

(6) When appropriate, the administrative judge may decide that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.

(7) The administrative judge shall transmit his or her decision to accept or dismiss a complaint to the agency and the agent. The agency shall take final action by issuing a final order within 40 days of receipt of the hearing record and administrative judge's decision. The final order shall notify the agent whether or not the agency will implement the decision of the administrative judge. If the final order does not implement the decision of the administrative judge, the agency shall simultaneously appeal the administrative judge's decision in accordance with §1614.403 and append a copy of the appeal to the final order. A dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed under subpart A or that the complaint is also dismissed as an individual complaint in accordance with §1614.107. In addition, it shall inform the agent of the right to appeal the dismissal of the class complaint to the Equal Employment Opportunity Commission or to file a civil action and shall include EEOC Form 573, Notice of Appeal/Petition.

(e) *Notification.* (1) Within 15 days of receiving notice that the administrative judge has accepted a class complaint or a reasonable time frame specified by the administrative judge, the agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

(2) Such notice shall contain:

(i) The name of the agency or organizational segment, its location, and the date of acceptance of the complaint;

(ii) A description of the issues accepted as part of the class complaint;

(iii) An explanation of the binding nature of the final decision or resolution of the complaint on class members; and

(iv) The name, address and telephone number of the class representative.

(f) *Obtaining evidence concerning the complaint.* (1) The administrative judge shall notify the agent and the agency representative of the time period that will be allowed both parties to prepare their cases. This time period will include at least 60 days and may be extended by the administrative judge upon the request of either party. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(2) If mutual cooperation fails, either party may request the administrative judge to rule on a request to develop evidence. If a party fails without good cause shown to respond fully and in timely fashion to a request made or approved by the administrative judge for documents, records, comparative data, statistics or affidavits, and the information is solely in the control of one party, such failure may, in appropriate circumstances, caused the administrative judge:

(i) To draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(ii) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(iii) To exclude other evidence offered by the party failing to produce the requested information;

(iv) To recommend that a decision be entered in favor of the opposing party; or

(v) To take such other actions as the administrative judge deems appropriate.

(3) During the period for development of evidence, the administrative judge may, in his or her discretion, direct that an investigation of facts relevant to the complaint or any portion be conducted by an agency certified by the Commission.

(4) Both parties shall furnish to the administrative judge copies of all materials that they wish to be examined and such other material as may be requested.

(g) *Opportunity for resolution of the complaint.* (1) The administrative judge shall furnish the agent and the representative of the agency a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss materials with the agency representative and attempt resolution of the complaint.

(2) The complaint may be resolved by agreement of the agency and the agent at any time pursuant to the notice and approval procedure contained in paragraph (g)(4) of this section.

(3) If the complaint is resolved, the terms of the resolution shall be reduced to writing and signed by the agent and the agency.

(4) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and to the administrative judge. It shall state the relief, if any, to be granted by the agency and the name and address of the EEOC administrative judge assigned to the case. It shall state that within 30 days of the date of the notice of resolution, any member of the class may petition the administrative judge to vacate the resolution because it benefits only the class agent, or is otherwise not fair, adequate and reasonable to the class as a whole. The administrative judge shall review the notice of resolution and consider any petitions to vacate filed. If the administrative judge finds that the proposed resolution is not fair, adequate and reasonable to the class as a whole, the administrative judge shall issue a decision vacating the agreement and may replace the original class agent with a petitioner or some other class member who is eligible to be the class agent during further processing of the class complaint. The decision shall inform the former class agent or the petitioner of the right to appeal the decision to the Equal Employment Opportunity Commission and include EEOC Form 573, Notice of Appeal/Petition. If the administrative judge finds that the resolution is fair, adequate and reasonable to the class as a whole, the resolution shall bind all members of the class.

(h) *Hearing.* On expiration of the period allowed for preparation of the case, the administrative judge shall set a date for hearing. The hearing shall be conducted in accordance with 29 CFR 1614.109 (a) through (f).

(i) *Decisions:* The administrative judge shall transmit to the agency and class agent a decision on the complaint, including findings, systemic relief for the class and any individual relief, where appropriate, with regard to the personnel action or matter that gave rise to the complaint. If the administrative judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall order appropriate relief.

(j) *Agency final action.* (1) Within 60 days of receipt of the administrative judge's decision on the complaint, the agency shall take final action by issuing a final order. The final order shall notify the class agent whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the class agent's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the

name of the proper defendant in any such lawsuit, and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal in accordance with §1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 573 shall be attached to the final order.

(2) If an agency does not issue a final order within 60 days of receipt of the administrative judge's decision, then the decision of the administrative judge shall become the final action of the agency.

(3) A final order on a class complaint shall, subject to subpart D of this part, be binding on all members of the class and the agency.

(k) *Notification of final action:* The agency shall notify class members of the final action and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 days of the transmittal of the final action to the agent.

(l) *Relief for individual class members.* (1) When discrimination is found, an agency must eliminate or modify the employment policy or practice out of which the complaint arose and provide individual relief, including an award of attorney's fees and costs, to the agent in accordance with §1614.501.

(2) When class-wide discrimination is not found, but it is found that the class agent is a victim of discrimination, §1614.501 shall apply. The agency shall also, within 60 days of the issuance of the final order finding no class-wide discrimination, issue the acknowledgement of receipt of an individual complaint as required by §1614.106(d) and process in accordance with the provisions of subpart A of this part, each individual complaint that was subsumed into the class complaint.

(3) When discrimination is found in the final order and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO Director within 30 days of receipt of notification by the agency of its final order. Administrative judges shall retain jurisdiction over the complaint in order to resolve any disputed claims by class members. The claim must include a specific detailed showing that the claimant is a class member who was affected by the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which class-wide discrimination was found in the final order. Where a finding of discrimination against a class has been made, there shall be a presumption of discrimination as to each member of the class. The agency must show by clear and convincing evidence that any class member is not entitled to relief. The administrative judge may hold a hearing or otherwise supplement the record on a claim filed by a class member. The agency or the Commission may find class-wide discrimination and order remedial action for any policy or practice in existence within 45 days of the agent's initial contact with the Counselor. Relief otherwise consistent with this part may be ordered for the time the policy or practice was in effect. The agency shall issue a final order

on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D of this part and the applicable time limits.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37658, July 12, 1999; 74 FR 63984, Dec. 7, 2009; 77 FR 43505, July 25, 2012]

## **Subpart C—Related Processes**

### **§1614.301 Relationship to negotiated grievance procedure.**

(a) When a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in §1614.105 does not constitute an election for purposes of this section. An employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure including the right to appeal to the Commission from a final decision as provided in subpart D of this part. The dismissal of such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision to the Commission.

(b) When a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part.

(c) When a person is employed by an agency not subject to 5 U.S.C 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in §1614.106 and for appeal to the Commission contained in §1614.402 may be held in abeyance during processing of a grievance covering the same matter as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.



## **§1614.302 Mixed case complaints.**

(a) *Definitions*—(1) *Mixed case complaint.* A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or genetic information.

(b) *Election.* An employee may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to §1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under §1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c) *Dismissal.* (1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, §1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to §1614.107(a)(4) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue.

A dismissal of a mixed case complaint is not appealable to the Commission except where it is alleged that §1614.107(a)(4) has been applied to a non-mixed case matter.

(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to §1614.107(a)(4), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

(d) *Procedures for agency processing of mixed case complaints.* When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(b)(2) or may file a civil action as specified at §1614.310(g), but not both; and

(ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with §1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at §1614.310(a).

[57 FR 12646, Apr. 10, 1992, as amended at 61 FR 17576, Apr. 22, 1996; 64 FR 37659, July 12, 1999; 74 FR 63984, Dec. 7, 2009; 77 FR 43505, July 25, 2012]

## **§1614.303 Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.**

(a) *Who may file.* Individuals who have received a final decision from the MSPB on a mixed case appeal or on the appeal of a final decision on a mixed case complaint under 5 CFR part 1201, subpart E and 5 U.S.C. 7702 may petition EEOC to consider that decision. The EEOC will not accept appeals from MSPB dismissals without prejudice.

(b) *Method of filing.* Filing shall be made by certified mail, return receipt requested, to the Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013.

(c) *Time to file.* A petition must be filed with the Commission either within 30 days of receipt of the final decision of the MSPB or within 30 days of when the decision of a MSPB field office becomes final.

(d) *Service.* The petition for review must be served upon all individuals and parties on the MSPB's service list by certified mail on or before the filing with the Commission, and the Clerk of the Board, MSPB, 1615 M Street, NW., Washington, DC 20419, and the petitioner must certify as to the date and method of service.

[74 FR 3430, Jan. 21, 2009, as amended at 77 FR 51470, Aug. 24, 2012]

## **§1614.304 Contents of petition.**

(a) *Form.* Petitions must be written or typed, but may use any format including a simple letter format. Petitioners are encouraged to use EEOC Form 573, Notice Of Appeal/Petition.

(b) *Contents.* Petitions must contain the following:

- (1) The name and address of the petitioner;
- (2) The name and address of the petitioner's representative, if any;
- (3) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, in whole or in part, only with regard to issues of discrimination based on race, color, religion, sex, national origin, age, disability, or genetic information;
- (5) The signature of the petitioner or representative, if any.

[57 FR 12646, Apr. 10, 1992, as amended at 74 FR 63984, Dec. 7, 2009]

## **§1614.305 Consideration procedures.**

(a) Once a petition is filed, the Commission will examine it and determine whether the Commission will consider the decision of the MSPB. An agency may oppose the petition, either on the basis that the Commission should not consider the MSPB's decision or that the Commission should concur in the MSPB's decision, by filing any such argument with the Office of Federal Operations and serving a copy on the petitioner within 15 days of receipt by the Commission.

(b) The Commission shall determine whether to consider the decision of the MSPB within 30 days of receipt of the petition by the Commission's Office of Federal Operations. A determination of the Commission not to consider the decision shall not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(c) If the Commission makes a determination to consider the decision, the Commission shall within 60 days of the date of its determination, consider the entire record of the proceedings of the MSPB and on the basis of the evidentiary record before the Board as supplemented in accordance with paragraph (d) of this section, either:

(1) Concur in the decision of the MSPB; or

(2) Issue in writing a decision that differs from the decision of the MSPB to the extent that the Commission finds that, as a matter of law:

(i) The decision of the MSPB constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in 5 U.S.C. 7702(a)(1)(B); or

(ii) The decision involving such provision is not supported by the evidence in the record as a whole.

(d) In considering any decision of the MSPB, the Commission, pursuant to 5 U.S.C. 7702(b)(4), may refer the case to the MSPB for the taking of additional evidence within such period as permits the Commission to make a decision within the 60-day period prescribed or provide on its own for the taking of additional evidence to the extent the Commission considers it necessary to supplement the record.

(e) Where the EEOC has differed with the decision of the MSPB under §1614.305(c)(2), the Commission shall refer the matter to the MSPB.

## **§1614.306 Referral of case to Special Panel.**

If the MSPB reaffirms its decision under 5 CFR 1201.162(a)(2) with or without modification, the matter shall be immediately certified to the Special Panel established pursuant to 5 U.S.C.

7702(d). Upon certification, the Board shall, within five days (excluding Saturdays, Sundays, and Federal holidays), transmit to the Chairman of the Special Panel and to the Chairman of the EEOC the administrative record in the proceeding including—

- (a) The factual record compiled under this section, which shall include a transcript of any hearing(s);
- (b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and
- (c) A transcript of oral arguments made, or legal brief(s) filed, before the Board and the Commission.

### **§1614.307 Organization of Special Panel.**

(a) The Special Panel is composed of:

- (1) A Chairman appointed by the President with the advice and consent of the Senate, and whose term is 6 years;
- (2) One member of the MSPB designated by the Chairman of the Board each time a panel is convened; and
- (3) One member of the EEOC designated by the Chairman of the Commission each time a panel is convened.

(b) *Designation of Special Panel member—(1) Time of designation.* Within five days of certification of the case to the Special Panel, the Chairman of the MSPB and the Chairman of the EEOC shall each designate one member from their respective agencies to serve on the Special Panel.

(2) *Manner of designation.* Letters of designation shall be served on the Chairman of the Special Panel and the parties to the appeal.

### **§1614.308 Practices and procedures of the Special Panel.**

(a) *Scope.* The rules in this subpart apply to proceedings before the Special Panel.

(b) *Suspension of rules in this subpart.* In the interest of expediting a decision, or for good cause shown, the Chairman of the Special Panel may, except where the rule in this subpart is required by statute, suspend the rules in this subpart on application of a party, or on his or her own motion, and may order proceedings in accordance with his or her direction.

(c) *Time limit for proceedings.* Pursuant to 5 U.S.C. 7702(d)(2)(A), the Special Panel shall issue a decision within 45 days of the matter being certified to it.

(d) *Administrative assistance to Special Panel.* (1) The MSPB and the EEOC shall provide the Panel with such reasonable and necessary administrative resources as determined by the Chairman of the Special Panel.

(2) Assistance shall include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the EEOC shall be responsible for all administrative costs incurred by the Special Panel and, to the extent practicable, shall equally divide the costs of providing such administrative assistance. The Chairman of the Special Panel shall resolve the manner in which costs are divided in the event of a disagreement between the Board and the EEOC.

(e) *Maintenance of the official record.* The Board shall maintain the official record. The Board shall transmit two copies of each submission filed to each member of the Special Panel in an expeditious manner.

(f) *Filing and service of pleadings.* (1) The parties shall file the original and six copies of all submissions with the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. One copy of each submission shall be served on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be by mail or by personal delivery during normal business hours (8:15 a.m.- 4:45 p.m.). Due to the short statutory time limit, parties are required to file their submissions by overnight delivery service should they file by mail.

(4) The date of filing shall be determined by the date of mailing as indicated by the order date for the overnight delivery service. If the filing is by personal delivery, it shall be considered filed on that date it is received in the office of the Clerk, MSPB.

(g) *Briefs and responsive pleadings.* If the parties wish to submit written argument, briefs shall be filed with the Special Panel within 15 days of the date of the Board's certification order. Due to the short statutory time limit responsive pleadings will not ordinarily be permitted.

(h) *Oral argument.* The parties have the right to oral argument if desired. Parties wishing to exercise this right shall so indicate at the time of filing their brief, or if no brief is filed, within 15 days of the date of the Board's certification order. Upon receipt of a request for argument, the Chairman of the Special Panel shall determine the time and place for argument and the time to be allowed each side, and shall so notify the parties.

(i) *Post-argument submissions.* Due to the short statutory time limit, no post-argument submissions will be permitted except by order of the Chairman of the Special Panel.

(j) *Procedural matters.* Any procedural matters not addressed in this subpart shall be resolved by written order of the Chairman of the Special Panel.

### **§1614.309 Enforcement of Special Panel decision.**

The Board shall, upon receipt of the decision of the Special Panel, order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board shall apply. These regulations are set out at 5 CFR part 1201, subpart E.

### **§1614.310 Right to file a civil action.**

An individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 U.S.C. 7702 to file a civil action in an appropriate United States District Court:

- (a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or
- (b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or
- (c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or
- (d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or
- (e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or
- (f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or
- (g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or
- (h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

## **Subpart D—Appeals and Civil Actions**

### **§1614.401 Appeals to the Commission.**

(a) A complainant may appeal an agency's final action or dismissal of a complaint.

(b) An agency may appeal as provided in §1614.110(a).

(c) A class agent or an agency may appeal an administrative judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal an agency's final action or an agency may appeal an administrative judge's decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and a class member, a class agent or an agency may appeal a final decision on a petition pursuant to §1614.204(g)(4).

(d) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB or if 5 U.S.C. 7121(d) is inapplicable to the involved agency.

(e) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement or final decision in accordance with §1614.504.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37659, July 12, 1999; 77 FR 43505, July 25, 2012]

### **§1614.402 Time for appeals to the Commission.**

(a) Appeals described in §1614.401(a) and (c) must be filed within 30 days of receipt of the dismissal, final action or decision. Appeals described in §1614.401(b) must be filed within 40 days of receipt of the hearing file and decision. Appeals described in §1614.401(d) must be filed within 30 days of receipt of the final decision of the agency, the arbitrator or the Federal Labor Relations Authority. Where a complainant has notified the EEO Director of alleged noncompliance with a settlement agreement in accordance with §1614.504, the complainant may file an appeal 35 days after service of the allegations of noncompliance, but no later than 30 days after receipt of an agency's determination.



(b) If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37659, July 12, 1999; 77 FR 43505, July 25, 2012]

## **§1614.403 How to appeal.**

(a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 77960, Washington, DC 20013, or electronically, or by personal delivery or facsimile. The appellant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed.

(b) The appellant shall furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party.

(c) If an appellant does not file an appeal within the time limits of this subpart, the appeal shall be dismissed by the Commission as untimely.

(d) Any statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal. Any statement or brief on behalf of the agency in support of its appeal must be submitted to the Office of Federal Operations within 20 days of filing the notice of appeal. The Office of Federal Operations will accept statements or briefs in support of an appeal by facsimile transmittal, provided they are no more than 10 pages long.

(e) The agency must submit the complaint file to the Office of Federal Operations within 30 days of initial notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency.

(f) Any statement or brief in opposition to an appeal must be submitted to the Commission and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal. The Office of Federal Operations will accept statements or briefs in opposition to an appeal by facsimile provided they are no more than 10 pages long.

(g) Agencies are required to submit appeals, complaint files, and other filings to the Office of Federal Operations in a digital format acceptable to the Commission, absent a showing of good cause why an agency cannot submit digital records. Appellants are encouraged, but not

required, to submit digital appeals and supporting documentation to the Office of Federal Operations in a format acceptable to the Commission.

[64 FR 37659, July 12, 1999, as amended at 74 FR 3430, Jan. 21, 2009; 77 FR 43505, July 25, 2012]

## **§1614.404 Appellate procedure.**

(a) On behalf of the Commission, the Office of Federal Operations shall review the complaint file and all written statements and briefs from either party. The Commission may supplement the record by an exchange of letters or memoranda, investigation, remand to the agency or other procedures.

(b) If the Office of Federal Operations requests information from one or both of the parties to supplement the record, each party providing information shall send a copy of the information to the other party.

(c) When either party to an appeal fails without good cause shown to comply with the requirements of this section or to respond fully and in timely fashion to requests for information, the Office of Federal Operations shall, in appropriate circumstances:

(1) Draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(2) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(3) Issue a decision fully or partially in favor of the opposing party; or

(4) Take such other actions as appropriate.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37659, July 12, 1999]

## **§1614.405 Decisions on appeals.**

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§1614.107, 1614.403(c) and 1614.409. The decision shall be based on the preponderance of the evidence. The decision on an appeal from an agency's final action shall be based on a de novo review, except that the review of the factual findings in a decision by an administrative judge issued pursuant to §1614.109(i) shall be based on a substantial evidence standard of review. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or

her or her civil action rights, and be transmitted to the complainant and the agency by first class mail.

(b) The Office of Federal Operations, on behalf of the Commission, shall issue decisions on appeals of decisions to accept or dismiss a class complaint issued pursuant to §1614.204(d)(7) within 90 days of receipt of the appeal.

(c) A decision issued under paragraph (a) of this section is final within the meaning of §1614.407 unless a timely request for reconsideration is filed by a party to the case. A party may request reconsideration within 30 days of receipt of a decision of the Commission, which the Commission in its discretion may grant, if the party demonstrates that:

- (1) The appellate decision involved a clearly erroneous interpretation of material fact or law; or
- (2) The decision will have a substantial impact on the policies, practices or operations of the agency.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37659, July 12, 1999; 77 FR 43505, July 25, 2012]

## **§1614.406 Time limits. [Reserved]**

## **§1614.407 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.**

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

- (a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;
- (b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken;
- (c) Within 90 days of receipt of the Commission's final decision on an appeal; or
- (d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

[57 FR 12646, Apr. 10, 1992. Redesignated and amended at 64 FR 37659, July 12, 1999]

## **§1614.408 Civil action: Equal Pay Act.**

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

[57 FR 12646, Apr. 10, 1992. Redesignated at 64 FR 37659, July 12, 1999]

## **§1614.409 Effect of filing a civil action.**

Filing a civil action under §1614.407 or §1614.408 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

[57 FR 12646, Apr. 10, 1992. Redesignated at 64 FR 37659, July 12, 1999. 77 FR 43505, July 25, 2012]

## **Subpart E—Remedies and Enforcement**

### **§1614.501 Remedies and relief.**

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief which shall include the following elements in appropriate circumstances:

- (1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;
- (2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;
- (3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;
- (4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) *Relief for an applicant.* (1)(i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) *Relief for an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay

shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*—(1) *Awards of attorney's fees or costs*. The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. In a decision or final action, the agency, administrative judge, or Commission may award the applicant or employee reasonable attorney's fees (including expert witness fees) and other costs incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid for services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the agency, administrative judge or Commission, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Agencies are not required to pay attorney's fees for services performed during the pre-complaint process, except that fees are allowable when the Commission affirms on appeal an administrative judge's decision finding discrimination after an agency takes final action by not implementing an administrative judge's decision. Written

submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* (i) When the agency, administrative judge or the Commission determines an entitlement to attorney's fees or costs, the complainant's attorney shall submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the agency or administrative judge within 30 days of receipt of the decision and shall submit a copy of the statement to the agency. A statement of attorney's fees and costs shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. The agency may respond to a statement of attorney's fees and costs within 30 days of its receipt. The verified statement, accompanying affidavit and any agency response shall be made a part of the complaint file.

(ii)(A) The agency or administrative judge shall issue a decision determining the amount of attorney's fees or costs due within 60 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

(B) The amount of attorney's fees shall be calculated using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. There is a strong presumption that this amount represents the reasonable fee. In limited circumstances, this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the agency.

(C) The costs that may be awarded are those authorized by 28 U.S.C. 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a Federal employee who is in a duty status when made available as a witness.

[57 FR 12646, Apr. 10, 1992, as amended at 60 FR 43372, Aug. 21, 1995; 64 FR 37659, July 12, 1999]

## **§1614.502 Compliance with final Commission decisions.**

(a) Relief ordered in a final Commission decision is mandatory and binding on the agency except as provided in this section. Failure to implement ordered relief shall be subject to judicial enforcement as specified in §1614.503(g).

(b) Notwithstanding paragraph (a) of this section, when the agency requests reconsideration and the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision orders retroactive restoration, the agency shall

comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified by the Commission, pending the outcome of the agency request for reconsideration.

(1) Service under the temporary or conditional restoration provisions of this paragraph (b) shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds its decision after reconsideration.

(2) When the agency requests reconsideration, it may delay the payment of any amounts ordered to be paid to the complainant until after the request for reconsideration is resolved. If the agency delays payment of any amount pending the outcome of the request to reconsider and the resolution of the request requires the agency to make the payment, then the agency shall pay interest from the date of the original appellate decision until payment is made.

(3) The agency shall notify the Commission and the employee in writing at the same time it requests reconsideration that the relief it provides is temporary or conditional and, if applicable, that it will delay the payment of any amounts owed but will pay interest as specified in paragraph (b)(2) of this section. Failure of the agency to provide notification will result in the dismissal of the agency's request.

(c) When no request for reconsideration is filed or when a request for reconsideration is denied, the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 120 days after receipt of the final decision unless otherwise ordered in the decision.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37660, July 12, 1999; 77 FR 43506, July 25, 2012]

## **§1614.503 Enforcement of final Commission decisions.**

(a) *Petition for enforcement.* A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) *Compliance.* On behalf of the Commission, the Office of Federal Operations shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) *Clarification.* On behalf of the Commission, the Office of Federal Operations may, on its own motion or in response to a petition for enforcement or in connection with a timely request for reconsideration, issue a clarification of a prior decision. A clarification cannot change the



result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) *Referral to the Commission.* Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

(e) *Commission notice to show cause.* The Commission may issue a notice to the head of any Federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(f) *Certification to the Office of Special Counsel.* Where appropriate and pursuant to the terms of a memorandum of understanding, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(g) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

## **§1614.504 Compliance with settlement agreements and final action.**

(a) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. Final action that has not been the subject of an appeal or civil action shall be binding on the agency. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or decision. The complainant may file such an appeal 35 days after he or she has served the

agency with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

(c) Prior to rendering its determination, the Commission may request that parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the agency is not in compliance with a decision or settlement agreement, and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance with the decision or settlement agreement, or, alternatively, for a settlement agreement, it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints under §1614.106 or §1614.204, as appropriate, rather than under this section.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37660, July 12, 1999; 77 FR 43506, July 25, 2012]

## **§1614.505 Interim relief.**

(a)(1) When the agency appeals and the case involves removal, separation, or suspension continuing beyond the date of the appeal, and when the administrative judge's decision orders retroactive restoration, the agency shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified in the decision, pending the outcome of the agency appeal. The employee may decline the offer of interim relief.

(2) Service under the temporary or conditional restoration provisions of paragraph (a)(1) of this section shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds the decision on appeal. Such service shall not be credited toward the completion of any applicable probationary or trial period or the completion of the service requirement for career tenure if the Commission reverses the decision on appeal.

(3) When the agency appeals, it may delay the payment of any amount, other than prospective pay and benefits, ordered to be paid to the complainant until after the appeal is resolved. If the agency delays payment of any amount pending the outcome of the appeal and the resolution of the appeal requires the agency to make the payment, then the agency shall pay interest from the date of the original decision until payment is made.

(4) The agency shall notify the Commission and the employee in writing at the same time it appeals that the relief it provides is temporary or conditional and, if applicable, that it will delay the payment of any amounts owed but will pay interest as specified in paragraph (b)(2) of this

section. Failure of the agency to provide notification will result in the dismissal of the agency's appeal.

(5) The agency may, by notice to the complainant, decline to return the complainant to his or her place of employment if it determines that the return or presence of the complainant will be unduly disruptive to the work environment. However, prospective pay and benefits must be provided. The determination not to return the complainant to his or her place of employment is not reviewable. A grant of interim relief does not insulate a complainant from subsequent disciplinary or adverse action.

(b) If the agency files an appeal and has not provided required interim relief, the complainant may request dismissal of the agency's appeal. Any such request must be filed with the Office of Federal Operations within 25 days of the date of service of the agency's appeal. A copy of the request must be served on the agency at the same time it is filed with EEOC. The agency may respond with evidence and argument to the complainant's request to dismiss within 15 days of the date of service of the request.

[64 FR 37660, July 12, 1999]

## **Subpart F—Matters of General Applicability**

### **§1614.601 EEO group statistics.**

(a) Each agency shall establish a system to collect and maintain accurate employment information on the race, national origin, sex and disability of its employees.

(b) Data on race, national origin and sex shall be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If the employee still refuses to provide the information, the agency must make visual identification and inform the employee of the data it will be reporting. If an agency believes that information provided by an employee is inaccurate, the agency shall advise the employee about the solely statistical purpose for which the data is being collected, the need for accuracy, the agency's recognition of the sensitivity of the information and the existence of procedures to prevent its unauthorized disclosure. If, thereafter, the employee declines to change the apparently inaccurate self-identification, the agency must accept it.

(c) The information collected under paragraph (b) of this section shall be disclosed only in the form of gross statistics. An agency shall not collect or maintain any information on the race, national origin or sex of individual employees except when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission to insure individual privacy and the separation of that information from personnel record.

(d) Each system is subject to the following controls:

- (1) Only those categories of race and national origin prescribed by the Commission may be used;
- (2) Only the specific procedures for the collection and maintenance of data that are prescribed or approved by the Commission may be used;
- (3) The Commission shall review the operation of the agency system to insure adherence to Commission procedures and requirements. An agency may make an exception to the prescribed procedures and requirements only with the advance written approval of the Commission.
- (e) The agency may use the data only in studies and analyses which contribute affirmatively to achieving the objectives of the equal employment opportunity program. An agency shall not establish a quota for the employment of persons on the basis of race, color, religion, sex, or national origin.
- (f) Data on disabilities shall also be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If an employee who has been appointed pursuant to special appointment authority for hiring individuals with disabilities still refuses to provide the requested information, the agency must identify the employee's disability based upon the records supporting the appointment. If any other employee still refuses to provide the requested information or provides information which the agency believes to be inaccurate, the agency should report the employee's disability status as unknown.
- (g) An agency shall report to the Commission on employment by race, national origin, sex and disability in the form and at such times as the Commission may require.

[57 FR 12646, Apr. 10, 1992, as amended at 74 FR 63984, Dec. 7, 2009]

## **§1614.602 Reports to the Commission.**

- (a) Each agency shall report to the Commission information concerning pre-complaint counseling and the status, processing and disposition of complaints under this part at such times and in such manner as the Commission prescribes.
- (b) Each agency shall advise the Commission whenever it is served with a Federal court complaint based upon a complaint that is pending on appeal at the Commission.
- (c) Each agency shall submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to:
  - (1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

### **§1614.603 Voluntary settlement attempts.**

Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in writing and signed by both parties and shall identify the claims resolved.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37661, July 12, 1999]

### **§1614.604 Filing and computation of time.**

(a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(b) A document shall be deemed timely if it is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period.

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37661, July 12, 1999]

### **§1614.605 Representation and official time.**

(a) At any stage in the processing of a complaint, including the counseling stage §1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond

to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(c) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

(d) Unless the complainant states otherwise in writing, after the agency has received written notice of the name, address and telephone number of a representative for the complainant, all official correspondence shall be with the representative with copies to the complainant. When the complainant designates an attorney as representative, service of all official correspondence shall be made on the attorney and the complainant, but time frames for receipt of materials shall be computed from the time of receipt by the attorney. The complainant must serve all official correspondence on the designated representative of the agency.

(e) The Complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are Federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other Federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37661, July 12, 1999]

## **§1614.606 Joint processing and consolidation of complaints.**

Complaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the agency or the Commission for joint processing after appropriate notification to the parties. Two or more complaints of discrimination filed by the same complainant shall be consolidated by the agency for joint processing after appropriate notification to the complainant. When a complaint has been consolidated with one or more earlier filed complaints, the agency shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days after the filing of the original complaint, except that the complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint. Administrative judges or the Commission may, in their discretion, consolidate two or more complaints of discrimination filed by the same complainant.

[64 FR 37661, July 12, 1999]

## **§1614.607 Delegation of authority.**

An agency head may delegate authority under this part, to one or more designees.

## **Subpart G—Procedures Under the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act)**

AUTHORITY: Sec. 303, Pub. L. 107-174, 116 Stat. 574.

SOURCE: 71 FR 43650, Aug. 2, 2006, unless otherwise noted.

## **§1614.701 Purpose and scope.**

This subpart implements Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. 107-174. It sets forth the basic responsibilities of Federal agencies and the Commission to post certain information on their public Web sites.

## **§1614.702 Definitions.**

The following definitions apply for purposes of this subpart.

(a) The term *Federal agency* or *agency* means an Executive agency (as defined in 5 U.S.C. 105), the United States Postal Service, and the Postal Rate Commission.

(b) The term *Commission* means the Equal Employment Opportunity Commission and any subdivision thereof authorized to act on its behalf.

(c) The term *investigation* refers to the step of the federal sector EEO process described in 29 CFR 1614.108 and 1614.106(e)(2) and, for purposes of this subpart, it commences when the complaint is filed and ceases when the complainant is given notice under §1614.108(f) of the right to request a hearing or to receive an immediate final decision without a hearing.

(d) The term *hearing* refers to the step of the federal sector EEO process described in 29 CFR 1614.109 and, for purposes of §1614.704(l)(2)(ii), it commences on the date the agency is informed by the complainant or EEOC, whichever occurs first, that the complainant has requested a hearing and ends on the date the agency receives from the EEOC notice that the EEOC Administrative Judge (AJ) is returning the case to the agency to take final action. For all

other purposes under this subpart, a hearing commences when the AJ receives the complaint file from the agency and ceases when the AJ returns the case to the agency to take final action.

(e) For purposes of §1614.704(i), (j), and (k) the phrase without a hearing refers to a final action by an agency that is rendered:

- (1) When an agency does not receive a reply to a notice issued under §1614.108(f);
- (2) After a complainant requests an immediate final decision;
- (3) After a complainant withdraws a request for a hearing; and
- (4) After an administrative judge cancels a hearing and remands the matter to the agency.

(f) For purposes of §1614.704(i), (j), and (k), the term *after a hearing* refers to a final action by an agency that is rendered following a decision by an administrative judge under §1614.109(f)(3)(iv), (g) or (i).

(g) The phrase *final action by an agency* refers to the step of the federal sector EEO process described in 29 CFR 1614.110 and, for purposes of this subpart, it commences when the agency receives a decision by an Administrative Judge (AJ), receives a request from the complainant for an immediate final decision without a hearing or fails to receive a response to a notice issued under §1614.108(f) and ceases when the agency issues a final order or final decision on the complaint.

(h) The phrase *final action by an agency involving a finding of discrimination* means:

- (1) A final order issued by an agency pursuant to §1614.110(a) following a finding of discrimination by an administrative judge; and
- (2) A final decision issued by an agency pursuant to §1614.110(b) in which the agency finds discrimination.

(i) The term *appeal* refers to the step of the federal sector EEO process described in 29 CFR 1614.401 and, for purposes of this subpart, it commences when the appeal is received by the Commission and ceases when the appellate decision is issued.

(j) The term basis of alleged discrimination refers to the individual's protected status (i.e., race, color, religion, reprisal, sex, national origin, Equal Pay Act, age, disability, or genetic information). Only those bases protected by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, the Equal Pay Act of 1963, 29 U.S.C. 206(d), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.*, the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 *et seq.*, and the Genetic Information Nondiscrimination Act, 42 U.S.C. 2000ff *et seq.*, are covered by the federal EEO process.



(k) The term *issue of alleged discrimination* means one of the following challenged agency actions affecting a term or condition of employment as listed on EEOC Standard Form 462 (“Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints”): Appointment/hire; assignment of duties; awards; conversion to full time; disciplinary action/demotion; disciplinary action/reprimand; disciplinary action/suspension; disciplinary action/removal; duty hours; evaluation/appraisal; examination/test; harassment/non-sexual; harassment/sexual; medical examination; pay/overtime; promotion/non-selection; reassignment/denied; reassignment/directed; reasonable accommodation; reinstatement; retirement; termination; terms/conditions of employment; time and attendance; training; and, other.

(l) The term *subordinate component* refers to any organizational sub-unit directly below the agency or department level which has 1,000 or more employees and is required to submit EEOC Form 715-01 to EEOC pursuant to EEOC Equal Employment Opportunity Management Directive 715.

[57 FR 12646, Apr. 10, 1992, as amended at 74 FR 63984, Dec. 7, 2009]

## **§1614.703 Manner and format of data.**

(a) Agencies shall post their statistical data in the following two formats: Portable Document Format (PDF); and an accessible text format that complies with section 508 of the Rehabilitation Act.

(b) Agencies shall prominently post the date they last updated the statistical information on the Web site location containing the statistical data.

(c) In addition to providing aggregate agency-wide data, an agency shall include separate data for each subordinate component. Such data shall be identified as pertaining to the particular subordinate component.

(d) Data posted under this subpart will be titled “Equal Employment Opportunity Data Posted Pursuant to Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. 107-174,” and a hyperlink to the data, entitled “No FEAR Act Data” will be posted on the homepage of an agency's public Web site. In the case of agencies with subordinate components, the data shall be made available by hyperlinks from the homepages of the Web sites (if any exist) of the subordinate components as well as the homepage of the Web site of the parent agency.

(e) Agencies shall post cumulative data pursuant to §1614.704 for the current fiscal year. Agencies may not post separate quarterly statistics for the current fiscal year.

(f) Data posted pursuant to §1614.704 by agencies having 100 or more employees, and all subordinate component data posted pursuant to subsection 1614.703(c), shall be presented in the

manner and order set forth in the template EEOC has placed for this purpose on its public Web site.

(1) Cumulative quarterly and fiscal year data shall appear in vertical columns. The oldest fiscal year data shall be listed first, reading left to right, with the other fiscal years appearing in the adjacent columns in chronological order. The current cumulative quarterly or year-end data shall appear in the last, or far-right, column.

(2) The categories of data as set forth in §1614.704(a) through (m) of this subpart shall appear in horizontal rows. When reading from top to bottom, the order of the categories shall be in the same order as those categories appear in §1614.704(a) through (m).

(3) When posting data pursuant to §1614.704(d) and (j), bases of discrimination shall be arranged in the order in which they appear in §1614.702(j). The category “non-EEO basis” shall be posted last, after the basis of “disability.”

(4) When posting data pursuant to §1614.704(e) and (k), issues of discrimination shall be arranged in the order in which they appear in §1614.702(k). Only those issues set forth in §1614.702(k) shall be listed.

(g) Agencies shall ensure that the data they post under this subpart can be readily accessed through one or more commercial search engines.

(h) Within 60 days of the effective date of this rule, an agency shall provide the Commission the Uniform Resource Locator (URL) for the data it posts under this subpart. Thereafter, new or changed URLs shall be provided within 30 days.

(i) Processing times required to be posted under this subpart shall be recorded using number of days.

## **§1614.704 Information to be posted—all Federal agencies.**

Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, each Federal agency shall post the following current fiscal year statistics on its public Internet Web site regarding EEO complaints filed under 29 CFR part 1614.

(a) The number of complaints filed in such fiscal year.

(b) The number of individuals filing those complaints (including as the agent of a class).

(c) The number of individuals who filed two or more of those complaints.

- (d) The number of those complaints, whether initially or through amendment, raising each of the various bases of alleged discrimination and the number of complaints in which a non-EEO basis is alleged.
- (e) The number of those complaints, whether initially or through amendment, raising each of the various issues of alleged discrimination.
- (f) The average length of time it has taken an agency to complete, respectively, investigation and final action by an agency for:
- (1) All complaints pending for any length of time during such fiscal year;
  - (2) All complaints pending for any length of time during such fiscal year in which a hearing was not requested; and
  - (3) All complaints pending for any length of time during such fiscal year in which a hearing was requested.
- (g) The number of complaints dismissed by an agency pursuant to 29 CFR 1614.107(a), and the average length of time such complaints had been pending prior to dismissal.
- (h) The number of complaints withdrawn by complainants.
- (i)(1) The total number of final actions by an agency rendered in such fiscal year involving a finding of discrimination and, of that number,
- (2) The number and percentage that were rendered without a hearing, and
  - (3) The number and percentage that were rendered after a hearing.
- (j) Of the total number of final actions by an agency rendered in such fiscal year involving a finding of discrimination,
- (1) The number and percentage of those based on each respective basis,
  - (2) The number and percentage for each respective basis that were rendered without a hearing, and
  - (3) The number and percentage for each respective basis that were rendered after a hearing.
- (k) Of the total number of final actions by an agency rendered in such fiscal year involving a finding of discrimination,
- (1) The number and percentage for each respective issue,

- (2) The number and percentage for each respective issue that were rendered without a hearing, and
- (3) The number and percentage for each respective issue that were rendered after a hearing.
- (l) Of the total number of complaints pending for any length of time in such fiscal year,
  - (1) The number that were first filed before the start of the then current fiscal year,
  - (2) Of those complaints falling within subsection (l)(1),
    - (i) The number of individuals who filed those complaints, and
    - (ii) The number that are pending, respectively, at the investigation, hearing, final action by an agency, and appeal step of the process.
- (m) Of the total number of complaints pending for any length of time in such fiscal year, the total number of complaints in which the agency has not completed its investigation within the time required by 29 CFR 1614.106(e)(2) plus any extensions authorized by that section or §1614.108(e).

### **§1614.705 Comparative data—all Federal agencies.**

Commencing on January 31, 2004 and no later than January 31 of each year thereafter, each Federal agency shall post year-end data corresponding to that required to be posted by §1614.704 for each of the five immediately preceding fiscal years (or, if not available for all five fiscal years, for however many of those five fiscal years for which data are available). For each category of data, the agency shall post a separate figure for each fiscal year.

### **§1614.706 Other data.**

Agencies shall not include or otherwise post with the data required to be posted under §1614.704 and 1614.705 of this subpart any other data, whether or not EEO related, but may post such other data on another, separate, Web page.

### **§1614.707 Data to be posted by EEOC.**

(a) Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, the Commission shall post the following current fiscal year statistics on its public Internet Web site regarding hearings requested under this part 1614.

- (1) The number of hearings requested in such fiscal year.

- (2) The number of individuals filing those requests.
- (3) The number of individuals who filed two or more of those requests.
- (4) The number of those hearing requests involving each of the various bases of alleged discrimination.
- (5) The number of those hearing requests involving each of the various issues of alleged discrimination.
- (6) The average length of time it has taken EEOC to complete the hearing step for all cases pending at the hearing step for any length of time during such fiscal year.
- (7)(i) The total number of administrative judge (AJ) decisions rendered in such fiscal year involving a finding of discrimination and, of that number,
  - (ii) The number and percentage that were rendered without a hearing, and
  - (iii) The number and percentage that were rendered after a hearing.
- (8) Of the total number of AJ decisions rendered in such fiscal year involving a finding of discrimination,
  - (i) The number and percentage of those based on each respective basis,
  - (ii) The number and percentage for each respective basis that were rendered without a hearing, and
  - (iii) The number and percentage for each respective basis that were rendered after a hearing.
- (9) Of the total number of AJ decisions rendered in such fiscal year involving a finding of discrimination,
  - (i) The number and percentage for each respective issue,
  - (ii) The number and percentage for each respective issue that were rendered without a hearing, and
  - (iii) The number and percentage for each respective issue that were rendered after a hearing.
- (10) Of the total number of hearing requests pending for any length of time in such fiscal year,
  - (i) The number that were first filed before the start of the then current fiscal year, and
  - (ii) The number of individuals who filed those hearing requests in earlier fiscal years.

(11) Of the total number of hearing requests pending for any length of time in such fiscal year, the total number in which the Commission failed to complete the hearing step within the time required by §1614.109(i).

(b) Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, the Commission shall post the following current fiscal year statistics on its public Internet Web site regarding EEO appeals filed under part 1614.

(1) The number of appeals filed in such fiscal year.

(2) The number of individuals filing those appeals (including as the agent of a class).

(3) The number of individuals who filed two or more of those appeals.

(4) The number of those appeals raising each of the various bases of alleged discrimination.

(5) The number of those appeals raising each of the various issues of alleged discrimination.

(6) The average length of time it has taken EEOC to issue appellate decisions for:

(i) All appeals pending for any length of time during such fiscal year;

(ii) All appeals pending for any length of time during such fiscal year in which a hearing was not requested; and

(iii) All appeals pending for any length of time during such fiscal year in which a hearing was requested.

(7)(i) The total number of appellate decisions rendered in such fiscal year involving a finding of discrimination and, of that number,

(ii) The number and percentage that involved a final action by an agency rendered without a hearing, and

(iii) The number and percentage that involved a final action by an agency after a hearing.

(8) Of the total number of appellate decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage of those based on each respective basis of discrimination,

(ii) The number and percentage for each respective basis that involved a final action by an agency rendered without a hearing, and

(iii) The number and percentage for each respective basis that involved a final action by an agency rendered after a hearing.

(9) Of the total number of appellate decisions rendered in such fiscal year involving a finding of discrimination,

(i) The number and percentage for each respective issue of discrimination,

(ii) The number and percentage for each respective issue that involved a final action by an agency rendered without a hearing, and

(iii) The number and percentage for each respective issue that involved a final action by an agency rendered after a hearing.

(10) Of the total number of appeals pending for any length of time in such fiscal year,

(i) The number that were first filed before the start of the then current fiscal year, and

(ii) The number of individuals who filed those appeals in earlier fiscal years.





# APPENDIX B



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**XXXX District Office**

<hr/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
v.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
<b>AGENCY HEAD,</b>	)	
<b>TITLE,</b>	)	
<b>AGENCY</b>	)	
Agency	)	<b>DATE:</b>
<hr/>	)	

**COMPLAINANT’S REQUEST FOR INTERROGATORIES**

The Complainant, by and through (fill in representative’s name), designated representative, requests that the Agency respond to the following written interrogatories under the provisions of 29 C.F.R. 1614. The Agency is required to answer these interrogatories separately and fully in writing, under oath.

These Interrogatories shall be deemed continuing so that supplemental answers shall be reasonably provided in accordance with Rule 26(e) of the Federal Rules of Civil Procedure.

These Interrogatories call for all information available to the Agency, its employees, and agents with respect to the subject matter into which they inquire. Please identify which employee or agent provided information with respect to each answer. If some of the information is known by or available to a particular employee or agent, please include in your answers all information known by or available to each employee or agent.

Even if you provided answers in the investigative report, those answers do not relieve you of this responsibility, responses to interrogatories and documents referencing the investigative report do not meet the requirement for these purposes, unless it is done so with specificity and identifies the tab number, page number and line numbers responsive to the request.

For each individual identified, please state the individual’s name, whether or not he or she is a member of a protected class, whether or not the individual is employed by the Agency, business address, and business telephone number, and if not employed by the Federal Government, the individual’s forwarding information.

Furthermore, Complainant has also requested that the Agency produce designated documents, as designated below.

When responding to document request, please identify the corresponding request number.

If you withhold any documents or refuse to answer an interrogatory under a claim of privilege or other protection, provide the following information with respect to any such documents or interrogatory, to the extent applicable:

- (1) The identity of the person(s) who signed the document and over whose name it was sent out or issued;
- (2) The identity of the person(s) to whom the document was directed;
- (3) The nature and subject matter of the document, with sufficient particularity so that the Court and parties hereto may identify the document;
- (4) The date of the document; and
- (5) The basis on which any privilege or other protection is claimed.

## DEFINITIONS

The words "**During the relevant time period**" as used in these interrogatories, shall mean the three year period of time prior to the last date when the alleged discrimination took place as set forth in the Complainant's complaint and continuing through the current day.

The words "**Occurrence**" or "**Alleged occurrence**," as used in these interrogatories, shall mean the facts alleging liability of the defendant as set forth in the complaint for the instant case.

As used herein, the term "**Agency**" means (fill in Agency).

As used herein, "**Identify**" when referring to an individual shall mean to state full name, position title, and whether or not the individual is a current employee of the federal service.

As used herein, "**Document**" shall include any written, printed, typed, computerized, programmed or graphic matter of any kind or nature, however produced, and all mechanical and electronic sound recordings or transcripts thereof, however produced or reproduced, including, but not limited to memoranda, reports, envelopes, emails, notes of telephone conversations and conferences, studies, analyses, bulletins, instructions, inter- and intro-office communications, charts, graphs, photographs, and all other forms and means of data compilations and recordings. As used herein, unless otherwise specified, when reference is made to Complainant, the reference is meant to include any and all representatives, employees, agents, officials, or other persons in any way affiliated with any Complainant.

## INSTRUCTIONS

- A. Each interrogatory, document request, and admission should be fully responded to on the basis of information which is reasonably available or subsequently becomes available.
- B. These discovery requests shall be continuing in nature. Therefore, the Agency is required to supplement its responses if and when new or supplemental information is obtained.
- C. Any objection or claim of privilege or confidentiality asserted in response to any discovery should be stated with sufficient specificity so as to permit an informed ruling by the

Administrative judge, if necessary. It should be noted that OPM has issued regulations under which information about specific persons contained in Federal agency personnel records, such as Official Personnel files (OPF), may be disclosed by federal agencies: 1) to another “party in... an administrative proceeding being conducted by a Federal agency, when the Government is a party to the ...administrative proceeding; “and/or 2) “in response to a request for discovery” when the information requested “is relevant to the subject matter involved in pending administrative proceeding,” as routine use exception to the Privacy Act, 5 U.S.C. §552a See 61 Fed. Reg. 3, 6919-22 (July 15, 1996) final regulation as of Sep.13, 1996).

D. In any instance where the Agency denies knowledge or information sufficient to answer an interrogatory or any part thereof, identify each person, if any, known, who should know, is believed to know, may know or possess such knowledge and/or information.

E. If any document responsive to this discovery request is no longer in the Agency’s possession or subject to its control or no longer exists, please identify whether such document is: a) missing or lost; b) destroyed (by any means); c) transferred to others; and/or d) otherwise disposed of. In any of the above instances, please describe in detail the circumstances surrounding and any reason, authorization, and/or approval of such disposition, and state the actual and/or approximate date of such disposition.

F. Where a request for production calls for document(s) already contained in the EEO Report of Investigation, the Agency may respond by noting the Exhibit and page number of the Report of Investigation where the documents(s) are located rather than producing the document, along with providing any additional documentation that the Agency may have responsive to the Request.

G. For any request for admission that the Agency denies, either in whole or in part, explain in detail its reasons for the denial.

Prior to answering these interrogatories, please make a due and diligent search or inquiry of the Agency’s documents, agents, and employees.

## **GENERAL INTERROGATORY QUESTIONS**

1. Identify any and all witnesses who will testify in person and/or via affidavit or deposition on behalf of the Agency at the EEOC administrative hearing and state the relationship of these witnesses to the Agency's case.
2. Identify any and all individuals who witnessed (fill in the key event or events, if appropriate) or who otherwise have information that is relevant to the issue involved in this hearing, but are not listed in response to interrogatory No. 1, above.
3. With respect to each formal complaint of discrimination filed against the agency in (fill in location) during the relevant time period, identify the complainant, identify the bases of the

discrimination alleged, state the date and charge number, state the recommended decision of the EEOC administrative judge, if any, and the action, if any, taken by the agency.

4. Describe every lawsuit filed in federal court against the Agency involving charges of discrimination in employment during the relevant time period and indicate the disposition of each.
5. Please state whether (fill in name of alleged discriminating official) has ever been named the alleged discriminator in a complaint of discrimination. If so, please state the basis of the allegation (discrimination based on disability, gender, race, etc); date of each complaint; a description of the disability if disability was one of the bases of the complaint; a description of the investigation and resolution of each complaint; the name and title of the person(s) responsible for resolving each complaint; and the current employment status of the person filing the complaint.
6. Please describe what education and continuing education, if any, the Agency requires management to have/take in order to learn of anti-discrimination laws and policies, Agency policies, and new advances in anti-discrimination law. Please state whether the alleged discriminating officials have taken any training classes regarding anti-discrimination laws and policies, Agency policies, and new advances in anti-discrimination law.
7. Identify specifically all documents, records or other materials used in preparing your answers to or containing information relating to matter raised in the preceding interrogatories setting forth such information separately for each interrogatory and indicating location and custodian of the document.
8. Regarding the Requests for Admission served upon the agency on (fill in date), for each denial or partial admission, state with specificity the reason the statement cannot be admitted as true. Identify all evidence that would support the reasoning for each denial or partial admission.
9. Identify and describe any investigations conducted concerning the Complainant during the relevant time period including identifying the individuals conducting the investigation.
10. If any investigation was conducted regarding Complainant during the relevant time period, identify the individuals who were interviewed, the dates of their interviews, and the result of the investigation including the information obtained during the interviews, even if those interviews were not part of the final findings of the investigation.
11. Please describe in as much detail as possible the manner in which the Agency maintains and stores employee records, including but not limited to employee medical records, state the location of said records, and identify the person responsible for maintaining the records for the Agency.

12. What is the Agency's alleged legitimate, non-discriminatory reason for the personnel action(s) at issue in this Complaint and on what facts do you rely to support this alleged legitimate, non-discriminatory reason?

### **NONSELECTION QUESTIONS**

13. State any and all qualifications necessary for the position of (fill in the name of the position to which you were not hired).
14. Describe all the requirements for the position(s) of (fill in any job relevant to the complaint), including educational requirements, work experience requirements, recommendations of superiors and/or managers (if so, state the criteria used and indicate the person or persons who made or make such reports), transfer or promotion rights, and other requirements.
15. State whether there have been any changes in requirements for the positions(s) of (fill in with positions relevant to the instant complaint), and describe all such changes.
16. State the method of recruitment for new employees. If there is no particular method, state any and all ways that employees are notified of open positions at the agency.
17. Identify any and all employees whose job duties included preparing, posting, or administering the preparation or posting of available employment opportunities at (fill in the agency and location) for the period (fill in applicable time period).
18. Identify the person who was selected for (fill in the name of the position to which you were not promoted or position for which you were not hired) and describe his or her qualifications, as well as identify the individual's protected class as relevant to the instant complaint.
19. Identify all persons who held the position of (fill in appropriate position) during the period of (fill in appropriate time period) and state the date on which employment commenced, qualifications, prior employment record, starting salary, job ratings, any special training, including whether each person attended any school or course and if so, when and by whom such training was provided, whether he or she was promoted or demoted and if so, state in detail the reasons for such promotion or demotion, and their protected status relevant to the instant complaint.
20. Identify all persons denied promotion within the Agency at (fill in location) whom were (fill in protected bases relevant for this case) and for each state position occupied at time of denial and reason for denial.
21. State the name and role of every Agency employee who participated in the selection process of the position at issue.
22. Identify all persons who participated in making the decision not to promote the Complainant to the position of (fill in position at issue) and the reason each individual gave to not promote Complainant.

23. State the name and position of the individual who made the decision to hire the selectee to the position at issue.

### **PERFORMANCE/SUSPENSION/TERMINATION QUESTIONS**

24. State separately for each year, the number of employees and their the (fill in protected bases relevant for this case), whether they were discharged, terminated or laid off, including temporary lay-offs, with the Agency at (fill in location) commencing with (fill in appropriate date) and for each year thereafter.
25. Does the Agency have a policy or procedure for transfer of employees from one department or operational unit? If so, please describe.
26. Until the date Complainant ceased employment/was demoted at the Agency, were there any complaints relating to his/her ability to do his/her work? If so, please list the complaints and identify the person(s) making the complaint.
27. Identify who was present when Complainant was suspended/laid off/discharged/demoted and describe in detail any conversation that commenced?
28. Does the Agency have policies and/or guidelines relevant to the writing and dissemination of performance evaluations, (fill in any policy that you believe has been violated), the prevention of discrimination based on (fill in protected bases relevant for this case), reasonable accommodation, the facilitation of reasonable accommodation for disability, and the maintenance of medical documents in confidence? If yes, please attach copies (i.e. see Document Request No. \_\_\_ ) and state:
- the name of the person(s) responsible for the oversight and administration of the policies and/or guidelines;
  - the method, if any, the Agency uses to alert management of these policies and guidelines; and
  - the method, if any, the Agency uses to alert employees of these policies and guidelines.

### **HARASSMENT QUESTIONS**

29. Does the Agency have a harassment policy at the location identified in the Complaint?
30. Identify each and every time that (fill in name) was disciplined for harassment or inappropriate conduct, or conduct unbecoming a federal officer, or like/similar violations during that individual's federal employment. [Disciplinary records that are ordinarily subject to Privacy Act claims can be waived under the routine use provision: see 5 U.S.C. 552a(b)(3).]
31. Identify each and every employee (fill in name) supervised during the relevant time period, including the EEO protected classes relevant to the instant case.



32. Does (fill in name) have any authority to hire, fire, promote, transfer, grant leave, and/or issue discipline over Complainant's position?
33. Identify and describe each and every investigation, if any that was conducted by the Agency against (fill in name) during the relevant time period.
34. For each investigation against (fill in name), please identify the individuals interviewed in those investigations, their EEO protected class information relevant to the instant case, and the substance of information provided to the Agency during their interviews.
35. Identify what, if any, steps were taken by the Agency to stop the alleged harassment?

### **DISABILITY QUESTIONS**

36. Does the Agency allege or contend that the Complainant is not a qualified individual with a disability? If yes, please state the factual basis for this belief.
37. Does the Agency allege or contend that it was unable to reasonably accommodate the Complainant? If yes, please state the factual basis for this belief; any expert medical opinion relied upon; efforts made to attempt accommodation; the undue hardship involved; and all communications with complainant relative to efforts to accommodate.
38. Does the Agency allege or contend that complainant was unable to do an essential function of the job? If yes, please state the essential function complainant allegedly was unable to accomplish; what effort was made to communicate this to the complainant; the names and titles of other employees who can perform the duties; whether the requirement for these duties has ever been waived in the past, and if so, the name of the employee affected and the circumstances of the waiver.
39. Please identify each individual under the alleged discriminating official's supervision who the agency considers disabled and state the nature of the individual's disability, any accommodation requested, and the Agency response to the accommodation request.
40. Please describe the method the Agency used during the relative time period to determine if a disability can be reasonably accommodated, and state the effective date for the use of this method, any expert opinion that supports the use of this method, whether this method is still used by the agency and if not, why.
41. Please identify any disabled employee that the Agency was unable to accommodate during the relevant time period and state the name, nature of the disability, and the reason the Agency could not accommodate the disability.
42. On what bases did the Agency determine that the Complainant's disability could not be reasonably accommodated?

43. Describe the essential functions of the position of (fill in the position for which Complainant did not receive appropriate accommodation).
44. Describe the different possible accommodations the Agency considered in making its determination about accommodating the Complainant and explain the reason(s) for rejection of each alternative accommodation.
45. At any time between (fill in time period surrounding decision not to accommodate Complainant), were there any funded, vacant positions within the Agency at (fill in location)? If so, please name positions and describe essential functions of each position.
46. State under what circumstances the Agency decided not to permit, as a reasonable accommodation, leave for the Complainant to obtain suitable living arrangements and after-care treatment following hospitalization for alcohol and substance abuse.

### **RETALIATION QUESTIONS**

47. Name each and every management official with knowledge of Complainant's protected EEO Activity and when they became aware of the Complainant's protected activity.
48. Was (fill in name) contacted by an EEO Official during the informal stage of (insert complaint #), and if so, when?

\_\_\_\_\_

Date

\_\_\_\_\_

Complainant's Representative (fill in)  
Address and Phone Number (fill in)

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) \_\_\_\_\_, 20\_\_, to the agency's representative, (fill in name) at (fill in address or fax number).

\_\_\_\_\_

(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**XXXX District Office**

<hr/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
v.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
AGENCY HEAD,	)	
TITLE,	)	
AGENCY	)	
Agency	)	DATE:
<hr/>	)	

**COMPLAINANT'S REQUESTS FOR PRODUCTION OF DOCUMENTS**

“Document” or “documents” for the purposes of this document request includes but is not limited to any written, typed, printed, recorded or graphic matter, statement, report, facsimile, e-mail, letter, memorandum, policy, contract, note, binder, cover note, minutes, certificate, correspondence, record, table, chart, analysis, graph, schedule, report, test, study memorandum, list, diary, log, calendar, telex, message, questionnaire, bill, purchase order, shipping order, contract, agreement, assignment, acknowledgement, photograph, transcript, log, draft, revisions of drafts, sketches, or preliminary notes in the Agency’s actual or constructive possession, custody or control.

The words “during the relevant time period” as used in these interrogatories, shall mean the three-year period of time prior to and ending on the last date when the alleged discrimination took place as set forth in the Complainant’s complaint.

1. Complete files relating to the Complainant, including, but not limited to the Complainant’s personnel file and documents pertaining to duties, salaries, promotions, evaluations, medical condition, leave usage, discipline, and/or benefits.
2. All documents relating to any complaints of discrimination or harassment in which (fill in name) is identified as an alleged discriminator.
3. All documents sent to or from the alleged discriminating official(s) regarding Complainant during the relevant time period.
4. All documents that the Agency intends to use at hearing including but not limited to documents intended to be introduced into evidence, used as rebuttal, or used to refresh the recollections of witnesses at the hearing.

5. All documents that the Agency contends support the defenses it will assert or that relate to any claims alleged in this complaint.
6. All documents, speeches, articles or publications of the Agency, management employees or employees that refer or relate to discrimination and harassment based on (fill in relevant protected bases).
7. All manuals, handbooks, policies, procedures, notices, directive or handouts issued by the Agency or alleged discriminating official(s) pertaining to:
  - (fill in policies alleged to have been violated)
    - Falsification of an official agency document,
    - Maintaining records in confidence,
    - Responding to accommodation requests,
    - Medical documents,
    - Discrimination,
    - Harassment,
    - Telecommuting,
    - Disability, or
    - Pregnancy.
8. All notes, documents, memoranda, letters or records of any kind pertaining to:
  - Complainant's job performance during the relevant time,
  - Complainant's meeting or failure to meet deadlines during the relevant time,
  - Complainant's cancellation of meetings during the relevant time,
  - management's opinion(s) of Complainant's work,
  - negative and/or critical comments concerning the Complainant or Complainant's work during the relevant time, or
  - favorable comments concerning the Complainant or Complainant's work during the relevant time.
9. All documents that support answers given in the interrogatories, or requests for admissions, if applicable.
10. All documents pertaining to meetings, discussions, encounters, and/or conversations during the relevant time period, whether in private or public, that the any agent or employee of the Agency had with Complainant, or alleged discriminating official(s) regarding complaint's work, work performance, disability, medical condition, performance evaluation, approved leave, or accommodations.
11. All documents used to support the performance appraisal at issue in this Complaint.
12. All written statements made by any individual or documents relevant to the allegations contained in the complaint.

13. Any and all writings or documents pertaining to the reduction in force instituted during the relevant time period.
14. Any and all writings or documents pertaining the selection of the individual for the position of (fill in applicable position) over the other applicants at the Agency at (fill in appropriate location).
15. Any and all employment applications filed at the Agency at (fill in appropriate location) from (fill in appropriate date) to the present, for the position at issue.
16. Any and all employment application forms used at the Agency at (fill in appropriate location) from (fill in date) to the present.
17. Any and all manuals, guidelines, written memoranda pertaining to advertisement for, application, selection, and promotion for the position of (fill in appropriate position) at the agency.
18. Any and all current Agency regulations and orders, instructions, or other directives relating to the treatment and rehabilitation/accommodation of individuals employed by the Agency afflicted with alcoholism.
19. Any and all manager's handbooks and guides issued by the Agency containing guidance on employee discipline.
20. All other documents in the possession of the Agency that pertain to this complaint and that are not described above.

\_\_\_\_\_

Date

\_\_\_\_\_

Complainant's Representative (fill in)  
Address and Phone Number (fill in)

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) \_\_\_\_\_, 20\_\_, to the agency's representative, (fill in name) at (fill in address or fax number).

\_\_\_\_\_

(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
XXXX District Office**

<hr style="border-top: 1px solid black;"/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
v.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
<b>AGENCY HEAD,</b>	)	
<b>TITLE,</b>	)	
<b>AGENCY</b>	)	
Agency	)	<b>DATE:</b>
<hr style="border-top: 1px solid black;"/>	)	

**COMPLAINANT'S REQUESTS FOR ADMISSIONS**

The Complainant, through his/her (choose one) designated representative, requests that the agency admit or deny the following requests for admission under the provisions of 29 C.F.R. 1614. You are required to respond to these requests for production of admissions no later than thirty (30) calendar days after receipt of these requests. Do remember to refer to the instructions, listed above, for how to properly respond to these Requests for Admissions.

1. Admit that the Agency failed to take any action to prevent the alleged harassment.
2. Admit that Complainant is a qualified individual with a disability.
3. Admit that the Agency filled the position at issue with someone who was not a member of Complainant's protected class claimed in the Complaint.
4. Admit that the Agency terminated complainant (fill in time) after Complainant contacted the EEO Counselor.
5. Admit that (fill in name) was aware that Complainant's protected status is (fill in protected status).
6. (FILL IN FURTHER FACTS SPECIFIC TO YOUR COMPLAINT)

---

Date

---

Complainant's Representative (fill in)  
Address and Phone Number (fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) \_\_\_\_\_, 20\_\_, to the agency's representative, (fill in name) at (fill in address or fax number).

\_\_\_\_\_  
(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**XXXX District Office**

<hr/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
v.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
AGENCY HEAD,	)	
TITLE,	)	
AGENCY	)	
Agency	)	DATE:
<hr/>	)	

**COMPLAINANT'S MOTION TO COMPEL RESPONSE TO REQUESTS FOR DISCOVERY**

Complainant by and through his undersigned representative requests pursuant to 29 CFR §1614.109 that the EEOC Administrative Judge issue an Order compelling the Agency to fully respond to the Complainant's Requests for Interrogatories, Requests for Production of Documents and Requests for Admissions served on (fill in date).

1. The Acknowledgment and Order was sent on (fill in date), and was received by (fill in date).
2. In timely compliance with the deadlines set forth in the Acknowledgment and Order, the Complainant, through his representative, served the Agency with Requests for Interrogatories, Requests for Production of Documents and Requests for Admissions, attached as **Exhibit 1**.
3. On (fill in date), the Complainant's Representative:  
  
    [A] received a communication from Agency counsel, declining to respond to the Complainant's discovery on the grounds of timeliness (See Letter from X to X (DATE) (stating that the Acknowledgment and Order should have been received within 5 days, so discovery should have been initiated by DATE, but was not initiated until DATE, X days after the deadline); **or**  
  
    [B] failed to receive a response within the 30 days allotted for response to the requests; **or**  
  
    [C] received the attached responses which were deficient, attached as **Exhibit 2**.
4. On (fill in date), Complainant's Representative contacted Agency counsel in a good faith effort to resolve the dispute with minimal intervention from the Administrative Judge.



[A] Complainant's Representative explained that the discovery was timely because \_\_\_\_\_;

5. [B] Complainant's Representative reiterated the timeline for discovery; **or**

[C] Complainant's Representative explained that the discovery was deficient because \_\_\_\_\_.

6. Agency asked for an extension until (fill in time), and the information still has not been provided; **and**

[A] Agency refused to provide any additional discovery or amend their answers; **or**

[B] The Agency objected to the following discovery requests on the following grounds:

**Interrogatory # \_\_\_\_\_:**

**Production of Document # \_\_\_\_\_:**

**Admission # \_\_\_\_\_:**

The information sought by these discovery requests are relevant and calculated to produce or lead to the production of material evidence. The requested information is not privileged or restricted. The information and documents sought are in the possession of the Agency and/or can be easily obtained.

Wherefore, for the above-mentioned reasons, Complainant respectfully requests that Administrative Judge (a) **COMPEL** the Agency to respond fully to discovery pursuant to Complainant's Request for Interrogatories and Request for Production of Documents and (b) **ORDER** any other sanction and/or action as appropriate.

Respectfully submitted,

\_\_\_\_\_

xxxxxxxxxx.

AFGE,  
Address  
PHONE

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
XXXX District Office**

<hr/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
v.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
<b>AGENCY HEAD,</b>	)	
<b>TITLE,</b>	)	
<b>AGENCY</b>	)	
Agency	)	<b>DATE:</b>
<hr/>	)	

**ORDER**

Complainant's Motion to Compel the Agency's Response to Complainant's Request for Discovery is hereby **GRANTED**. The Agency is **ORDERED** to respond fully to Complainant's Request for Discovery.

---

Administrative Judge

Dated: XXXX

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion and attached order was mailed/faxed this (fill in) day of (fill in) \_\_\_\_\_, 20\_\_, to the agency's representative, (fill in name) at (fill in address or fax number), and the administrative judge (fill in name) at (fill in address or fax number).

\_\_\_\_\_  
(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**XXXX District Office**

<hr/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
v.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
<b>AGENCY HEAD,</b>	)	
<b>TITLE,</b>	)	
<b>AGENCY</b>	)	
Agency	)	<b>DATE:</b>
<hr/>	)	

**SAMPLE COMPLAINANT’S RESPONSE TO AGENCY’S FIRST SET OF DISCOVERY**

1. The information contained in these answers is provided in accordance with the non-privileged facts within the recipient’s knowledge that may be relevant or lead to discovery of relevant information. Accordingly, the party answering these requests, by providing the information requested, does not waive objections to its admission of evidence on the grounds of relevance, materiality, or any other proper grounds for objections, nor does it submit to the instructions and definitions listed at the beginning of the Interrogatories, except as those instructions and definitions specifically conform to the requirements of applicable rules and case law developed thereunder. Specific objections are noted, and without waiver of the objections reserved as stated above.
2. The Answers set forth herein are based upon information that has been collected and/or reviewed for the purpose of responding to these requests. Complainant reserves the right to supplement answers in the event that Complainant obtains additional, different, or more precise information.
3. Complainant objects to each and all of the requests to the extent they seek information which is protected from disclosure by attorney-client privilege, work product doctrine, or other applicable privilege. Complainant does not waive any protections or privileges by responding to these Interrogatories.

4. Complainant objects to these requests to the extent they are unreasonably vague, broad, repetitious, unduly burdensome, or purport to require the disclosure of information beyond the scope of permissible discovery.
5. Complainant objects to these requests to the extent that they purport to require Complainant to produce documents or information outside Complainant's possession, custody, and control.
6. Many of the Agency's Interrogatories are ambiguous or uncertain. Complainant has responded to such requests to the best of Complainant's ability but will not speculate as to the meaning thereof.
7. Complainant incorporates by reference the General Objections in each of the specific responses set forth below.

### **Response to Interrogatories**

#### **Response to Interrogatory No. 1:**

Complainant will rely on documents contained in the Report of Investigation. If and when Complainant identifies additional information that will be relied upon in presenting the case, such information will be provided.

#### **Response to Interrogatory No. 2:**

See Report of Investigation, Tab X and subparts; Tab Y

#### **Response to Interrogatory No. 3:**

See Response to Interrogatory 2, and Report of Investigation, Tab X; Tab Y.

#### **Response to Interrogatory No. 4:**

See Report of Investigation, Tab X, Tab Y. Additionally, Complainant contends that the Complainant's education, training, vast knowledge, experience, and level of performance is superior to that of the selectee. For example, (fill in reasons here).

**Response to  
Interrogatory No. 5:**

Complainant objects to this Interrogatory as it is unduly burdensome, overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding the objection, see Report of Investigation Tab X.

**Response to  
Interrogatory No. 6:**

Complainant objects to this Interrogatory on the basis of relevancy. Notwithstanding the objection, <Insert relevant and available information>.

**Response to Production of Documents**

**Response to Request No. 1:**

Complainant relies on the Report of Investigation, if and when additional information is identified, it will be provided.

**Response to Request No. 2:**

Complainant relies on the Report of Investigation, additionally, the Agency is in possession of all the documentation needed to calculate the pay and benefit differentials identified, and if and when additional information is identified, it will be provided.

**Response to Request No. 3:**

Complainant has attached to this response several documents that are responsive to the discovery request: (list out dates and titles of documents stamps of e-mails).

**Response to Admissions**

**Response to Request No. 1:**

Admit.

**Response to Request No. 2:**

Deny. <Add reason for denial>

**Response to Request No. 3:**

Admit in part, deny in part. <Add reason for denial in part>

**Response to Request No. 4:**

**Objection:** The subject matter of the request is irrelevant. Notwithstanding the objection, deny.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Complainant's Representative (fill in)  
Address and Phone Number (fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) \_\_\_\_\_, 20\_\_\_\_, to the agency's representative, (fill in name) at (fill in address or fax number).

\_\_\_\_\_  
(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
XXXX District Office**

<hr style="border-top: 1px solid black;"/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
	)	<b>EEOC Case No.</b>
v.	)	
	)	<b>Agency Case No.</b>
<b>AGENCY HEAD,</b>	)	
<b>TITLE,</b>	)	
<b>AGENCY</b>	)	
Agency	)	<b>DATE:</b>
<hr style="border-top: 1px solid black;"/>	)	

**STIPULATED PROTECTIVE ORDER**

It is hereby stipulated and agreed, by and between the undersigned parties to this action, that the following restrictions and procedures shall apply to certain information, documents and excerpts from documents supplied by the parties to each other in response to discovery requests:

1. Counsel for any party may designate any document or information, whether contained in a document, deposition transcript or otherwise, as confidential if counsel determines, in good faith, that such designation is necessary to protect the interests of his or her client. Information and documents designated by a party as confidential will be labeled as applicable, "CONFIDENTIAL -- PRODUCED PURSUANT TO PROTECTIVE ORDER" "Confidential" information or documents may be referred to herein collectively as "confidential information."
  
2. Unless otherwise ordered by the Administrative Judge, or unless otherwise provided for herein, the confidential documents or information disclosed will be held and used by the person receiving such information solely for use in connection with the above-captioned action.
  
3. In the event a party challenges another party's confidential designation, counsel shall make a good faith effort to resolve the dispute in accordance with applicable rules, and in the absence of a resolution, the challenging party may thereafter seek resolution by the Equal Employment Opportunity Commission ("EEOC" or "Court"). Nothing in this Stipulated



Protective Order constitutes an admission by any party that documents or information disclosed in this case are relevant or admissible. Each party specifically reserves the right to object to the use or admissibility of all documents and information disclosed in accordance with applicable law and EEOC rules.

4. Information or documents designated as “Confidential shall not be disclosed to any person except:
  - A. the requesting party and counsel, which may include outside counsel; employees of such counsel assigned to and necessary to assist in the litigation;
  - B. consultants or experts to the extent deemed necessary by counsel;
  - C. any person from whom testimony is taken or is to be taken in this/these action(s), except that such a person may only be shown the confidential information or documents during and in preparation for his/her testimony and may not retain the confidential documents or information; and
  - D. the EEOC Administrative Judge (or any Court of competent jurisdiction in this matter).
  
5. Prior to disclosing or displaying the confidential information to any person counsel shall:
  - A. apprise that person of the confidential nature of the information or documents; and
  - B. apprise that person that the Court has enjoined the use of that information or documents by him/her for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.
  
6. The confidential information or documents may be displayed to and discussed with the persons identified in Paragraph 4(c) and 4(d) only on the condition that prior to any such display or discussion, each such person shall be asked to sign an agreement to be bound by this order in the form attached as Exhibit A. In the event such person refuses to sign an agreement in the form attached as Exhibit A, the party desiring to disclose the confidential documents or information may seek appropriate relief from the Court.

7. Each person given access to the confidential information or documents pursuant to Paragraphs 4(a), 4(b), 4(c) and 4(d) shall segregate such material, keep it strictly secure, and refrain from disclosing it in any manner, and shall keep the information or documents strictly confidential, except as specifically provided for by the terms of this Order.

8. At the conclusion of litigation, the confidential documents and information and any copies thereof shall be promptly (and in no even later than thirty (30) days after entry of final judgment no longer subject to further appeal) returned to the producing party or, with written consent from the producing party, be destroyed. The return or destruction shall be certified in writing by the holder of the confidential documents or information.

9. The foregoing is entirely without prejudice to the right of any party to apply to the Administrative Judge for any further protective order relating to confidential documents or information; or to object to the production of documents or information; or to apply to Administrative Judge for an order compelling production of documents or information; or for modification of this order.

Stipulated to by the parties:

\_\_\_\_\_  
Complainant/Complainant's Representative

\_\_\_\_\_  
Date

\_\_\_\_\_  
Agency's Representative

\_\_\_\_\_  
Date

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
XXXX District Office**

<hr style="border-top: 1px solid black;"/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
v.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
<b>AGENCY HEAD,</b>	)	
<b>TITLE,</b>	)	
<b>AGENCY</b>	)	
Agency	)	<b>DATE:</b>
<hr style="border-top: 1px solid black;"/>	)	

**ORDER**

The foregoing Stipulated Protective Order having come before this Commission is hereby

ORDERED.

\_\_\_\_\_  
Honorable \_\_\_\_\_  
Administrative Judge

**EXHIBIT A**

**AGREEMENT**

I \_\_\_\_\_, have been apprised by counsel that certain documents or information to be disclosed to me in connection with this matter have been designated as confidential in nature. I have been apprised that any such documents or information labeled "CONFIDENTIAL --PRODUCED PURSUANT TO PROTECTIVE ORDER" are confidential. I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

SIGNED \_\_\_\_\_ DATED \_\_\_\_\_

Signed in the presence of:

\_\_\_\_\_ DATED \_\_\_\_\_

Agency Representative/Attorney

# APPENDIX C



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
XXXX District Office**

<hr style="border-top: 1px solid black;"/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
vi.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
AGENCY HEAD,	)	
TITLE,	)	
AGENCY	)	
Agency	)	DATE:
<hr style="border-top: 1px solid black;"/>	)	

**SETTLEMENT AGREEMENT**

**IT IS HEREBY STIPULATED AND AGREED** by and between, (fill in name) ("Complainant"), and the (fill in agency) ("Agency"), and their respective representatives, that in consideration of mutual promises and other good and valuable consideration, the parties agree to resolve the allegations of discrimination based on (fill in basis) as identified under EEOC Case Nos. (fill in number(s)), and Agency Nos. (fill in number(s)), and agree as follows:

1. No Admission. This Settlement Agreement is not to be construed as an admission of liability or wrongdoing on the part of any party.

2. Obligations.

a. THE AGENCY WILL:

(1) pay the Complainant \$(fill in amount) within 90 days;

(2) restore to Complainant (fill in number of hours)hours of Annual Leave and (fill in number of hours) hours of Sick Leave within 60 days;

(3) require that managers in the Regional office to certify in 60 days that they have taken the Virtual University Course "Diversity Training for Managers";

(4) certify in 60 days that (fill in name) (RMO) has taken the Virtual University Course "Diversity Training for Managers";

---

Initials:      \_\_\_\_\_ Complainant      \_\_\_\_\_ Complainant's Representative  
                  \_\_\_\_\_ Management Official      \_\_\_\_\_ Agency Representative

(5) restore (number of hours) hours of sick leave and (number of hours) hours of annual leave to Complainant's leave bank within 60 Calendar days;

(6) remove all references to (Complainant's termination/negative employment action) from Complainant's personnel file and all other files maintained by the Agency including all documents associated with her performance and termination.

(7) remove from all Agency records and files all references to Complainants removal and will substitute documentation of a voluntary resignation from the Agency (if applicable).

(8) remove all information from Complainants personnel records and all other records regarding Complainant's failure to qualify for (fill in failure for qualifications, if applicable).

(9) provide EEO training to all (insert name of applicable staff) from an outside source within 9 months.

(10) promote the Complainant to the position of (insert name of position and grade/step) within two pay periods.

b. THE COMPLAINANT AGREES TO:

Promptly, after the full execution of this Settlement Agreement, withdraw her Equal Employment Opportunity Commission Complaint (referenced in the caption of this Settlement Agreement) with prejudice with no right to raise these issues again, except as provided in Paragraph 10, below. This withdrawal will take effect on the effective date of this Agreement.

3. Dismissal of Proceedings.

a. Complainant's signature on this agreement constitutes full and complete settlement and withdrawal of the complaint noted above. Complainant shall not refile this complaint or any other actions regarding the issues that are covered by this complaint with any other agency or judicial forum. Additionally, complainant shall withdraw with prejudice any and all complaints or appeals that he may have pending against the agency at the time he signs this agreement.

---

Initials:            \_\_\_\_\_ Complainant            \_\_\_\_\_ Complainant's Representative  
                          \_\_\_\_\_ Management Official            \_\_\_\_\_ Agency Representative



b. This Settlement Agreement, when fully executed by the parties, shall serve as sufficient documentation for the agency and the Equal Employment Opportunity Commission to dismiss this Complaint with prejudice, without needing additional documentation or authorization from the complainant or his representative. Facsimile copies of this Settlement Agreement may be relied upon by the Equal Employment Opportunity Commission for purposes of dismissing this complaint and/or for enforcing the terms stated herein.

4. Expenses. Unless otherwise stated in this Settlement Agreement (in which case the terms of any specific clauses regarding expenses shall take precedence) each party shall be responsible for its own costs incurred in this complaint, including attorney’s fees, except as provided by the agreed upon terms set forth above.

5. Jurisdiction. The parties agree that if a dispute regarding this Settlement Agreement arises, to include allegations of a breach, unless otherwise precluded or limited by the terms of this Settlement Agreement, they will consent to the Equal Employment Opportunity Commission assuming jurisdiction over the matter.

6. Integration. This Settlement Agreement contains the full and complete agreement of the parties with respect to their mutual releases. No agreement or representation shall be deemed binding upon any party hereto, nor shall any amendment to this Settlement Agreement be deemed binding unless set forth in writing after this date and signed by all parties hereto.

7. Statement of Understanding. The parties acknowledge that they have read this entire Settlement Agreement, that they fully understand this Settlement Agreement, and that they voluntarily enter into this Settlement Agreement. The parties further acknowledge that they are, or have had the opportunity to be, represented by individuals of their choosing, who fully advised them (if so represented) of all available rights and remedies with respect to the matters contained herein.

8. Joint Draftsmanship. The parties acknowledge that each of them has participated in the drafting of the terms of this Settlement Agreement and that any ambiguity shall not be construed against any party on the ground that such party was the draftsman of this Settlement Agreement.

9. Status of Facsimile Copies. The parties agree that facsimile copies of this Settlement Agreement, and the signatures thereon, shall be deemed “originals,” and shall have the same force and effect as an original copy of this Settlement Agreement.

---

Initials:            \_\_\_\_\_ Complainant            \_\_\_\_\_ Complainant’s Representative  
                          \_\_\_\_\_ Management Official        \_\_\_\_\_ Agency Representative

10. Noncompliance Procedure. In accordance with the regulations of the Equal Employment Opportunity Commission, if the complainant believes that the agency has failed to comply with the terms of a settlement agreement or decision, the complainant shall notify the **OFFICER FOR CIVIL RIGHTS AND CIVIL LIBERTIES WITHIN THE AGENCY (INSERT AGENCY NAME), INSERT ADDRESS** or its designee in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased. The agency will attempt to resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Equal Employment Opportunity Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Equal Employment Opportunity Commission within 30 days of receiving notice of the appeal.

11. Confidentiality and No Precedent: The Complainant shall not disclose or discuss the terms of this Settlement Agreement or the underlying facts or allegations of this Equal Employment Opportunity complaint, except to her attorneys, accountants and spouse, or to the extent necessary to enforce any terms contained herein. The parties further agree and understand that this Settlement Agreement shall not be deemed to create any precedent.

12. Exempt Agency Files. Irrespective of any provisions of this settlement agreement, the parties agree that no provision of this settlement agreement shall require expungement or modifications of files maintained by the agency's Office of Inspector General, Office of General Counsel, Office of Professional Responsibility, Office of Principal Legal Advisor, Office of Employee & Labor Relations, Office of Equal Employment Opportunity, and Office of Civil Rights & Civil Liberties.

13. Waiver under the Age Discrimination in Employment Act of 1967, as amended (ADEA) and the Older Workers Benefit Protection Act (OWBPA). In the event that this case, as referenced in the caption of this settlement agreement, is covered by the Age Discrimination in Employment Act of 1967, as amended (ADEA) and the Older Workers Benefit Protection Act (OWBPA), the Complainant understands that he has 21 days in which to consider whether to accept this settlement agreement. Complainant recognizes that if he is signing this agreement less than 21 days after the Agency's final offer was

---

Initials:            \_\_\_\_\_ Complainant            \_\_\_\_\_ Complainant's Representative  
                         \_\_\_\_\_ Management Official            \_\_\_\_\_ Agency Representative

made, he affirms that his/her decision to take less than 21 days to consider the Agency's offer was done freely and voluntarily and that the Agency did not induce hereto do so through fraud, misrepresentation, or threats to withdraw or alter the offer prior to the expiration of the 21-day period. The complainant knowingly and voluntarily agrees that by entering into this settlement agreement, he is waiving her rights or claims under the ADEA. However, the complainant also understands that he is not waiving any future rights or claims under the ADEA. The complainant agrees that he has received valuable consideration in exchange for this waiver of her rights or claims under the ADEA. The complainant agrees that he is fully aware of her right to discuss any and all aspects of this matter with an attorney of her own choosing prior to executing this settlement agreement, that he has carefully read and fully understands all of the terms and conditions of this agreement, and that he has had a reasonable time to read and consider the settlement agreement. The complainant understands he will have 7 days to revoke it. Irrespective of any other timeframes stated within this settlement agreement, this settlement agreement shall not become effective or enforceable until the 7-day revocation period has expired. The revocation period begins when the Agreement is fully executed by the signatories designated below to include all concurrences.

14. Effective Date. This Agreement will become effective as of the date that all of the parties to the Settlement Agreement have signed it.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement consisting of 5 pages,

\_\_\_\_\_  
(fill in name)  
Complainant

Date:

\_\_\_\_\_  
(fill in name)  
Complainant's Representative

Date:

\_\_\_\_\_  
(fill in name)  
Title of Management Official  
For the Agency

Date:

\_\_\_\_\_  
(fill in name)  
Agency's Representative

Date:



# APPENDIX D



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**XXXX District Office**

<hr/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
v.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
AGENCY HEAD,	)	
TITLE,	)	
AGENCY	)	
Agency	)	<b>DATE:</b>
<hr/>	)	

**MOTION FOR IMPOSITION OF SANCTIONS**

(fill in name), Complainant, through his representative (fill in name), hereby moves the EEOC to impose sanctions for the Agency’s failure to develop an impartial and appropriate factual record. In support thereof, Complainant states as follows:

1. Complainant filed a formal complaint on (fill in date).
2. Pursuant to 29 CFR § 1614.108(e-g), the Respondent Agency has 180 days from the filing of the formal complaint to develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint and deliver that record to the Complainant.
3. The Agency failed to develop an impartial and appropriate factual record within the requisite time frame.
4. The Agency (choose one from below):
  - did not investigate the formal complaint;
  - investigated the formal complaint but did not issue a report of investigation; or
  - did issue a report of investigation but it was not impartial and appropriate because it was lacking (fill in information).

WHEREFORE, the Complainant asks the EEOC to:

- A. **FIND** that the Agency violated its duties pursuant to 29 CFR §1614.108 (e-g); **AND**
- B. **ORDER** the Respondent Agency to pay for Complainant's discovery costs including but not limited to:
  - 1) Costs for conducting depositions such as a court reporter and any related fees;
  - 2) Costs for copying, printing and sending document requests, interrogatories, and admissions;
  - 3) Reasonable attorney's fees including travel and incidental costs; and,
- C. **ORDER** other sanctions as appropriate.

Respectfully Submitted,

---

(fill in name and contact information)



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
XXXX District Office**

\_\_\_\_\_  
**NAME OF COMPLAINANT,** )  
Complainant )  
 )  
v. )  
 )  
**AGENCY HEAD,** )  
**TITLE,** )  
**AGENCY** )  
Agency )  
\_\_\_\_\_ )

**EEOC Case No.**  
**Agency Case No.**  
**DATE:**

**ORDER**

UPON CONSIDERATION of Complainant's Motion for Sanctions, it is this \_\_\_\_\_ day  
of \_\_\_\_\_, 20\_\_\_\_,

hereby

**ORDERED,**

That \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

\_\_\_\_\_  
Honorable \_\_\_\_\_  
Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) \_\_\_\_\_, 20\_\_\_\_, to the agency's representative, (fill in name) at (fill in address or fax number) and the (fill in EEOC Office) at (fill in address or fax no.).

\_\_\_\_\_  
(Fill in name of person who served copy)

# APPENDIX E



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
XXXX District Office**

<hr/>	)	
NAME OF COMPLAINANT,	)	
Complainant	)	
	)	
vii.	)	<b>EEOC Case No.</b>
	)	
	)	<b>Agency Case No.</b>
AGENCY HEAD,	)	
TITLE,	)	
AGENCY	)	
Agency	)	DATE:
<hr/>	)	

**COMPLAINANT’S OPPOSITION TO AGENCY’S MOTION FOR SUMMARY  
JUDGMENT**

COMES NOW, NAME, Complainant through his designated co-representative, and submits Complainant’s Opposition to Agency’s Motion for Summary Judgment. For the reasons stated below, the Complainant respectfully requests that the Agency’s Motion be denied and the case proceed to hearing.

**I. Accepted Issues**

Whether Complainant was subjected to discrimination on the basis of (fill in basis) when:

1. CLAIM 1 and/or
2. CLAIM 2.

**II. MATERIAL FACTS IN DISPUTE**

1. MATERIAL FACT NO.1
2. MATERIAL FACT NO.2
3. MATERIAL FACT NO.3

**III. STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. UNDISPUTED FACT NO.1
2. UNDISPUTED FACT NO.2

#### IV. APPLICABLE LEGAL STANDARD TO SUMMARY JUDGMENT

Pursuant to 29 C.F.R. §1614.109(g), a party is entitled to a decision without a hearing, or summary judgment if there are no genuine issues of material facts in dispute. The moving party must demonstrate that there are no genuine issues of material facts in dispute. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A genuine dispute of material fact exists if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party. Oliver v. Digital Equipment Corp., 846 F.2d 103, 105 (1<sup>st</sup> Cir. 1988). The non-moving party must demonstrate that there exist factual disputes that require a fact finder to resolve the party's different versions of the truth at trial. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248-249 (1986). In opposing summary judgment, the nonmoving party must identify specific evidence that raises a genuine issue of material fact. Hanley v. Postmaster General, EEOC Appeal No. 01960603 (1998). A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, a decision without a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Department of Defense, EEOC Appeal No. 01A24206 (July 11, 2003), additionally, it may also be inappropriate to issue a summary judgment where the veracity of witnesses is crucial or issues of motive or intent are involved. Schwapp v. Town of Avon, 118 F.3d 106 (2<sup>nd</sup> Cir. 1997) (Court is "particularly cautious" in granting summary judgment when defendant's intent is at issue).

Once the moving party meets its burden, the opposing party must come forward with specific facts, to show that a genuine issue remains for trial. DeHorney v. Bank of America Nat. Trust & Sav. Assoc., 879 F.2d 459 (9<sup>th</sup> Cir. 1989). In Aka v. Washington Hospital Center, 156

F.3d 1284 (D.C. Cir. 1998), the D.C. Circuit held, inter alia, that a plaintiff is not limited to challenging an employer's explanation for its action to defeat summary judgment. Id. at 1295, n.11. A plaintiff may defeat a motion for summary judgment and prevail at trial by presenting other evidence that permits an inference of discrimination. Id. Moreover, in Anderson, the Supreme Court held that in ruling on summary judgment motions, a court cannot weigh the evidence or grant summary judgment merely because it believes that the nonmoving party will lose at trial. Anderson, at 249.

In certain cases, summary judgment is clearly inappropriate and precluded, such as, where there are factual disputes, where the veracity of witnesses is crucial, or where issues of motive or intent are involved. Schwapp v. Town of Avon, 118 F.3d 106 (2<sup>nd</sup>. Cir. 1997) (court is particularly cautious in granting summary judgment when defendant's intent is at issue); Grier v. Medtronic Inc., 99 F.3d 238, 240 (7<sup>th</sup> Cir. 1996) (applying summary judgment standards with "especial scrutiny" where cases turn on issues of intent or credibility); Hossaini v. Western Missouri Medical Center, 97 F.3d 1085, 1088 (8<sup>th</sup> Cir. 1996) (recognizing the difficulty of disposing of intent issues at the summary judgment stage).

In addition, the EEOC goes further than the courts in concluding that summary judgment cannot be granted where there is a genuine issue as to credibility. 29 C.F.R. § 1614.109(g). In Thomas v. Postmaster General, EEOC Appeal No. 01890469 (1989), the Commission reversed an entry of summary judgment, finding that the conclusory affidavit of a selecting official as to who was the best qualified candidate did not dispense with the factual dispute because the affidavit was a mere opinion. Credibility issues are not ripe for summary judgment in Commission cases because an administrative judge, unlike a federal judge, is charged as a fact-finder at hearing which is an extension of the investigative process. See Sampson v. Attorney

General, EEOC Appeal No. 01942844 (1996)(overturned on other grounds). Likewise, an administrative judge may not rely solely on representation of agency counsel in finding that there is no genuine issue of material fact. Daley v. Secretary of Treasury, EEOC Appeal No. 01960094 (1997). The administrative judge should pay attention to questions in the factual record and complainant’s contrary representations. *Id.* See also, Pederson v. Dept. of Justice, Federal Bureau of Prison, EEOC Appeal No. 05940339 (1995); Bang v. Postmaster General, EEOC Appeal No. 01961575 (1998).

In Pederson, the appellant filed a formal complaint alleging that she was discriminated against on the basis of her sex when she was not allowed to attend a professional conference and when she was denied a pay increase. The EEOC administrative judge issued a decision on the merits of the appellant’s complaint without holding a hearing. The agency issued a final decision finding no discrimination. On appeal, the Commission initially affirmed the agency’s decision; however, upon review of the appellant’s request for reconsideration, the Commission vacated its previous decision. The Commission in Pederson found that the administrative judge improperly relied solely on the representations of the agency witnesses, while ignoring gaps in the record and appellant’s contrary representations.

#### **V. COMPLAINANT IS ABLE TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION BASED ON [BASIS]**

The Complainant has the initial burden of proving a prima facie of discrimination. McDonnell Douglas Corp. v Green, 411 U.S. 792, 802 (1973). Once the Complainant establishes a *prima facie* case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The Complainant must then, by a preponderance of the evidence,



establish that the Agency's explanation is pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000).

**[Insert Argument Here for Prima Facie Case]**

**VI. THE AGENCY’S REASON FOR X IS PRETEXT FOR DISCRIMINATION**

The Agency has articulated what it alleges to be a Legitimate Nondiscriminatory Reason for its actions. The Agency stated that **[give reason]**.

**[Insert why the Agency reason is pretext]**

**VII. CONCLUSION**

The Complainant has established a *prima facie* case of discrimination. There are a number of material facts that remain in dispute and the testimony and cross examination of management officials and witnesses is needed. It would be inappropriate for the Commission to merely take the Agency’s self-serving proclamations as true. The Complainant should be granted a hearing and given the opportunity to question witnesses, scrutinize the Agency’s unsupported proffers thereby completing the record. A hearing is necessary in this case to ensure all remaining questions are adequately answered to complete the record.

For the reasons outlined above, Complainant respectfully requests that the Agency’s motion be denied and a decision in favor of Complainant be issued. In the Alternative, The Agency’s Motion should be denied and this case proceed to hearing to ensure all facts are clear and complete before the Administrative Judge renders a decision.

---

Date

---

Complainant's Representative (fill in)  
Address and Phone Number (fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) \_\_\_\_\_, 20\_\_, to the agency's representative, (fill in name) at (fill in address or fax number), and to the administrative judge (fill in name) at (fill in address or fax number).

(Fill in name of person who served copy)