

AFGE'S Guide to Fighting Discrimination



AFGE Women's & Fair Practices Departments

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The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO representing approximately 700,000 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.

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“That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination . . . ”

-Title VII of the Civil Rights Act of 1964

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What is Discrimination?

Discrimination in the context of employment law occurs when an individual or group is treated less favorably than another individual or group because of their known protected statuses.

What is Equal Employment Opportunity?

Equal Employment Opportunity is the concept that employment decisions should be based on valid job-related requirements without regard to protected status. This concept is embodied in federal laws that are used to protect employees from employment decisions based on an individual's protected status. The laws listed below identify the federal statutes and protected statuses that protect employees from employment discrimination.

Federal Statutes

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

A. Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e

Title VII of the Civil Rights Act was passed by Congress in 1964 and was amended in 1972 to cover federal employees. Title VII prohibits discrimination on the basis of race, color, religion, national origin, sex and retaliation.

B. The Age Discrimination in Employment Act of 1963 (“ADEA”), 29 U.S.C. Section 633

The Age Discrimination in Employment Act (“ADEA”) was enacted in 1963 and made applicable to federal employees in 1974. It prohibits age discrimination and applies to individuals 40 years of age or older. As an alternative to filing an administrative complaint, employees pursuing claims under the ADEA may file a civil action in U.S. District Court directly. 29 C.F.R. § 1614.201.

C. 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.

D. The Rehabilitation Act 29 U.S.C. Section 794, The Americans with Disabilities Act, 42 U.S.C. Sections 12101 et seq., and The Americans with Disabilities Act Amendments Act (ADAAA), 42 U.S.C. Section 12111

The Rehabilitation Act of 1973, as amended, protects qualified employees and applicants with disabilities in the federal government from employment discrimination 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 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. § 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.

In 2008, the **ADA Amendments Act of 2008 (“ADAAA”)** was enacted and became effective on January 1, 2009 in order to broaden protections for individuals intended to be covered by the Act. The Act shifts the focus from litigation as to whether the complainant was a qualified individual with a disability to “whether entities covered under the ADA have complied with their obligations.” 42 U.S.C. § 12101. Furthermore, the ADAAA expands the definition of disability to be “construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.” 42 U.S.C. § 12102 (4)(A).

The ADAAA identifies specific examples of impairments that should not require extensive analysis. For example, partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder and post-traumatic stress disorder are identified as in 29 C.F.R. §1630.2(j)(3)(iii) as impairments that should be easily concluded to be disabilities under the ADAAA.

Additional changes effectuated by the ADAAA:

1. Mitigating measures are not to be considered in assessing if the person has a disability, except for eyeglasses and contacts;
2. Episodic and in remission impairments may meet the ADAAA definition of disability if the impairment substantially limits and individual’s major life activity when active; and

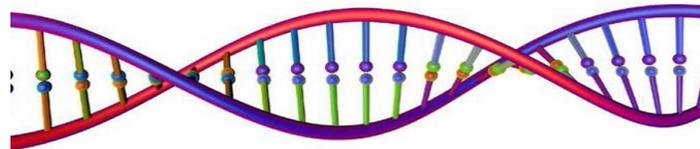
3. To be regarded as having a disability, an individual no longer needs to show that the individual is perceived to be substantially limited in a major life activity, just that the individual is perceived to have a disability;
 - a. Alcoholism is considered a disabling condition that is eligible for a reasonable accommodation but cannot preclude and individual from discipline based on misconduct or poor performance; and
 - b. Drug addiction is not regarded as a disability if illegal drugs are being used.

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

The Pregnancy Discrimination Act (“PDA”) was enacted in 1978 and provides that claims of discrimination based on pregnancy, childbirth, or related medical conditions shall be raised as a claim of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964. The PDA requires an agency to treat pregnant employees/applicants the same as non-pregnant employees/applicants and does not require an agency to give preferential treatment or accommodations to pregnant women solely because of their pregnancy.

F. Genetic Information Nondiscrimination Act of 2008 (“GINA”) 42 U.S.C. Chapter 21F

The Genetic Information Nondiscrimination Act (“GINA”) became effective November 21, 2009, makes it unlawful for an employer “to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee.” 42 U.S.C. § 2000ff-1(a)(1). GINA may be litigated in conjunction with a violation of the Rehabilitation Act/Americans with Disabilities Act Amendments Act.



G. Additional Protections

1. **Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (“No Fear”)**

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 requires federal agencies be more accountable for violations of anti-discrimination and whistleblower protection laws. The Act expanded agency obligations under The Whistleblower Protection Act (5 U.S.C. § 2302(b)(8)); Prohibited Personnel Practices as governed by U.S.C. §

2302(b)(1) and (9); The Equal Pay Act, the Age Discrimination in Employment Act; The Rehabilitation Act; and Title VII of the Civil Rights Act.

2. Management Directive (“MD”) 715

MD 715 provides policy guidance and standards to federal agencies for establishing and maintaining effective equal employment opportunity programs under §717 of Title VII. Additionally, MD 715 requires agencies to collect and analyze data which show the distribution of employees in various profiles (e.g., grade distribution, major occupations, promotions, career developments, etc.) by ethnicity, race, sex, and disability of employees.

3. Executive Orders

a. Executive Orders Amending Executive Order 11478

Executive Order 11478 was signed by President Nixon on August 8, 1969 and prohibited discrimination in the competitive service for federal employees. Executive Order 11478 was twice amended by President Clinton to establish additional protections for **sexual orientation (Executive Order 13087)** and **parental status (Executive Order 13152)**.

Executive Order 13087’s provisions have been expanded by the EEOC in that sexual orientation is now a protected status under sex.

Pursuant to Executive Order 13152, 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 an employee will not stay late because of their family responsibilities.

b. Facilitate Accommodations for the Disabled, Executive Order 13164 and Increasing the Opportunity for Individuals with Disabilities to Be Employed in the Federal Government, Executive Order 13163

On July 26, 2000, President Clinton ordered that agencies establish effective written procedures regarding initiating and processing requests for reasonable accommodations pursuant to Executive Order 13164. The Order also required agencies to outline how decisions to regarding requests will be made and must set forth processing time limits. In Executive Order 13163, President Clinton called for an additional 100,000 workers with disability to be hired by the Federal Government over 5 years, or 2005.

c. Increasing Federal Employment of Individuals with Disabilities, Executive Order 13548

President Obama issued Executive Order 13548 requiring agencies to set forth strategies and programs to develop agency specific plans for promoting employment opportunities for individuals with disabilities.

d. Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Executive Order 13988

Executive Order 13988 directs all federal agencies to review all policies which implement the non-discrimination protections on the basis of sex ordered by Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Fair Housing Act and section 412 of the Immigration and Nationality Act of 1965 and to extend these protections to the categories of sexual orientation and gender identity.

e. Protecting the Federal Workforce, Executive Order 14003

Executive Order 14003 rescinds Trump Administration EOs 13836, 13837, & 13839 (banned clean records). However, agencies are taking a cautious approach to implementing the Biden Administration's EO and are waiting for further instruction from OPM before proceeding.

f. Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce, Executive Order 14035

Executive Order 14035 directs the Office of Personnel Management to develop a federal Government-wide Diversity, Equity, Inclusion, and Accessibility (DEIA) Initiative and Strategic Plan. The DEIA plan must identify strategies to advance equitable policies and practices in areas including, but not limited to federal workforce recruitment, hiring, background investigations, performance reviews, and promotions, as well as take a data-driven approach to determine what federal agency practices result in inequitable employment outcomes.

PROTECTED STATUSES



There are nine protected statuses: 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 or because of personal characteristics associated with race (such as hair texture, skin color or certain facial features). Race discrimination also can involve treating someone unfairly because the person is married to (or associated with) a person of a certain race. Discrimination can occur when the victim and the person who inflicted the discrimination are of the same race.

The *Office of Management and Budget Standards on Race and Ethnicity* (1997) determines the options available for self-identification of race for the United States Census Bureaus' reporting purposes. An individual can choose to self-identify with one or more of the following categories:

White – A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Black or African American – A person having origins in any of the Black racial groups of Africa.

American Indian or Alaska Native – A person having origins in any of the original peoples of North and South America (including Central America) and who maintains tribal affiliation or community attachment.

Asian – A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

Native Hawaiian or Other Pacific Islander – A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

An individual may also write in the race for which they self-identify.

2. COLOR

Color discrimination involves treating someone (an applicant or employee) unfavorably because of skin color or complexion. Color discrimination can also involve treating someone unfairly because an individual is married to (or associated with) a person of a certain color. The courts and the commission read "color" to have its commonly understood meaning -- pigmentation, complexion, or skin shade or tone. Thus, color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Even though race and color clearly overlap, they are not synonymous. EEOC Compliance Manual, Section 15: Race and Color Discrimination (April 19, 2006).

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, have a particular ethnicity or accent, appear to be of a certain ethnic background, or 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 can involve treating someone less favorably because of their connection with an organization or group that is generally associated with people of a certain sex. In addition, sexual orientation or a person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII.

Sex based discrimination can also stem from an individual’s pregnancy. In *Young v. United Parcel Service*, 135 S.Ct. 1338 (2015), the Supreme Court found that a woman denied a light-duty assignment could bring suit due to pregnancy discrimination where male employees with similar restrictions were granted light-duty assignments.



Demonstrative Case: *Bostock v. Clayton County Board of Commissioners*, 590 U.S.

_____ (2020), explained that sexual orientation and gender identity discrimination are part of sex discrimination. The case states that “an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”

5. RELIGION

Religious discrimination involves treating a person (an applicant or employee) unfavorably because of their 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. The non-discrimination provisions of the statute also protect employees who do not possess religious beliefs or engage in religious practices." EEOC Compliance Manual, Section 12: Religious Discrimination (Jan. 15, 2021). Religious discrimination can also involve treating someone differently because that person is married to (or associated with) an individual of a particular religion.



6. RETALIATION

Title VII prohibits punishing job applicants or employees from asserting their rights to be free from employment discrimination. Asserting these EEO rights is called “protected activity,” and it can take many forms. For example, it is unlawful to retaliate against applicants or employees for:

- a. Filing an EEO charge, complaint, investigation or lawsuit;
- b. Being a witness in an EEO charge, complaint, investigation or lawsuit;

- c. Complaining to a supervisor or manager about employment discrimination, including harassment;
- d. Answering questions during an employer investigation of discrimination, including harassment;
- e. Refusing to follow orders that would result in discrimination;
- f. Resisting sexual advances, or intervening to protect others; or
- g. Requesting accommodation for a disability or for a religious practice.

7. DISABILITY

Disability discrimination occurs when an employer or other entity covered by the Americans with Disabilities Act, as amended, or the Rehabilitation Act, as amended, treats a qualified individual with a disability unfavorably because they have a disability. Disability discrimination also occurs for example, when an agency treats an applicant or employee less favorably because they have a history of a disability or is perceived to be a person with a disability.

The law requires an employer to provide a 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").

The law also protects employees or applicants for employment from discrimination based on the individual's relationship with a person with a disability (even if they do not themselves have a disability). For example, it is illegal to discriminate against an employee because their spouse has a disability.

8. AGE

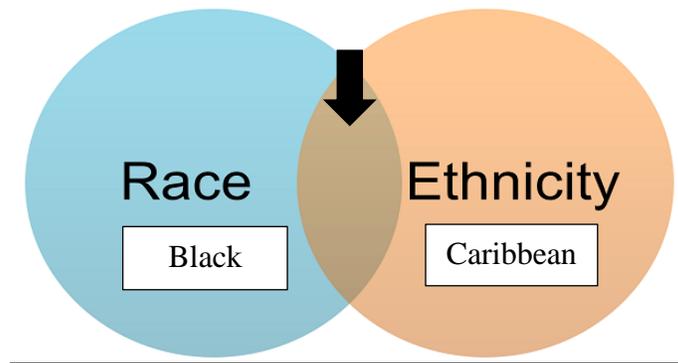
Age discrimination involves treating an applicant or employee less favorably because of their age. The Age Discrimination in Employment Act ("ADEA") forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40, although some states have laws that protect younger workers from age discrimination. It is not illegal under the ADEA for an employer or other covered entity to favor an older worker over a younger one, even if both workers are age 40 or older.

9. GENETIC INFORMATION

Under Title II of GINA, it is illegal to discriminate against employees or applicants because of their 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. The EEOC enforces Title II of GINA (dealing with genetic discrimination in employment). The Departments of Labor, Health and Human Services and the Treasury have responsibility for issuing regulations for Title I of GINA, which addresses the use of genetic information in health insurance.

10. INTERSECTION DISCRIMINATION / RACE PLUS / GENDER PLUS

Title VII prohibits "intersectional" discrimination, which occurs when someone is discriminated against because of the combination of two or more protected bases (e.g. national origin and race). Because intersectional discrimination targets a specific subgroup of individuals, Title VII prohibits, for example, discrimination against Asian women even if the employer has not also discriminated against Asian men or non-Asian women. EEOC Enforcement Guidance on National Origin Discrimination (November 2016).



Often referred to as Race Plus or Gender Plus, Title VII prohibits discrimination against a subgroup of persons in a racial group or of a gender because they have certain attributes in addition to their race and/or gender. For example, it would violate Title VII for an employer to reject Hispanic women with school age children, while not rejecting non-Hispanic women with school age children. EEOC Compliance Manual, Section 15: Race and Color Discrimination (April 19, 2006).

THEORIES OF DISCRIMINATION

In all discrimination cases, the Complainant carries the burden of proof meaning the Complainant must show through evidence that they were 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:

I. Disparate Treatment

Disparate treatment is another term for intentional discrimination cases.

Disparate Treatment

Disparate Treatment occurs when a management official intentionally treats a member of a protected group differently (with respect to the terms and conditions of employment) than the management official treats an individual of a different protected group.

Example: Elle was given a five-day suspension for reporting to work late 5 times last month. Elle believes that she was suspended because she is a woman because her colleague Peter was late 12 times last month and he was not disciplined.

II. Disparate Impact

Disparate Impact

Disparate Impact refers to an agency's facially neutral rule or policy that has an adverse effect on a particular protected group.

Example: A federal agency permits both men and women to apply for positions as police officers; however, the Agency implemented a minimum height requirement of 5 feet, 9 inches with no clear business necessity for the height requirement. Since the minimum height requirement excludes far more women than men from competing for positions as police officers, the requirement has a disparate impact on women.

III. Harassment/Hostile Work Environment

Harassment/ Hostile Work Environment

Harassment is unwelcome conduct that is based on race, color, religion, sex, national origin, EEO protected activity, age, disability, or genetic information. Harassment occurs when the conduct is severe and/or pervasive enough to create a work environment that is hostile, intimidating, offensive, or abusive.

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

1. 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: John, a 65-year-old systems analyst is repeatedly teased by his younger co-workers. The co-workers repeatedly ask him when is he going to retire and make jokes about John making sure he makes the early bird special and drinks his Metamucil. Even though John reports each incident to his supervisor, the supervisor does not take any action and the harassment continues.

2. Sexual Harassment

The EEOC defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when this conduct affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work 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.

There are two categories of sexual harassment: Quid Pro Quo and Harassment/Hostile Work Environment.

a. Quid Pro Quo Sexual Harassment

Quid pro quo harassment occurs when an individual's submission to or rejection of unwelcome sexual conduct is used as the basis for employment decisions.

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.

b. Harassment/Hostile Work Environment

An employee is subjected to unwelcome sexual conduct (based on sex) that is so severe and/or pervasive that it creates an intimidating, hostile, offensive or abusive work environment.

Example: Kate is repeatedly and insistently being asked out by a coworker, Kurt, at work. Kate has repeatedly informed her management about Kurt requesting dates 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.



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.

IV. Failure to Accommodate

Failure to Accommodate

Federal laws require an employer to reasonably accommodate an individual with a **disability** or a sincerely held **religious belief** that conflicts with a work requirement, unless doing so would pose an undue hardship.

There are two bases for which accommodations are requested: disability and religion.



A. 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 their job.

Example: Mike is HIV positive and must take medication on a strict schedule, every morning at 9:00 a.m. 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 10:00 a.m. His supervisor says “no.”



For more detailed information, consult **AFGE's Guide to Defending the Rights of People with Disabilities** available both in printed form and electronically.

B. Religious Accommodation

Federal laws require an employer, once on notice that an 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. Undue hardship under Title VII is defined as "more than *de minimis*" cost or burden which is a substantially lower standard for employers to satisfy than the "undue hardship" defense under the Americans with Disabilities Act (ADA), which is defined instead as "significant difficulty or expense." EEOC Compliance Manual, Section 12: Religious Discrimination (Jan. 15, 2021)

To prove undue hardship for a religious accommodation, the employer cannot rely on hypothetical hardship, but rather should rely on objective information such as the actual cost or disruption the proposed accommodation would involve. *Id.* Notably, an accommodation that would require the agency to pay overtime is more than a *de minimis* burden and is an undue hardship. *Arrendondo v. U.S. Postal Service*, EEOC Appeal No. 0120070018 (2008) (Complainant accommodated with two hours of leave to attend when additional time would require agency to pay overtime).

Example: Tim is Roman Catholic and employed at the EPA. His usual lunch hour is from 1:00 p.m. to 2:00 p.m., with another employee taking lunch between 12:00 noon and 1:00 p.m. 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. The supervisor denies the request. When asked for a reason, the supervisor says "I don't need a reason, the answer is just no."

V. Retaliation

Retaliation

An employer may not retaliate against an individual for making allegations of 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 handed Charlie a five-day suspension.

WHERE CAN AN EEO CLAIM BE HEARD?

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:

I. 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.

Individual Complaints

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 Administrative Judge, or requesting that the Agency issue an immediate final decision. (For more information, see Stages of the EEO Complaint Process on page 25).

Class Action Complaints

Class actions before the EEOC are difficult to establish and litigate as not every situation is right for a class action. Before filing a class action complaint, the Complainant and their representative should 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.

A "class complaint" is "a written complaint of discrimination filed on behalf of a class by the agent of the class." 29 C.F.R. § 1614.204 (a)(2). A "class" is a group of current or former employees who 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 protected class. 29 C.F.R. § 1614.204(a)(1).

A class complaint can only proceed with certification from an Administrative Judge. Should they find that the class meets the prerequisites for a class action, they will issue a decision certifying the class; however, the AJ continues to have authority to redefine the class or dismiss the complaint based on the information that arises as the case develops.



Practice Point: Knowledge of discriminatory conduct against other coworkers is not sufficient for a class action. For an individual suit to become a class action, it is not enough that an employee suspects other coworkers are experiencing discrimination or harassment, nor is the existence of a coworkers EEO complaint evidence that a class action is warranted.

A class representative or class agent is chosen, whose allegations of discrimination is representative of the discrimination amongst the class of complaints. A class agent is a member of the class who acts on behalf of the class during the processing of the class complaint. 29 C.F.R. § 1614.204 (a)(3).

The class agent must allege each of the four requirements in their complaint. The four requirements for a class complaint are: numerosity, commonality, typicality, and adequacy of representation. Each element is discussed below.

A. Numerosity

The class is so numerous that a consolidated complaint of the members of the class is impractical. Similarly, it must also be impractical for individual, separate complaints to be filed on behalf of each complainant. There is no minimum number of employees to be included for the case to be certified as a class action. Each case will be evaluated on its own facts.

B. Commonality

Class members must share common questions of fact and law with the class agent. Potential class members must share common or similar harm as any decision by the AJ will be binding on all parties. Commonality explores whether the class members share enough common or similar interests so that one decision, binding on all, is fair and in the interest of justice to all class members.

C. Typicality

Typicality examines whether the interests of the class agent are similar enough to the members of the putative class such that an AJ's decision can be applied to all members of the class. The claims and defenses of the named complainant ("class representative") are typical of the other un-named class members' claims and defenses.

D. Adequacy of representation

The class representative fairly and appropriately represents un-named class members.

II. Merit Systems 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. § 7512 the MSPB has jurisdiction over:

- a. Removals;
- b. Suspensions for more than 14 days;
- c. Reductions in grade;

- d. Reductions in basic pay; and
- e. Furloughs of 30 days or less.

Mixed Case Complaints and Appeals

A mixed case may be filed as the original complaint or an appeal. 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.

Pursuant to 29 C.F.R. § 1614.302(b), 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. Whatever action the individual files first is considered an election to proceed in that forum. Additionally, 29 C.F.R. §1614.105 provides that where an employee files a MSPB appeal and timely seeks counseling, counseling may continue at the option of the parties. In any case, counseling must be terminated with the notice of rights, pursuant to §1614.015(d), (e) or (f).

Both “mixed complaint” and “mixed appeals” refer to allegations of discrimination connected to an adverse employment action; however, a mixed complaint is filed through the Agency EEO process, while a mixed appeal is filed at the Merit Systems Protection Board (MSPB). EEOC regulations allow the processing of 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.

The following employees generally have a right to appeal to the MSPB and therefore to initiate a mixed case complaint or appeal: competitive service employees not serving a probationary or trial period under an initial appointment; career appointees to the Senior Executive Service; 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.); and non-preference eligible excepted service employees who have completed their probationary period or with two or more years of continuous service (i.e., attorneys).

Because Removal actions are typically reserved for review by the MSPB and discrimination claims are generally within the purview of the EEOC, an employee might be required to litigate a removal action separately from its underlying discriminatory causes. Constructive discharge presents special considerations. Constructive action appear voluntary, but the employee claims they were involuntary, such as, “being forced to retire”. The MSPB has jurisdiction only over involuntary actions (constructive discharge). Thus, when an employee alleges that a seemingly voluntary action was involuntary, issues of MSPB jurisdiction arise.

A. Filing a Mixed Case Complaint

If the employee files a mixed case complaint through the Agency EEO process, the Agency is obligated to conduct an investigation and inform the employee of his/her rights. Upon completion of the investigation, the Agency may issue a final decision that is appealable to the MSPB, but not the EEOC.

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 29 C.F.R. §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 29 C.F.R. §1614.310(a), but that complainant cannot elect to do both.

Unlike the complaints going through the EEO process, the Agency does not conduct a separate investigation. Instead, the MSPB judge will conduct a hearing, where the parties may conduct discovery on their own to develop the record on the discrimination issue. The record may also be developed through a supplemental hearing.

B. Filing a Mixed Case Appeal

Once the Complainant receives an agency action that can be appealed to the MSPB, the employee may file a mixed case appeal directly to the MSPB. If the employee appeals an agency's decision to the MSPB, an MSPB Administrative Judge will preside over a hearing and issue a decision. The employee may appeal the decision of the MSPB AJ in the discrimination complaint to the EEOC.

Affirmative Defenses in Mixed Case Appeals

In a mixed case appeals to the MSPB, the employee is challenging an agency personnel action and must raise any allegation(s) of unlawful discrimination as an affirmative defense. Complainants are allowed to raise an affirmative defense of discrimination at any time prior to the prehearing conference if they have not already done so in the appeal.

Appeals to the EEOC

Should a mixed case reach the EEOC, the EEOC's role is to ensure the MSPB's findings on discrimination are correct. In both the mixed case appeal and the mixed case complaint, the Complainant may petition the EEOC to review the final decision of the MSPB to determine if it is correct, but only in regard to the decision on discrimination.



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**.

III. 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 the appropriate collective bargaining agreement.

For more details regarding the processing of discrimination complaints via the negotiated grievance procedure *see* 29 C.F.R. §1614.301 and the negotiated collective bargaining agreement.

Eligible union members may pursue a claim of discrimination connected to a personnel action through the negotiated grievance process, as long as the applicable bargaining agreement allows employees to raise discrimination allegations. If the CBA permits employees to raise allegations of discrimination in a grievance, an employee who elects the negotiated grievance process must raise all claims of discrimination during the grievance process or such claims will be lost.



Practice Point: While several forums exist, an employee can select only one. In general, the first selection an employee makes in writing will control the forum. An employee should always consult the collective bargaining agreement for the process specific to his or her agency.

Where should I bring my complaint?

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



Forum Selection Exercises

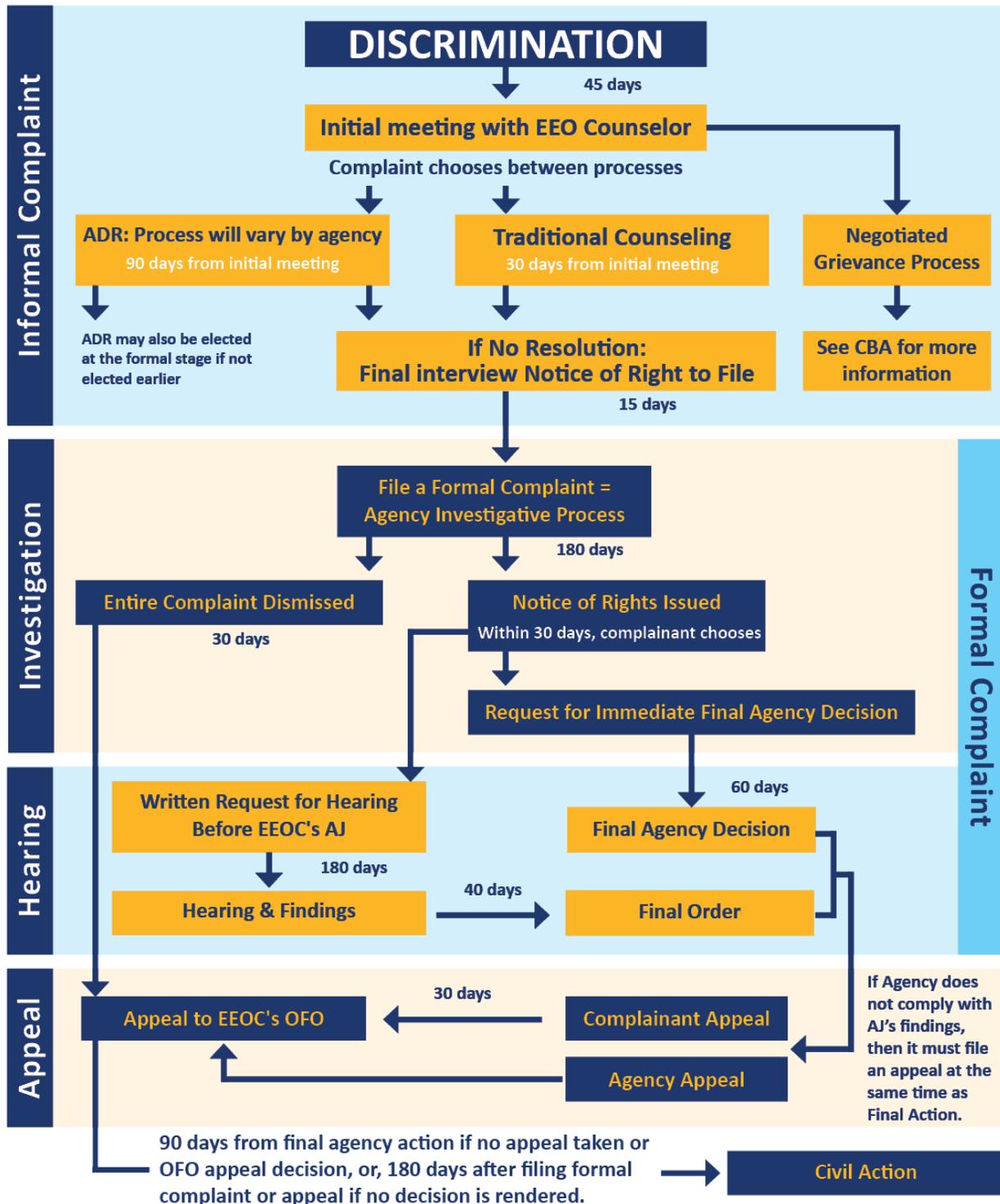
Example 1: Supervisor schedules a mandatory staff meeting on the same day individuals of the Baha'i faith celebrate the Birth of Baha'u'llah. An employee tells the supervisor that he cannot attend because he is Baha'i and observes the holiday. The supervisor excuses the employee after stating, "Baha'i, 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?

Example 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 male employee use to address the situation, if any? What forum(s) could the female employee use to address the situation, if any?

Example 3: Supervisor at a federal agency refuses to promote any individual with body piercings. What forum(s) could affected employees use to address the situation, if any?

Example 4: Two employees, one Caucasian and 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. Consequently, 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 African-American 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. § 1614.

In general, the process described in 29 C.F.R. § 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**



A complete copy of 29 C.F.R. § 1614 can be found in **Appendix A** of this book.

I. The Informal Stage

A. Initial Counselor Contact

A federal employee claiming discrimination **must** first contact an agency's EEO Counselor and seek to resolve the disputes informally. The initial contact between an employee and the EEO Counselor **must** occur within **45 calendar days** of either the date of the alleged discrimination, **or** the date the employee **knew or reasonably should have known** of the discrimination. 29 C.F.R. § 1614.105. Contact with an EEO Office within an agency begins the EEO process.

An employee can contact the EEO Counselor via telephone, in writing, or in person. The Local Union or the Agency's Human Resources Department can provide information on how to contact the facility's EEO counselor.



Practice Point: The employee should send an e-mail to the individual in the EEO Office with whom they have made contact to confirm and keep a record of the fact that the contact was timely made. The email should include the date and manner in which the contact took place (i.e.: by phone, in person, or by email). The email should also include a "read receipt" to prove that it was received by the Agency.



B. Pre-Complaint Counseling

The EEO Counselor has 30 days from the date of initial contact to complete their obligations, unless the employee agrees, in writing, to Alternative Dispute Resolution ("ADR"). ADR is a form of mediation. If the employee and agency attend ADR, the pre-complaint counseling can be extended no longer than 90 days. 29 C.F.R. § 1614.105.

1. Employees' Rights and Responsibilities:
 - a. An employee has the right to remain anonymous during the counseling phase, unless they consent otherwise in writing. However, 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.

- b. An 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 entitled to a remedy on the excluded issue.
 - c. An employee may bring a representative, including their union representative, to meetings with the EEO Counselor.
 - d. An EEO Counselor is an employee of the Agency, and they are neither the employee's representative nor advocate.
2. EEO Counselor's Responsibilities:
- a. An EEO Counselor is responsible for advising an employee, in writing, of their rights and responsibilities relating to the EEO process, including information related to:
 - i. The negotiated grievance process (if the employee chooses this, EEO processing ends);
 - ii. The traditional agency EEO process; or
 - iii. The Agency's ADR process.
 - b. The EEO Counselor:
 - i. Should give the employee literature and documents that will further explain the EEO process;
 - ii. Conduct a limited inquiry;
 - iii. Attempt to resolve the issue(s) brought before them;
 - iv. Frame the issues in the informal complaint; and
 - v. 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 whether or not ADR is appropriate in a given case. 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.

An 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, instead of 30 days, to discharge their duties and issue a Right to File Formal Complaint letter.



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.

After 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. The EEO Counselor must also prepare a report and issue a Notice of Right to File a Formal Complaint. The report's content will vary based whether or not ADR occurred.



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



Practice Point: An employee should keep copies of everything they submitted to the EEO Counselor and proof of all communications with that individual to preserve the record of what allegations were brought to the Counselor’s attention.

II. The Formal Stage

If an employee wants to file a formal complaint of discrimination, they must do so within **15 days** of receiving a Notice of Right to File a Formal Complaint. 29 C.F.R. § 1614.106.

A. Drafting the Formal Complaint

1. The complaint must:
 - a. Be in writing, using the Agency complaint form;
 - b. Identify the protected status(es) that form the basis of the EEO claim(s);
 - c. State the actions or practices that gave rise to the allegations of discrimination;
 - d. Include a chronology of events when applicable;
 - e. Identify the Responsible Management Officials (RMOs);
 - f. Specify the resolution sought;
 - g. Be signed by the employee (now called the “Complainant”); and
 - h. Contain contact information for the Complainant and the Complainant’s representative, if applicable.
2. Where to file a formal complaint:
 - a. The EEO Counselor should specify in the Notice of Right to File where the formal complaint should be filed.
 - b. If this information is missing, a complainant should file with the Agency’s EEO Office.
 - c. A complainant should keep a record that the formal complaint was filed and confirmation of how and when it was filed.

B. Letter of Acceptance of Claims

1. 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.
2. The letter will also include the date on which the complaint was filed.
3. The Agency may have rephrased claims in a different manner than the Complainant wrote the claim on the formal complaint form. **The Complainant should immediately inform the Agency, in writing, if their claim is incorrectly stated.**
4. The Agency may have dismissed certain allegations or even the entire complaint. Any dismissal can be addressed when a Judge is assigned. Reasons for dismissal can include:
 - a. Failure to timely make contact with the EEO office within 45 days of the discriminatory event;
 - b. Failure to timely file a formal complaint within 15 days of Complainant's receipt of the Notice of Right to File a Formal Complaint;
 - c. Failure to state a claim under which relief can be granted;
 - d. Stating a claim that is pending before or has been decided by the Agency or Commission;
 - e. Stating a claim that is pending or has already been decided in an appeal to the MSPB;
 - f. Stating a claim pending under a negotiated grievance procedure;
 - g. Stating a claim which is the subject of a pending lawsuit in another case;
 - h. A pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination; and/or
 - i. The complaint is a spin-off complaint, *i.e.* a second complaint alleging dissatisfaction with the processing of a previously filed complaint.



III. The Investigation Stage

A. Time Period of Investigation

1. Once the Agency accepts one or more of Complainant's claims, the investigative stage begins. 29 C.F.R. § 1614.108.
2. Allegations that are accepted by an agency must be investigated within 180 days from the date of the filing of the formal complaint.
3. A complaint can be amended to include like or related claims by contacting an agency's EEO office and/or EEO counselor.
4. 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.
5. The Agency may request an extension to the 180-day time limit for investigation, in writing. If the Complainant agrees to an extension, it should also be done in writing.
6. Agencies are encouraged to allow complainants and their designated representatives an opportunity to examine the investigative file and to notify the Agency, in writing, of any perceived deficiencies in the investigation. A copy of complainant's notification to the Agency of perceived deficiencies must be included in the investigative file together with a written description by the Agency of the corrective action taken. See MD-110, Chapter 6, Section X.



B. Authority of Investigator

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

C. Responsibilities of Federal Employees

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



Practice Point: A complainant should 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.



Practice Point: Employees should provide all relevant evidence to the investigator, but keep a copy in case the investigator does not include it in the Report of Investigation.

D. Completion of the Investigation

1. 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").
2. The Complainant and their representative shall be entitled to one copy each of the ROI. The Complainant and their representative should be given the option to receive these documents in a digital and/or paper medium. See MD-110, Chapter 6, Section VIII (F).

3. At the same time as providing Complainant a copy of the ROI, the Agency must also provide the Complainant a Notice of Right to Request a Hearing from the Commission (EEOC) or to request a final agency decision (“FAD”).

E. How to Request a Hearing

1. To request a hearing before an Administrative Judge (“AJ”), the Complainant must send a written request directly to the EEOC Office identified in the Notice of Right to Request a Hearing and to the Agency within 30 days of receipt of the ROI. A Hearing may also be requested through the EEOC Portal.
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 file a motion for sanctions and send a written request for a hearing to the nearest EEOC field office and the Agency’s EEO office. 29 C.F.R. § 1614.108(h).
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



See **Appendix D** for a Sample Motion for Sanctions.



Practice Point: A complainant should send their Request for Hearing via certified mail, with a return receipt requested or by facsimile. It may be necessary to prove that the Request for Hearing was submitted timely if the Agency challenges timeliness.

Practice Point: If the Complainant **does not request** a hearing within 30 days of receipt of the Notice of Right to Request a Hearing, **the complaint will default to a FAD**. If the complaint results in a FAD, the Complainant is not entitled to a hearing before an administrative judge with the EEOC. Instead, the Agency will review the ROI and issue a decision on the Complainant’s allegations of discrimination.

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

F. How to Request a Final Agency Decision

1. If a complainant wishes to request a FAD, the Complainant should send notice to the address listed on the Notice of Right to Request a Hearing. The Agency then will have 60 days to produce a FAD to the Complainant.
2. If a complainant selects a FAD, skip ahead to Section V located on page 46.



VI. The Hearing Stage

The Hearing Stage applies to those who timely requested a hearing. 29 C.F.R. § 1614.108 (f). When a complainant timely requests a hearing within the allotted time, the AJ will:

1. Issue an Acknowledgment and Order and/or Order Setting an Initial Conference Call outlining the hearing process;
2. Set deadlines for the parties to conduct discovery;
3. Set deadlines for motions to reinstate any dismissed claims, amend the case, or consolidate with another case;
4. Offer the parties the opportunity to attempt settlement discussions, sometimes with a settlement judge or EEOC Administrative Settlement Envoy (“EASE”);
5. Make decisions on motions to compel discovery;
6. Review any motions filed, including motions for summary judgment (also called motion for decision without hearing); and
7. Hold a closed hearing and issue findings of fact and conclusions of law on the complaint.

A. Order Scheduling Initial Conference Call

In most jurisdictions, Complainants will receive an order setting an initial conference call. At the initial conference, the AJ will discuss the case, potential settlement, the necessity for discovery, and all other matters regarding the case listed in the AJ's order. The Complainant will likely need to identify specific discovery that is needed. Please review the Investigator's Memo to determine if the Investigator requested information that was not provided. Appendix B includes sample discovery to help why discovery is necessary.

B. Acknowledgment and Order

If only an Acknowledgement and Order is issued without an Initial Call, it is likely that the parties are granted discovery through the Acknowledgement and Order without necessitating a call to convince the Judge that discovery is necessary. However, a Preliminary Case Information (PCI) form may be attached. The PCI requires the Complainant review the case and determine whether claims were dismissed, a grievance was filed, or an MSPB appeal was filed. It also seeks to determine if additional documents/statements are necessary to complete the record. The PCI must be completed and uploaded to the EEOC Portal within the designated time frame outlined in the Acknowledgement and Order.



Practice Point: It is important for a complainant to review the Acknowledgment and Order/Order Scheduling Initial Conference Call for deadlines and other responsibilities, as some deadlines occur within just 20 days of receipt. Receipt may include uploading it to the Portal. Please be sure to check your email and the EEOC Portal regularly. A complainant must meet these deadlines, as they may miss the opportunity to participate in discovery, suffer sanctions, or have the case dismissed for a failure to meet a deadline.

Practice Point: If more time is needed to meet a deadline, a party may submit a motion to the Administrative Judge to extend the deadline before the deadline occurs. The AJ has the discretion to grant motions for extensions.

Practice Point: Unless otherwise stated, the term "days" means calendar days, not just weekdays/workdays. If a deadline falls on a weekend or holiday, the due date is the following business day.

C. 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”). Discovery requests are made directly by one party to the opposing party, and do not include the Administrative Judge. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. 29 C.F.R. §1614.109 (d). Evidence may be developed through stipulations, interrogatories, requests for admissions, requests for production of documents, and depositions.

The types of discovery mechanisms are:

1. **Requests for Interrogatories:** Requests for Interrogatories are written questions submitted to the opposing party in order to receive answers and information about the case during the discovery process.
2. **Requests for Documents:** Requests for Documents are written requests submitted to the opposing party in order to receive specified written or electronic information relevant to the case.
3. **Requests for Admissions:** Request for Admissions are written requests submitted to the opposing party in order to receive a voluntary acknowledgment, confession or concession of the existence of a fact.
4. **Depositions:** A Deposition is sworn, out-of-court testimony from a party or witness during the discovery period. 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. 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.



Practice Point: A complainant must check the Acknowledgement and Order/Order Scheduling Initial Conference Call for 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: Sometimes an Acknowledgment and Order or an Order Following an Initial Conference Call will require the parties to submit proposed witness lists and/or exhibit lists within a set number of days before and/or after the close of discovery.

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.

When preparing a set of discovery requests:

1. A complainant must read through the Report of Investigation before drafting any requests for discovery to ascertain what information is missing or needed.
2. The requests must be tailored to ensure that the Complainant will receive the information that will allow them to meet the burden of proof for the specific type of case. Refer to the Burdens of Proof section at page 51 for details.
3. The requests must be as clear as possible in order to ensure that the Agency will answer each request as thoroughly as possible. The requests may reference specific pages or exhibits in the ROI that require clarification.



Practice Point: The Complainant and Agency only serve their discovery requests and responses to each other, and do not serve the Administrative Judge unless they are specifically required to do so.



Sample discovery requests and responses are available in **Appendix B**.



When responding to discovery requests:

1. A responding party must provide an answer or objection to every single request.
2. When answering requests for admissions, a party must respond in writing, stating that they admit or deny in whole or in part. If a party denies an admission in whole or in part, they may be required to provide an explanation for the denial.
3. A responding party may answer and cite to a specific tab and/or page in the ROI.

4. A responding party can request additional time from the other party to respond, but must provide a date certain for answering, and the reasons for why an extension is needed. An extension request should be made as soon as the need for one arises.



Practice Point: If a responding party fails to answer or object to request for admission, the subject of that request will be considered admitted. **Some common objections to discovery include but are not limited to:**

1. **Privilege:** A party may object if the request calls for privileged information. However, the objecting party must state that the information is privileged and why the information is privileged.
2. **Not Relevant:** A party may object to discovery requests that are not relevant or not reasonably calculated to lead to the discovery of admissible evidence.
3. **Unduly Burdensome:** A 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.
4. **Exceeds Allowable Number:** A party may object to discovery requests that exceed the maximum number contained in the AJ's order regarding discovery.
5. **Vague:** A party may object to discovery requests that are vague if the request is worded such that the party cannot understand what information is requested.
6. **Duplicative:** A party may object to discovery requests that are repetitive and ask for information already sought in another interrogatory or document request.
7. **Overly-Broad:** A party may object to discovery requests that do not specifically identify information sought, time frames, or the relevant party or individual.



Practice Point: If the Complainant is asked to sign a general waiver for health information or medical records, the Complainant should request the Agency to identify specifically what information is sought and provide that information directly.



Practice Point: Complainants who are *pro se* (represent themselves) can have the Agency obtain permission from the Judge before seeking medical information. Contact the Administrative Judge to request a protective order in response to an overly broad or intrusive requests for medical records. See MD-110, Chapter 7, Section IV (B) (4).



Prior to producing any medical information, complainants should consult the Sample Protective Order found in **Appendix B**.

Motion to Compel

If a party fails to fully respond to the opposing party's discovery requests within the time limit imposed by the Acknowledgement and Order, the requesting party **must** make attempts, such as sending a reminder letter/e-mail or calling opposing counsel, to obtain the requested information. If the attempts are unsuccessful, the requesting party may file a Motion to Compel Discovery. A Motion to Compel contains:



1. A statement that the party attempted to resolve the discovery dispute with the opposing party;
2. A copy of the disputed questions and answers (if submitted); and
3. A Proposed Order for the Administrative Judge to sign; and
4. A certificate of service indicating a copy was timely served upon the opposing party.

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:

1. An order requiring the party to produce the requested discovery responses within a certain time;
2. An Order to Show Cause why sanctions should not be imposed on the non-responsive party;
3. 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 requesting party may file a motion for sanctions. The motion may ask the Administrative Judge to draw adverse inferences against the non-compliant party, exclude other evidence, issue a decision against the non-compliant party, or take other appropriate action.



Practice Point: When filing a Motion for Sanctions, the requesting party must identify the section of the AJ's Order the opposing party has violated.



Practice Point: Parties must keep track of any efforts taken to settle discovery disputes. The Administrative Judge may want evidence of all efforts beyond just a brief statement.



Samples of written discovery requests, responses, a sample protective order and a sample Motion to Compel are available in **Appendix B** of this guide. **(The samples must be tailored to each individual case and should not be submitted as they appear in the Appendix.)**

D. 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 (the moving party) for the Administrative Judge to make a decision based on the evidentiary record without holding a hearing. Sometimes the AJ will issue a Notice of Intent to Issue A Decision Without A Hearing without either party filing a motion. When the AJ issues such a notice, the notice must give both parties an opportunity to respond.

A Motion for Summary Judgment will be granted if the Administrative Judge finds that there are ***no genuine issues of material fact in dispute***. 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 non-moving party. A decision granting summary judgment can dismiss all or part of the claims in a complaint.

The party opposing the motion (the non-moving party) must file an opposition to the motion within the timeframe specified in the Acknowledgment and Order, or otherwise set by the AJ. The moving party is then allowed to file a reply to the opposition.

An Opposition to Summary Judgment must:

1. Identify each material fact in dispute using facts and documents included in the Report of Investigation, additional documents, or additional witness declarations or affidavits;
2. Identify each material fact ***not*** in dispute;
3. Argue how the evidence demonstrates the Complainant’s *prima facie* case;
4. Argue how the evidence shows that the Agency’s reasons for the action(s) are pretext for discrimination;
5. Be timely served upon the Administrative Judge and Agency in the manner specified; and
6. Include a certificate of service indicating that a copy was timely served upon the opposing party and the AJ.

If the case is dismissed, the Complainant can appeal once the Agency issues a final action, or once more than 40 days have passed from the receipt of the AJ's Order of Dismissal. Please refer to Section VI on Appeals to the Commission on page 47.



Practice Point: If a complainant is relying on documents not in the Report of Investigation (declarations/affidavits), Complainant must attach them as exhibits to the Opposition Motion.



Practice Point: A complainant must serve the Opposition Motion by the method specified in the AJ's Order. Currently, it is the usual practice that all documents are exchanged via email and filed on the EEOC Portal. Mailing a hard copy of the motion and exhibits may also be required. It is recommended that complainants utilize the EEOC Portal, email, or certified mail in the event the Agency challenges the timeliness of the submission.



A sample Opposition to Agency Motion for Summary Judgment is available in **Appendix E**. The sample must be tailored to each individual case and should **not** be submitted as it appears in the Appendix.



E. The Pre-hearing Stage

If the case is not dismissed, the AJ will issue a Scheduling Order. This Order will require that the parties exchange Pre-hearing Reports and attend a pre-hearing conference call. The specific directions for each case can be found in the Scheduling Order. Following the pre-hearing conference, the AJ will issue a Pre-hearing Order reflecting what was discussed at the conference and what the AJ ordered as a result of the conference, such as approved witnesses and exhibits.

Pre-hearing Report

Prior to the pre-hearing conference, each party is required to submit a pre-hearing report by the deadline set in the Scheduling Order. The pre-hearing report includes the witnesses and exhibits each party intends to call at the hearing. Other required sections of the pre-hearing report may include: stipulations of facts to which both parties agree, a list of facts each party intends to prove at hearing, a report on the status of settlement discussions, and a statement of the relief sought by the Complainant.

When listing witnesses in the pre-hearing report, a party may be asked to include the contact information of each witness, their job title, and the anticipated nature of their testimony. Each

party will have the opportunity to object to witnesses proffered by the opposing party during the pre-hearing conference. The AJ makes the final determination as to which witnesses are permitted to testify and may limit the testimony of certain witnesses to certain relevant topics.

Witnesses for a hearing can include:

1. Eyewitnesses to events/actions;
2. Management officials;
3. Witnesses to management's actions regarding comparable employees;
4. Friends and/or coworkers who have seen the effect the discrimination had on the Complainant;
5. Medical professionals from whom the Complainant sought treatment/care; and
6. Any other individual with information relevant to the claims of discrimination.



Practice Point: The AJ will likely limit or disallow witnesses proffering duplicative testimony. If a complainant submits a long witness list, Complainant must be prepared to be asked to withdraw some witnesses or explain why testimony is not duplicative.

At the hearing, the Agency is required to produce all approved witnesses currently employed by the federal government and must pay for their travel expenses. Some AJ's will allow witnesses unavailable to travel outside the normal commuting area to testify via video-conference.

EEOC 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. Neither EEOC Administrative Judges, complainant's representatives, or agency attorneys have the power or authority to subpoena individuals to a hearing. However, any witness approved by the Judge who is willing to come to the hearing may provide testimony.



Practice Point: When listing witnesses in the pre-hearing report, a complainant must list all relevant witnesses, including the Complainant and management officials, as the Agency may fail to list them as potential witnesses in its report. If the witness is not listed, the witness will likely not be permitted to testify.

When listing exhibits in the pre-hearing report, a Complainant does not need to re-submit

documents already contained in the ROI. Any document in the ROI is automatically a part of the record. Parties may submit documents relating to the merits of the claims or the remedy requested. Any document that a party intends to use at a hearing must have been first produced to the opposing party during discovery. A party must prepare for possible objections to each exhibit from the opposing party.

Potential exhibits for a hearing can include:

1. Documents received during discovery regarding the incidents/actions;
2. Medical documents regarding the treatment/care a complainant received and its costs;
3. Documentation of any out of pocket expenses incurred because of the discrimination;
4. Affidavits of witnesses unavailable for the hearing; and
5. Any other documentation relevant to the claims of discrimination.

Pre-hearing Conference

The Scheduling Order will set a time and date for a pre-hearing conference call to take place. If the pre-hearing conference is telephonic, the Agency is typically responsible for providing a call-in number for the AJ and the parties. The Complainant and their representative must timely appear for the call and must be prepared to discuss the issue(s) to be adjudicated at the hearing, the witnesses and exhibits each party intends to present, and any other logistics necessary for the hearing.

The Complainant must be prepared for possible objections from the Agency to their proffered witnesses and exhibits. As such, a complainant must be prepared to explain to the AJ why each witness and exhibit is necessary for the hearing. During the call, the AJ will make the final decision as to which witnesses and exhibits are allowed during the hearing.

Pre-hearing Order

After the Pre-hearing conference, the AJ will issue an Order Following Pre-hearing Conference. This Order will reflect what was discussed during the pre-hearing conference. The Order typically includes the date(s), time, location of the hearing. It also contains which witnesses and exhibits were approved. Complainants must carefully read the Order Following Pre-hearing Conference to see if the AJ has any specific instructions regarding the hearing. Please bring the prehearing order with you to the hearing.



F. 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 waive their opening statement.
- 3. Presentation of Evidence:** The Complainant has the burden of proving discrimination and that the Complainant is entitled to relief. As discussed in the Theories of Discrimination section on page 12, the Complainant must present evidence of a *prima facie* case of discrimination, and evidence that the Agency's reasons for its action(s) are pretext for discrimination. Please refer to Burdens of Proof on pages 51-66. The Complainant presents their case 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:** Exhibits are often required to be a part of the parties' pre-hearing reports. Even if a complainant has previously provided a copy in the pre-hearing report, they must 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 admitted separately at the hearing. Please bring all orders and filings with you to the hearing.

6. **Objections:** Either party may object to any question asked of a witness or any document offered into evidence. The AJ will rule on each objection. A complainant should not object to any questions posed by the Administrative Judge during the hearing.
7. **Closing Argument:** Each party is permitted to give a closing statement, either oral or written, summarizing the evidence and points of law they want the AJ to consider. The Administrative Judge determines the type of closing argument (oral or written) and the length of statement allowed. However, like opening statements, closing arguments are not evidence themselves, and may be waived at the party's discretion. If oral closings are given, the Complainant goes first. If written closings are permitted, the Complainant is allowed to use the hearing transcript.
8. **Hearing Transcripts:** At the end of the hearing, the Agency is to provide and pay for a hearing transcript for the Complainant. 29 C.F.R. § 1614.109(h).

After the hearing takes place, the AJ will issue a decision based on the hearing transcript, and all other evidence on the record. An AJ's decision will analyze whether the Complainant has met their burden of proving discrimination. The decision may also speak to the credibility of the witnesses who testified. The AJ will enter a judgment for either the Complainant or the Agency. If there were multiple issues adjudicated at the hearing, it is possible for an AJ to find discrimination with respect to some issues, and not others.

If the AJ enters judgment for the Complainant, they are to also issue an order determining full relief. See MD-110, Chapter 7, Section III (D) (15). To assist the AJ in determining the appropriate remedy for the complaint, the Administrative Judge may ask the parties to submit statements on damages, if they have not asked for them prior to or during the hearing. See MD-110, Chapter 7, Section III (D) (15). After issuing the order and a determination of the appropriate remedy, the Administrative Judge shall return the hearing file to the Agency, which shall have 40 days to take final action. 29 C.F.R. § 1614.110(a).



Practice Point: A complainant should present the most compelling witnesses and evidence first and emphasize those witnesses and evidence in closing argument.



Practice Point: Sometimes an AJ will “bifurcate” a proceeding. This means that the AJ will first hold a hearing on the merits to determine whether the Complainant has met their burden of proving discrimination. This phase may also be referred to as the liability phase, in other words, the AJ will first determine if the Agency is liable to the Complainant. A separate hearing on damages will only take place if the AJ returns a finding of discrimination at the conclusion of the liability phase of the hearing. See MD-110, Ch. 7, Section III (D) (11).

V. Final Agency Decision/The Final Action Stage

A. Request for a Final Agency Decision

1. When a complainant requests a Final Agency Decision (“FAD”) following the receipt of the ROI, the Agency shall issue a FAD within 60 days of receipt of the Complainant’s request.
2. When a complainant fails to timely request a hearing with the EEOC, the Agency shall issue a FAD within 60 days of the Complainant’s failure to timely request a hearing.
3. The FAD from the Agency must include notice of the Complainant’s right to appeal to the EEOC’s Office of Federal Operations (“OFO”), or to file a civil action in federal district court; the applicable time limits for appeals and civil actions; and finally, the appeal form for an appeal to the EEOC’s OFO.

B. Final Agency Action/Order Following a Decision by the AJ

1. Once the AJ issues a decision granting summary judgment or issues a decision 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 or Final Action.
2. The Final Agency Action/Order will notify the employee:
 - a. Whether the Agency will fully implement the AJ’s decision, and
 - b. What Complainant's appeal rights are to the EEOC’s OFO.
3. 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. The Complainant is entitled to file a response to the Agency’s appeal brief within 30 days of receipt.



Practice Point: 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. The Appeals to the Commission Stage



A. Filing an Appeal

If the Complainant is dissatisfied with the Judge's decision and/or the Agency's Final Action or FAD, they may appeal the decision to the EEOC's OFO. The Complainant must file EEOC Form 573 Notice of Appeal/Petition within 30 days of receipt of either the FAD or Final Action/Order. The Notice of Appeal must be filed with the EEOC's OFO at the address listed on the FAD or Final Action/Order. Additionally, the Notice must also be filed with the Agency at the address listed on the FAD or Final Action/Order.

Any statement or brief in support of appeal must be submitted by the Complainant 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. Upon receipt of the Complainant's brief, the Agency has 30 days to file an opposition to the appeal.

A complainant can file an appeal when:

1. The entirety of the complaint has been dismissed and the Agency has issued a FAD;
1. The Agency has issued a FAD in error;
2. The Complainant loses at the hearing, and the Agency has issued a Final Action/Order incorporating the AJ's decision;
3. 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;

4. The Agency has issued a Final Order following an AJ decision granting summary judgment for the Agency; or
5. The Agency partially dismissed any claim prior to investigation that was not reinstated by the AJ.



Practice Point: A complainant should send EEOC Form 573 Notice of Appeal/Petition as well as the brief in support of appeal via certified mail, return receipt requested. The return receipt should be kept in the file to show timely service of process.

B. Standard of Review for the Appeal

1. In an appeal from an Agency's FAD where no AJ has issued a decision, the OFO will use the *de novo* standard (*de novo* means from the beginning) for both findings of fact and conclusions of law. See MD-110, Chapter 9, Section VI (A) (1)-(2). The OFO will evaluate the findings of fact and conclusions of law as if the OFO were the judge.
2. An appeal from an AJ decision granting summary judgment will be reviewed *de novo* with respect to findings of fact and conclusions of law. See MD-110, Chapter 9, Section VI(B)(4)(b).
3. An appeal from a decision by the AJ after a hearing will be subject to two separate standards of review. See MD-110, Chapter 9, Section VI (B).
 - a. For post hearing factual findings, OFO will uphold the AJ's decision if the decision is supported by *substantial evidence* in the record. Hayden R. v. U.S. Postal Service, EEOC Appeal No. 2019003428 (2019). *Substantial evidence* means that the evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It 'must do more than create a suspicion of the existence of the fact to be established. [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477 (1951). See also MD-110, Chapter 9, Section VI (B)(1).
 - b. Conclusions of law, however, will be reviewed *de novo*, See MD-110, Chapter 9, Section VI (B)(4)(a).

4. 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. 29 C.F.R. § 1614.404(b).

C. Request for Reconsideration

1. Once the OFO rules on an appeal, the decision is binding unless either party asks the OFO to reconsider its decision. See MD-110, Chapter 9, Section V (D); Section VII.
2. A party asking for reconsideration must do so within 30 days from receipt of the OFO decision and show that:
 - a. The OFO's decision involved a clearly erroneous interpretation of material fact or law, or
 - b. The OFO's decision will have a substantial impact on the policies, practices or operations of the Agency.
3. 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 within 20 days. 29 C.F.R. § 1614.402.

VII. The Right to File a Civil Action Stage

After exhausting the administrative process, a federal employee has the right to file a discrimination complaint in a federal district court. 29 C.F.R. § 1614.409.

An individual may file a civil action:

- A. Within 90 days of receipt of the AJ's Final Decision/Order where no administrative appeal has been filed;
- B. After 180 days from the date of filing a formal EEO complaint if no administrative appeal was filed and no Final Order or FAD was issued by the Agency;
- C. Within 90 days of receipt of a final decision on appeal; or
- D. After 180 days from the date of filing an appeal with EEOC if there has been no final decision.

Individuals suing under the ADEA may proceed directly to federal court. Such individuals must file a Notice of Intent to Sue with the EEOC within 180 calendar days of the date of the discriminatory action. The individual must then wait 30 days before filing the civil action. 29 U.S.C. § 633(d); 29 C.F.R. § 1614.201(a).



BURDENS OF PROOF

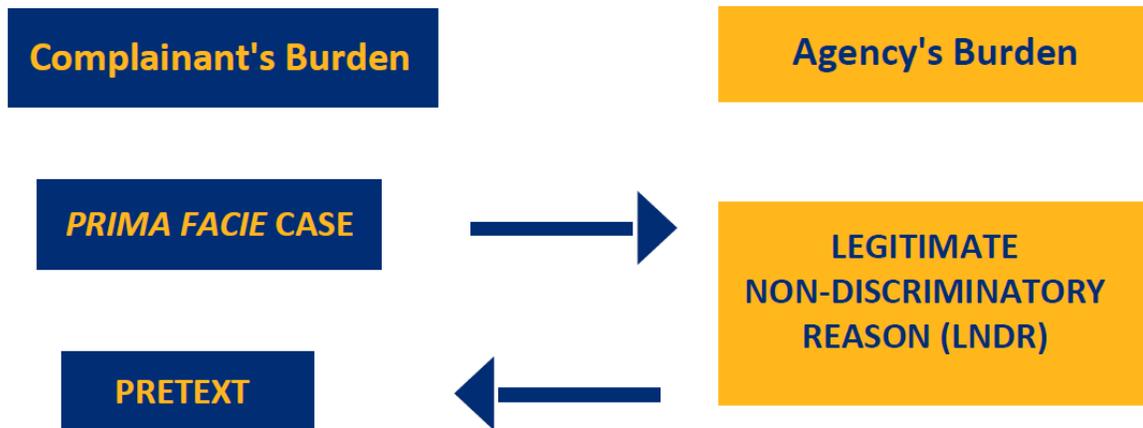
The Complainant bears the responsibility for proving that discrimination occurred and is based on a protected status. **If** the Complainant cannot show the discrimination was based on a protected status (race, color, age, sex, religion, disability, national origin, genetic information, and/or retaliation) **then** the Complainant will not prevail.

The Complainant must use the burden shifting approach to establish that discrimination occurred. First, the Complainant must specify sufficient facts to warrant a presumption of discrimination. This initial burden is known as a ***prima facie* case**.

The burden then shifts to the Agency to rebut the presumption of discrimination or *prima facie* case established by the Complainant. This rebuttal is referred to as a **Legitimate Non-Discriminatory Reason (“LNDR”)** for the Agency’s behavior.

Finally, the Complainant must establish that the Agency’s rebuttal or LNDR for its behavior is a lie **and** that the Agency did in fact discriminate against the Complainant based on a protected EEO status. Thereby, the Complainant is establishing that the rebuttal is **pretext**.

BURDEN SHIFTING APPROACH



Demonstrative Cases: The burden shifting approach was established by three 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).

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993): To establish pretext, Complainant must prove that the Legitimate Non-Discriminatory Reason is a lie and that an employer has unlawfully discriminated against Complainant by making an employment decision based on Complainant's protected class.

I. Disparate Treatment

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

1. Membership in one of the nine EEO protected statuses;
2. Complainant is subject to an adverse employment action with negative results; and
3. A similarly situated employee of a different protected status is treated more favorably.

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

Finally, the burden shifts back to Complainant to prove that the LNDR is pretext for discrimination. To do so, the Complainant must show:

1. The Agency's LNDR is unworthy of belief because the action is not supported by evidence and/or is inaccurate and/or the Agency action is inconsistent with other instances; and
2. The true reason for the discrimination is because of the Complainant's protected status.



Practice Point: Complainant argues that if not for the protected status, they would have been treated like a similarly situated employee. The terms similarly situated employee and comparator are interchangeable. Comparators must share as many job-related aspects as possible, i.e. the discriminating management official is the same.



Practice Point: A comparator should be different in at least one of the nine protected categories, however, both individuals can be over 40 if there is a substantial difference in age and/or both individuals can have a disability if the disabilities are different.



Demonstrative Cases:

Calloway v. Department of Veterans Affairs, EEOC Appeal No. 0120080458 (Sept. 29, 2009): Complainant established a non-selection was based on race and sex because his qualifications were plainly superior and the selectee's managerial expertise was irrelevant for the position.

Bingham v. U.S.P.S., EEOC Appeal No. 072006003 (Mar. 30, 2007): Complainant established race-based discrimination when the Agency could not articulate an LNDR for denying Complainant's request for a schedule change when a co-worker was granted a similar change.

Bart M. v. Dep't of the Interior, EEOC Appeal No. 0120160543 (Jan. 14, 2021); Commission found that the agency discriminated against complainant on the basis of sexual orientation when it did not select him for any of three supervisory positions; complainant established that the agency's proffered explanation was pretextual because, among other reasons, the Agency deviated from its procedure in how it weighed reference checks, and it did not contact all of Complainant's references, even though Complainant was the top ranked candidate compared to the other candidates.

Figuroa v. Department of State, 119 LRP 19062, No. 18-5064 (D.C. Cir. 2019): The D.C. appeals court reversed the lower court's dismissal of Figuroa's claim of intentional discrimination and returned the case to the district court for further proceedings, indicating that the agency cannot merely state that the employment decision was based on the hiring of the best qualified applicant. Instead, the agency must articulate specific reasons for that applicant's qualifications such as seniority, length of service in the same

position, personal characteristics, general education, technical training, experience in comparable work, or any combination of such criteria. At the summary judgment stage, the agency must proffer evidence reasonably revealing how it applied subjective standards to the employee's circumstances.

II. Disparate Impact

In order to establish 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 affects individuals in one of the nine EEO protected statuses in an adverse manner.

The burden then shifts to the Agency to articulate a Legitimate Non-Discriminatory reason (“LNDR”) for the employment action. One such LNDR is that the job requirement is a *Bona Fide Occupational Qualification* (“BFOQ”) and the requirement is consistent with a business necessity.

Finally, the burden shifts back to Complainant to prove that the LNDR is pretext for discrimination. To do so, the Complainant must show:

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: Statistical evidence is necessary to establish that an employer's practices have a discriminatory impact on a protected group. It is not necessary to show that the Agency intended to discriminate in disparate impact cases.



Demonstrative Cases:

Griggs v. Duke Power Co., 401 U.S. 424 (1971): An employment practice that has a discriminatory effect must be related to job performance or a business necessity. Employment practices with a neutral intent cannot be maintained if they operate to perpetuate the *status quo* of prior discriminatory employment practices.

Garcia, et al. v. Department of Justice, Drug Enforcement Administration, EEOC Appeal No. 0120122033 (June 7, 2013); affirmed with a modified remedy,

EEOC Appeal No. Appeal No. 0120122033 (Aug. 12, 2014): A class of female special agents for the Drug Enforcement Administration established that they were subjected to disparate impact on the basis of their sex when they were denied foreign assignments and promotions. The selection process was "highly subjective and without clear guidelines." The expert witness for the class highlighted that there were statistically significant disparities in the number of foreign assignments given to male and female agents at GS grades 11-13 during the relevant time period. The selection process, which included questions that had to do with difficulties raising families and bringing up children overseas, had a disparate impact on female DEA special agents who were denied foreign assignments and promotions.

Barela v. Secretary of State, EEOC Appeal No. 01965017 (Dec. 5, 1997): Complainant alleged that the Foreign Service Exam was designed in a way that discriminated against the Complainant's race and national origin. The EEOC ruled that the Agency did not prove that the exam was job related and consistent with business necessity. *Smith v. City of Jackson*, 544 U.S. 228 (2005): The Agency may base a practice on a factor that often correlates with age, such as seniority, but that does not necessarily constitute age discrimination.

Stephany A. v. Department of Homeland Security, Customs and Border Protection, EEOC Appeal No. 0120151021 (April 25, 2018): The Department of Homeland Security did not subject a Customs and Border Protection officer to sex discrimination when it assigned her the night shift pursuant to an agency policy that uses sex as a factor in assigning staff to shifts. The Agency practice of assigning a set number of female officers to the night shift was found to be a legitimate nondiscriminatory practice in order to ensure that there would be a sufficient amount of female officers available to perform same-sex pat-downs, which were required for security. And since neither party offered evidence of any reasonable cost-efficient alternative, there was no finding of sex discrimination.

III. Harassment/Hostile Work Environment

The terms harassment and hostile work environment are interchangeable. There are three types of harassment: (A) harassment based on a protected status; (B) sexual harassment; and (C) *quid pro quo* sexual harassment. The burden for each is indicated below.

A. Requirements for Establishing a Hostile Work Environment/Harassment Based on Protected Status

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

1. Membership in one of the nine EEO protected statuses;

2. The Complainant was subject 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 the 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 because either:
 - a. There is a tangible employment action; or
 - b. There is no tangible employment action and the Agency failed to exercise reasonable care to prevent and promptly correct behavior of a harasser.

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

1. The Agency was unaware the harassment occurred;
2. The Complainant unreasonably failed to take advantage of the offered preventative or corrective measures;
3. The Agency took immediate and effective corrective action against the alleged harassing individual;
4. The harassing actions ceased.

Finally, the burden shifts back to Complainant to prove that the LNDR is pretext for discrimination. To do so, the Complainant must show:

1. The Agency knew or should have known of the harassment; and
2. The Agency did not take immediate and effective corrective action or if said action was taken, the harassing actions continued despite the Agency's action.



Practice Point: Complainant can include events before the 45 days preceding their EEO contact if at least one instance of harassment occurred within those 45 days. Said incidents would otherwise be untimely.



Demonstrative Cases:

Vance v. Ball State, 570 U.S. 421 (2013): A supervisor is an individual authorized to take employment actions with respect to other employees. An employer will be held liable for the harassment of a non-supervisor if an employer was negligent in failing to prevent harassment from taking place.

Sharon M. v. Department of Transportation, Federal Aviation Administration, EEOC Appeal No. 0120180192 (Sept. 25, 2019): An email that was mistakenly sent to the complainant was sufficiently severe to create a hostile work environment based on race and color. It used a vulgar term as the subject line, included her initials, referred to her with a racial slur, and alluded to a violent act.

Sang B. v. Department of State, EEOC Appeal No. 0120152717 (Oct. 24, 2017): A political military affairs officer for the Department of State was not subjected to discriminatory harassment when a coworker made comments about his religion and threatened him while off duty at a pub in an embassy compound. The EEOC found the alleged incident was not sufficiently severe or pervasive to create a hostile work environment. While the EEOC did not condone the coworker's behavior, it found no evidence that it altered the terms or conditions of the officer's employment.

Adam D. v. Department of Homeland Security, EEOC Appeal No. 20200002826 (Oct. 14, 2020): 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 action, if severe enough, can form the basis of a harassment claim.

Stacie D. v. Department of the Army, EEOC Appeal No. 0120170925 (Mar. 14, 2017): The Agency improperly dismissed some of Complainant’s claims for failure to timely contact an EEO Counselor. A fair reading of the formal complaint reflected that Complainant was subject to a series of related incidents of harassment by various Agency officials, some of which occurred within the 45 days preceding her EEO contact.

Burlington Industries Inc. v. Ellerth, 524 U.S. 742 (1998): An employer is vicariously liable for the hostile work environment created by a supervisor. If an employee has not suffered a tangible job consequence, an employer may raise an affirmative defense indicating that it exercised reasonable care to promptly prevent and correct any sexually harassing behavior and that employee unreasonably failed to take advantage of any preventive or corrective opportunities.

Faragher v. City of Boca Raton, 524 U.S. 775 (1998): The Employer may not be vicariously liable for the discrimination caused by a supervisor if there was no tangible

employment action and the Employer reasonably sought to prevent and correct the harassing conduct and the Employee unreasonably did not avoid harm.

B. Requirements for Establishing a Sexual Harassment Case



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

1. The Complainant was subject to harassment in the form of unwanted or unwelcome verbal or physical conduct of a sexual nature;
2. The harassment was because of Complainant's sex;
3. The harassment affected a term or condition of the 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 the Agency failed to exercise reasonable care to prevent and promptly correct behavior of supervisor/co-worker.

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

1. The Agency was unaware the harassment occurred; and/or
2. The Complainant unreasonably failed to take advantage of offered preventative or corrective measures; and/or
3. The Agency took immediate and effective corrective action against the alleged harassing individual; and/or
4. The harassing actions ceased.

Finally, the burden shifts back to Complainant to prove that the LNDR is pretext for discrimination. To do so, the Complainant must show:

1. The Agency knew or should have known of the harassment; and
2. The Agency did not take immediate and effective corrective action or if said action was taken, the harassing actions continued despite the Agency's action.



Demonstrative Cases:

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986): Hostile environment sexual harassment is a form of sex discrimination actionable under Title VII if it is severe and/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): A hostile environment caused by sexual harassment does not have to cause psychological harm to be hostile or abusive, because the environment can detract from an employee's job performance.

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998): A woman can sexually harass another woman. Similarly, a man can sexually harass another man.

C. Requirements for Establishing a *Prima Facie* Case of *Quid Pro Quo* Sexual Harassment

Quid pro quo means a request for one thing in exchange for another. In order to prove a *quid pro quo* case of harassment, the Complainant must show:

1. The Harasser was a member of management, or a coworker who has control over Complainant;
2. The Harasser made unwanted sexual requests or demands to the Complainant;

3. The Harasser stated or implied that Complainant must comply to receive or keep a job benefit; and
4. The Complainant experienced a tangible employment action.

The Agency is strictly liable if harassment is by a supervisor with immediate or successively higher authority over the employee and the harassment culminated in a tangible employment action, such as demotion, discharge, or an undesirable reassignment.



Practice Point: Complainant can win a *quid pro quo* sexual harassment case even if they do not reject the advances.



For more information, consult AFGE's **Sexual Harassment book**.

IV. Failure to Provide Reasonable Accommodation

There are two types of reasonable accommodation: reasonable accommodation based on religion and reasonable accommodation based on a disability.

A. Requirements for Establishing a Failure to Provide a Religious Accommodation

In order to prove a *prima facie* case of Failure to Accommodate based on religion, the Complainant must show:

1. The Complainant has a sincerely held religious belief that conflicts with an employment requirement;
2. The Complainant informed a Supervisor of the need for an accommodation; and
3. An adverse employment action was taken against the Complainant for failure to comply with employment requirement.

The burden then shifts to the Agency to articulate a Legitimate Non-Discriminatory Reason (“LNDR”) for the employment action. For example, providing an accommodation may be an undue hardship based on the cost or nature of the accommodation.

Finally, the burden shifts back to Complainant to prove that the LNDR is pretext for discrimination. To do so, the Complainant must establish that the accommodation would not cause undue hardship.



Practice Point: *A de minimus* hardship may allow the Agency to escape liability.



Demonstrative Cases:

Trans World Airlines Inc. v. Hardison, 432 U.S. 63, 84 (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.”

Heidi B. v. U.S. Postal Service, EEOC Appeal No. 0120182601 (Nov. 8, 2019): A rural carrier associate for the U.S. Postal Service was subjected to religious discrimination when her request for Sundays off to observe her religion was denied. Her supervisor said he had only a few employees to work on Sundays and without the associate, it was difficult to continue with his schedule of rotating Sundays off. He further asserted that being unable to rotate Sundays off would result in poor employee morale. However, the EEOC found the supervisor did not demonstrate undue hardship because he did not

explore reasonable accommodation options and only speculated about the impact of accommodating the associate.

Levin v. Department of Homeland Security, Transportation Security Administration, EEOC Appeal No. 0120103001 (Oct. 15, 2010): The agency did not subject the complainant to religious discrimination when it denied her request for Sundays off to attend church. The agency offered her an alternative which allowed her to attend church but not enough time to get dressed up to her satisfaction and she rejected it. She did not show that the offered options would have been ineffective.

B. Requirements for Establishing a Failure to Accommodate a Disability

In order to prove a *prima facie* case of Failure to Accommodate based on disability, the Complainant must show:

1. Complainant is a qualified individual, meaning Complainant can perform the essential functions of the job with or without a reasonable accommodation.
2. Complainant has:
 - i. A mental or physical impairment;
 - ii. Which substantially limits one or more major life activities; and
 - iii. The impairment interferes with Complainant's ability to perform one or more of the essential function of Complainant's position;
3. The Agency was aware of the disability; and
4. The Complainant requested and was denied a reasonable accommodation.

The burden then shifts to the Agency to articulate reasons for denying the accommodation.

1. The Reasonable Accommodation would cause an undue hardship on the Agency based on the Agency's program size, type of operation, nature, and cost of accommodation, and/or
2. The Agency offered an alternative accommodation that would have accommodated the Complainant.



Finally, the burden shifts back to Complainant to prove that the LNDR is pretext for discrimination. To do so, the Complainant must establish the Agency's reasons are insufficient to establish undue hardship, the Agency's offered accommodation would not have accommodated the Complainant, or the Agency failed to engage in the interactive process.



Practice Point: The Agency is required to provide an effective accommodation, not necessarily the specific accommodation sought by an employee. However, even if the Complainant does not receive a reasonable accommodation, the Agency must engage in the interactive process in good faith.



Practice Point: When an employee is unable to perform the essential functions of their position with or without an accommodation, due to a disability, the Agency may be required to accommodate the employee through an Accommodation of Last Resort. If there is a vacant funded position within the Agency that the employee is qualified to perform, at the same or a lower grade, they can be noncompetitively reassigned to a position within the same commuting area unless it would pose an undue burden on the Agency. An employee should be proactive by providing an updated resume with all applicable job skills and actively looking for potential positions.



Demonstrative Cases:

Sabbers v. General Services Administration, EEOC Appeal No. 0120063209 (July 24, 2008): If an employee makes a statement contrary to the restrictions on an employee's reasonable accommodation, an employer has a right to request updated medical information.

Doria R. v. National Science Foundation, EEOC Appeal No. 0120152916 (Nov. 9, 2017): The Agency’s 10-month delay in providing Complainant additional telework was unlawful when the delay was caused by the Agency’s unjustified request for additional medical documentation and the complainant did not contribute to the delay.

Julius C. v. Department of the Air Force, EEOC Appeal No. 0120151295 (June 16, 2017): The Agency improperly denied an employee a reasonable accommodation when his supervisor rejected his request to be reassigned away from the building that was causing him to develop dermatitis. An agency's offered accommodations are not effective when they require an employee to regularly enter the place that he alleged caused his allergic dermatitis rashes.

Fonda M. v. Department of Treasury, EEOC Appeal No. 0120152809 (Oct. 17, 2017): The Agency determined that reducing Complainant’s workload to 18-22 cases would not be reasonable as it would remove an essential function of her position. The Agency offered an accommodation consisting of a 27-case workload and software. Complainant did not show that the offered accommodation was not effective.



For more information, consult **AFGE’s Guide to Defending the Rights of People with Disabilities**.

V. Retaliation

The term retaliation and reprisal are interchangeable. In order to prove a *prima facie* case of retaliation, the Complainant must show that:

1. The Complainant previously engaged in protected EEO activity, such as
 - a. Making a formal or informal complaint of discrimination;
 - b. Participating in the EEO process (i.e. complainant, witness, representative, etc.);
 - c. Requesting a reasonable accommodation; or
 - d. Opposing discrimination.
2. The Responsible Management Official (“RMO”) was aware of the protected EEO activity;
3. Adverse treatment occurred that would likely deter a reasonable person from engaging in EEO activity; and

4. The adverse treatment followed the manager's knowledge of the protected EEO activity within such a short period of time (temporal proximity) such that a retaliatory motive can be inferred.

The burden then shifts to the Agency to articulate a Legitimate Non-Discriminatory Reason ("LNDR") for the adverse treatment.

Finally, the burden shifts back to Complainant to prove that the LNDR is pretext for discrimination. To do so, the Complainant must show:

1. The Agency's LNDR is unworthy of belief because, for example, the action is not supported by evidence and/or is inaccurate and/or the Agency action is inconsistent with other instances; and
2. The true reason for the discrimination was because of the Complainant's protected activity.

Most retaliation cases rely on a timeline to allow the Administrative Judge to draw an inference of retaliation. The less time elapsed between the RMO's knowledge of the Complainant's protected activity and the date of the adverse action, the stronger the inference of retaliation.

Retaliation is not just employment-related retaliatory actions. It is also any employer conduct that is materially adverse and that might dissuade a reasonable employee from making or supporting a charge of discrimination against the employer. This is referred to as a "chilling effect."



Demonstrative Cases:

Burlington Northern v. White, 548 U.S. 53 (2006): An employer was found liable for retaliation when 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 because it may have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Thompson v. North American Stainless, 562 U.S. 170 (2011): An employee can be harmed by retaliation even if they had no involvement with the claim so long as they fell within the "zone of interest" sought to be protected by the party with EEO activity.

Jackson v. Department of Army, EEOC Appeal No. 0120070289 (May 18, 2007): It was sufficient to raise a claim of retaliation when an EEO Counselor said that Complainant had already filed too many complaints and that she could not file another.

Ivan V. v. Department of Veterans Affairs, EEOC No. 0120141416 (June 9, 2016): A supervisor engaged in retaliation when he asked the Complainant if he planned to “play the Latino card” while investigating a complaint from another employee. The Commission found that the comments made to the Complainant could have a chilling effect on the EEO process because they would make it less likely that other employees would feel comfortable availing themselves of the EEO process. Thus, the comments constituted a violation of the anti-retaliation provisions of Title VII.

Henderson v. U.S. Postal Service, EEOC Appeal No. 0120083298 (Dec. 10, 2008): Complainant was subject 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.

Henry L. v. Department of the Army, EEOC Appeal No. 0120172820 (Feb. 25, 2019): Complainant, a lead physical evaluation board liaison officer for the Army, was subject to retaliatory harassment for his participation as a witness in a coworker's EEO complaint. In retaliation for serving as a witness in the coworker's complaint, Management allowed a subordinate employee to act in an ongoing rude, disrespectful, and bullying manner toward the complainant, claiming in front of other staff that complainant was not his supervisor, and that complainant did not know what he was doing, which undermined his authority as a lead with other staff. Further, complainant's supervisor often responded to the complainant in an angry or aggressive manner. The EEOC found that the supervisor harbored retaliatory animus based on the supervisor's statement that he believed the complainant previously had "collaborated" with "false accusers."



Practice Point: Cat's paw discrimination occurs when a manager uses another employee to carry out a discriminatory agenda. The name reportedly comes from a 16th century tale in which a monkey tricks a cat into pulling chestnuts out of the fire to avoid burning its own paws. Similar to the monkey in the story, a manager with a discriminatory intent will sometimes dupe an unsuspecting decision-maker into taking an action that leads to negative consequences for the employee who is targeted by the manager for discriminatory reasons.



For a pocket-sized guide, consult **AFGE's How to Prove Discrimination**.

REMEDIES/DAMAGES

Damages are awarded in order to return the Complainant to the position they would have been in had the illegal discrimination not occurred. Complainant's may seek relief in the form of an award from the Administrative Judge and/or settlement.

The following are types of damages that can be awarded to complainants if they are successful on their claims. Not all claims 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.

There are two common methods to prove Complainant's damages: witness testimony and documents/exhibits. This evidence is shown by:

- Questioning witnesses such as the individual complainant, their 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 their colleagues to show that the Complainant's career was damaged by the Agency's discrimination.

Damages are divided into monetary relief and non-monetary relief.

I. Monetary Relief

A. Back Pay

What is 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. In other words, the purpose of back pay is to financially restore the Complainant to the position they would have been in absent the discrimination. Awards of back pay are permitted under 29 C.F.R. § 1614.501(b)-(c).

Back pay may be appropriate in cases of non-selections, denial of a within-grade increases, suspension, demotion, and termination (removal). Back pay may also include overtime pay to complainants who are able to prove that had the Agency's discriminatory conduct not occurred,

they would have been eligible to receive overtime. Additionally, the Complainant is entitled to other benefits associated with back pay (e.g., step increases, contributions to retirement accounts) they would have earned had the discriminatory conduct not occurred. The Agency is also entitled to make deductions to the back pay award to cover any debts to the Agency or union dues.

How is back pay calculated?

Back pay must include the pay, allowances and differentials the Complainant would have received if the discrimination at issue had not occurred. 5 C.F.R. § 550.805 (a)(2). Back pay includes all forms of compensation and reflects fluctuations in working time, overtime rates, penalty overtime, Sunday premium and night work, changing rates of pay, transfers, promotions, and privileges of employment. The Commission construes "benefits" broadly to include annual leave, sick leave, health insurance, and retirement contributions. See MD-110, Chapter 11.

When determining the proper amount for a back pay award, the Agency must use the average hours worked by employees in the same position and the same pay grade. A complainant may request that interest be added to any back pay calculation. The average hour calculation should include the average overtime and holiday hours worked by such employees. However, interest on an award of back pay is not available as a remedy in cases under the Age Discrimination in Employment Act. *Carroll v. Department of the Air Force*, EEOC No. 0720060064 (Feb. 29, 2008).

A complainant has a duty to mitigate their back pay damages. For example, a complainant must attempt to obtain other employment after being fired or any back pay award may be reduced for lack of a good faith effort to minimize damages. Absent a good faith effort to minimize damages, a back pay award may be reduced. A good faith effort may be illustrated by preserving applications the Complainant has submitted for other positions if the Complainant was terminated by the Agency.



Demonstrative Case: *Gervais v. Department of Veterans Affairs*, EEOC No. 0720070063 (Dec. 15, 2009): Because the Complainant was subjected to sex discrimination under both the Equal Pay Act and Title VII, he was entitled to back pay, but not under both laws. Instead, the Complainant was entitled to the "highest benefit" either statute provides.

Isabelle G. v. Department of Justice, Petition No. 0420170026, EEOC No. 0120130362 (Dec. 8, 2017): Finding, on a Petition for Enforcement, that Complainant was not awarded the appropriate amount of back pay because, *inter alia*, the Agency wrongfully deducted Complainant's unemployment compensation from her back pay award, and

complainant should have been compensated for the extra tax she was required to pay as a result of receiving a lump sum award.

Rodriguez v. Department of Energy, EEOC No. 0120101138 (July 14, 2011): Because the agency paid Complainant a lump sum for backpay but failed to provide the complainant with documentation as to how it calculated his back pay award, the EEOC remanded the issue of back pay to the agency, directing it to supplement the record with a narrative explanation of how the back pay was calculated and send a copy of the explanation to the complainant.

B. Lost Wage-Earning Capacity

Lost earning capacity represents a loss in Complainant's future earning power. Under Title VII, awards for loss of future earning capacity are subject to the statutory cap for compensatory damages.

C. 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 awarded for the work done by a complainant's non-attorney representative. No attorney's fees are awarded for cases alleging only age discrimination under the ADEA.

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 C.F.R. § 1614.501(e), the EEOC Administrative Judge reviews the submission and issues an award.

D. Compensatory Damages

Compensatory damages became a remedy for complainants with the passage of the Civil Rights Act of 1991. Under Title VII and the Rehabilitation Act, compensatory damages are awarded when there is a finding of intentional discrimination on the part of the Agency. The maximum amount of compensatory damages that may be awarded to a federal complainant before the EEOC is \$300,000. 42 U.S.C. § 1981a(b)(3)(D). Compensatory damages may be recovered by federal employees at the administrative level and in district court. Compensatory damages are not meant to punish the Agency for its discriminatory or harassing conduct, but are awarded in an effort to make the Complainant whole again. In other words, compensatory damages, as the name suggests, are meant to compensate the Complainant for out-of-pocket expenses and pain and suffering caused by the discrimination.

The burden of proof is on the Complainant to show the claimed injuries are caused by the Agency's discrimination. Complainant must submit adequate documentation showing the causal connection between the Agency's discrimination and the harm suffered by the Complainant. Complainant must provide objective evidence of pecuniary (or monetary) losses (i.e., billing statements, invoices, receipts, etc.).

An award of compensatory damages may be increased based on inflation. When determining an award for compensatory damages, the AJ can consider the present-day value of previous comparable awards in similar cases. To calculate inflation, the EEOC does not require agencies to use the Consumer Price Index ("CPI"); however, the CPI may assist with calculating a present-day award that is comparable to an award issued in a past case.



Demonstrative Case: *Lara G. v. U.S. Postal Service*, EEOC No. 0520130618 (June 9, 2017): Complainant was awarded \$100,000 in non-pecuniary damages by an EEOC AJ. On appeal, Complainant asserted that her award for non-pecuniary losses was too low. Complainant's injuries were comparable to a Complainant that was awarded \$95,000 in September 2003. In light of the "nearly six-year interval" between the comparable award and the Complainant's award, the EEOC found it appropriate to award the Complainant \$110,000 in non-pecuniary damages.



Practice Point: Complainant's harm is calculated based on the year(s) she experienced the discrimination, not the year the judge issues his decision.

Types of Compensatory Damages

There are two types of compensatory damages: pecuniary and non-pecuniary losses. Pecuniary losses are monetary or economic losses. Conversely, non-pecuniary losses are commonly referred to as non-monetary or non-economic losses.

a. Pecuniary Damages (Monetary or Economic)

Pecuniary damages are 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 by the discriminatory conduct.

The Complainant has the burden of proving a causal connection between the out-of-pocket harm and the discriminatory conduct taken by the Agency. In the absence of evidence proving the causal connection, the Complainant is not entitled to compensatory damages, even if there is a finding of unlawful discrimination.



i. Past Pecuniary Damages

Past pecuniary damages are reimbursement for out-of-pocket costs the Complainant has already incurred as a result of discrimination. An employee is entitled to reimbursement for those expenses that are caused by the Agency's discriminatory conduct. The amount to be awarded for past pecuniary losses can be determined by receipts, records, bills, cancelled checks, confirmation by other individuals, or other proof of actual losses and expenses. Damages for past pecuniary losses will not normally be awarded without documentation.

Past pecuniary losses are fully compensable if proven as they are *not* subject to the \$300,000 compensatory damages limitation.



Demonstrative Case: *Sainz v. Department of the Treasury*, EEOC No. 0720030103 (Sept. 19, 2008): The Complainant was not entitled to \$32,000 in pecuniary damages for the gun and coin collections he allegedly sold to support himself because he did not present documentary evidence regarding these losses.

ii. Future Pecuniary Damages

Future pecuniary damages are out-of-pocket expenses Complainant will incur after conciliation, settlement, or the conclusion of litigation. Typically, future pecuniary damages are awarded for future medical treatment. In such cases, Complainant must produce medical documentation showing the need for future treatment as evidence of harm. The medical documentation must be reasonably specific about the need for the treatment, the course of treatment, and its anticipated duration.

Future pecuniary losses are subject to the \$300,000 cap on compensatory damages.

b. Non-pecuniary Damages (Non-monetary or Non-economic)

Non-pecuniary 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.

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. Non-pecuniary damages are only awarded when there is sufficient evidence of a causal connection between the Agency's actions and the Complainant's injury. Non-pecuniary damages 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. Complainant's must prove the existence, nature, and severity of any alleged emotional harm.

Emotional harm may manifest itself as or through:

- Sleeplessness
- Anxiety
- Stress
- Depression
- Marital strain
- Humiliation
- Emotional distress
- Loss of self-esteem
- Excessive fatigue
- Nightmares
- Damaged social relationships
- Diminished pleasure in activities,
- Loss of consortium
- Less confidence on the job
- Concern for job or physical safety
- A nervous breakdown
- Any other mental and/or physical manifestation that can be directly attributed to the stress of the discrimination

Physical manifestations of emotional harm may consist of:

- Ulcers
- Gastrointestinal disorders
- Digestive issues
- Aggravation or exacerbation of pre-existing conditions
- Hair loss
- Headaches
- Any other physical manifestation that can be directly attributed to the stress of the discrimination

1. When Are Compensatory Damages NOT Awarded?

a. Cases of Unintentional Discrimination (Disparate Impact)

There are limitations on the availability of compensatory damages as they are only awarded in cases of intentional discrimination. As such, compensatory damages are not awarded in cases where the theory of discrimination is Disparate Impact.

b. Claims Where Age is the Only Basis for the Discrimination (under the ADEA)

Most notably, compensatory damages are not available to complainants who prevail in a claim of discrimination only on the basis of their age. However, a complainant is entitled to compensatory damages if Complainant prevailed in a claim of discrimination based on age and another protected class. In this instance, Complainant can only recover compensatory damages for the claims or events that were not based on age.



Demonstrative Case: *Schmidt v. U.S. Postal Service*, EEOC No. 0720080030 (June 8, 2008): The Complainant was subjected to a hostile work environment on the bases of her sex and age, allowing the claims to be brought under both Title VII and the Age Discrimination in Employment Act (ADEA). The EEOC rejected the Agency's argument that her compensatory damages should be reduced because she prevailed partially under the ADEA, which does not provide for compensatory damages. It found the record supported claims under the ADEA and Title VII independently.

c. Breach of a Settlement Agreement

Compensatory damages are not available as a remedy for breach of a settlement agreement. *LaKennedy Moore v. U.S. Postal Service*, EEOC No. 01992320 (Dec. 22, 1999).

d. Injuries Resulting from EEO process

Compensatory damages are *not* recoverable for injuries resulting from litigation in the EEO process. *Cher B. v. Department of Veterans Affairs*, EEOC No. 0120140445 (Jan. 9, 2017).

e. Pre-existing Conditions

The Agency is not liable for any pre-existing condition; however, the Agency can be held liable for the exacerbation of the pre-existing condition. The exacerbated harm must still have a causal connection to the Agency's discriminatory actions for Complainant to be awarded compensatory damages.

Conversely, if a complainant's condition would have worsened even in the absence of discrimination, Complainant cannot recover compensatory damages. In this case, the Agency has the burden of proof in establishing the reduction.



Demonstrative Case: *Janel B. v. Department of Justice, Executive Office of the U.S. Attorneys*, EEOC No. 0120132683 (Nov. 4, 2015): The Commission found the Agency appropriately reduced Complainant’s award by 50 percent when awarding pecuniary damages. Despite the daily harassment Complainant suffered for nearly two years, the Commission asserted that she suffered from a number of medical conditions that were not caused by the harassment.

f. Good Faith Effort to Accommodate (Disability)

While compensatory damages are available in cases of failure to accommodate a disability, an agency can avoid liability if it can show it made a good faith effort to accommodate the Complainant by engaging in the interactive process, even if that effort failed.



Demonstrative Case: *Guilbeaux v. U.S. Postal Service*, EEOC No. 0720050094 (Aug. 6, 2008): The Agency discriminated against the Complainant on the basis of her disability when it failed to provide her with the light-duty assignment she requested. However, it was not liable for compensatory damages because it made a good-faith effort to accommodate the Complainant by exploring other possible assignments, which eventually led to an assignment she accepted.

g. 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.

2. Punitive Damages

Punitive damages are designed to punish the employer and make it an example for others, where it can be shown that the employer intentionally discriminated with malice or reckless indifference. However, punitive damages are **not** available to government employees. 42 USC Section 1981a(b)(1).

3. Front Pay

Front pay is compensation to make up for the lost pay and benefits that the employee would have earned in the future absent the discrimination. Front pay is not subject to the \$300,000 cap because it is not considered a form of compensatory damages. Front pay is rarely awarded in the federal sector.

Front pay may be awarded in lieu of reinstatement under three circumstances where:

1. No position is available; making reinstatement impossible;
2. A working relationship between the parties would be antagonistic; or
3. The employer has a record of long-term resistance to antidiscrimination efforts. *Joseph B. v. Dept. of Veterans Affairs*, EEOC Appeal No. 0120180746 (Aug. 14, 2018). In *Joseph B.* the EEOC found that complainant was entitled to front pay, even though

reinstatement was possible because the working relationship at complainant's Agency had become so antagonistic as to be untenable. Thus, the AJ concluded that the working relationship had basically been ruined to the point that it could not be repaired and did not order that the complainant be reinstated. The AJ found that a reasonable employee in Complainant's situation would have quit because of the harassment and retaliation he experienced. Thus, complainant was to be awarded front pay going forward until he reached the age of 65 even though reinstatement was possible.

II. Non-monetary Relief

A. Hiring and Reinstatement

Pursuant to 29 C.F.R. § 1614.501(b)(1), where an employee has been discriminated against, the Agency shall offer the Complainant the position they would have occupied absent the Agency's discriminatory conduct or a substantially equivalent position. A substantially equivalent position is one in which the Complainant will have similar responsibilities and duties at the same facility/location where they applied. The burden of proof shifts to the Agency to prove the substantial equivalency.

A reinstated employee must be treated as if they were never terminated. That is to say, the Agency should not subject the reinstated employee to practices or procedures that are necessary for new hires, such as placing the employee back on probation.

A Complainant is not entitled to reinstatement if the Agency can demonstrate that the position has been eliminated and all employees that held the same position are no longer with the Agency. Additionally, the order of relief does not require the Agency to create a position or place Complainant in a better position than he would have been absent the discrimination. However, if the position was eliminated and other employees with Complainant's position were transferred, then Complainant is entitled to resume work in a position similar to their coworkers prior to the elimination of Complainant's previous position.

B. Promotion

Complainant may request a promotion in cases of non-selection.

C. Transfer

Complainant may request to be transferred to a new department to work under a different manager or away from the harasser and/or transfer facilities entirely. Complainant may also request to move to a different position.

D. Reasonable Accommodation

Complainant may request a reasonable accommodation on the bases of disability and/or religion, if applicable.

E. Restoration of Leave

Complainant may request restoration of annual and/or sick leave taken as a result of the discriminatory action(s).

F. Removal of disciplinary records and all references thereto

Complainant may request to have all references of the disciplinary action removed from all formal and/or informal personnel files or records.

G. Corrective or preventive measures

Complainant may request corrective or preventive measures in an effort to:

1. Minimize chance of reoccurrence; or
2. Discontinue practice.

The most common form of this type of request is training for managers and other coworkers to be conducted by a third party.

H. Post notices advising employees of their EEO rights

Pursuant to 29 C.F.R. § 1614.102(b)(7) the Agency is required to publicize to all employees and post at all times the names, business telephone numbers, and business addresses of the EEO Counselors, 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 so employees may be advised of their rights under EEOC laws.

Constructive knowledge of EEO processing and time limits (particularly for reporting discrimination or initiating EEO contact) will be imputed to the employee when an employer has fulfilled its posting obligations. *Oquendo v. U.S. Postal Service*, EEOC No. 0120093645 (Feb. 17, 2010).

I. Post notices addressing the violations

The Agency may be required to post notices informing other employees that an EEO violation has occurred at the facility; however, such notice shall contain no private or confidential information regarding the Complainant.

J. Temporary Forms of Relief

Complainant's may seek two forms of temporary relief that are meant to either stop the Agency from acting (Injunctive Relief) or relieve the complainant (Interim Relief).

1. 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.

2. Interim Relief

Interim relief is meant to benefit both the Agency and the Complainant by limiting the waste of human and financial resources during a petition for review. Interim relief is not granted to make the Complainant whole, but rather to protect the Complainant from hardship during the pendency of the case. Interim relief is available where the Agency appeals the decision of an Administrative Judge or files a Request for Reconsideration.

In cases of removal or separation from the job (e.g., due to suspension), the Agency must reinstate the Complainant (as ordered by the AJ); however, the Agency must also inform the Complainant that such reinstatement is temporary and conditional on the final disposition of the case.

An agency may decline to return a complainant to their place of employment if it determines that the return or presence of the Complainant will be unduly disruptive to the work environment. However, the Agency must provide prospective pay and benefits as interim relief during the period pending the outcome of the petition for review. 29 C.F.R. § 1614.505(a)(5).

III. Settlement and Offers of Resolution

A. Settlement

A **settlement** is a compromise between parties, which resolves one or multiple cases. Generally, an Acknowledgment and Order requires the parties to engage in settlement discussions before the hearing. Under the EEOC's Pilot Program, an Order Scheduling Initial Conference will require the parties to begin settlement discussions prior to the initial conference. A complainant must make a good faith effort to resolve the complaint and check the Order for any specific instructions regarding settlement discussions.



A sample settlement agreement is available in **Appendix C**.

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 non-compliance 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").

Pursuant to 29 C.F.R. 1614.504(c), allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints under 29 C.F.R. §§ 1614.106 or 1614.204 as appropriate.



Older Workers Benefit Protection Act

In settling claims of age discrimination, agencies must abide by the provisions of the Older Workers Benefit Protection Act ("OWBPA"). OWBPA requires a waiver for all complainants aged 40 or older. The waiver must:

1. Be written in a clear, understandable manner;
2. Specifically refer to rights or claims under the ADEA;
3. Not waive rights or claims that might arise after execution of the waiver;
4. Provide valuable consideration in exchange for the waiver;
5. Advise the Complainant to seek the advice of legal counsel before signing; and
6. Provide a reasonable period of time to consider the agreement.

29 C.F.R. § 1625.22.

All releases or settlement agreements involving complainants 40 years of age or older should comply with OWBPA. *Hester S. v. Equal Employment Opportunity Commission*, EEOC No. 0120121983 (Oct. 24, 2016).



A sample settlement agreement is available in **Appendix C**.

B. 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, as provided by 29 C.F.R. § 1614.109(c). For an offer of resolution to be effective it must include attorney's fees and costs and any non-monetary relief, if applicable. With regard to monetary relief, the Agency may make a lump sum payment covering all forms of monetary liability. Where a complainant fails to accept an offer of resolution, an agency may make another offers of resolution and either party may seek to negotiate a settlement of the complaint at any time.

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 attorney's 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 XIII.



DC Office of Human Rights (“OHR”)¹

The DC Office of Human Rights (“OHR”) is another forum that AFGE employees living, visiting or working in the District of Columbia may employ to secure their rights. You do not have to be a District of Columbia resident, but the alleged discrimination must have taken place in the District of Columbia.

The DC Office of Human Rights enforces the DC Human Rights Act, which makes discrimination illegal based on 21 protected traits. The DC Human Rights Act prohibits discrimination in housing, employment, public accommodations and educational institutions as explained below.

Protected Traits for Housing, Employment, Public Accommodations and Educational Institutions include:

1. Race: classification or association based on a person’s ancestry or ethnicity.
2. Color: skin pigmentation or complexion.
3. Religion: a belief system which may or may not include spirituality.
4. National origin: the country or area where one’s ancestors are from.
5. Sex: a person’s gender; includes sexual harassment and a woman’s right to breastfeed.
6. Age: 18 years or older.
7. Marital status: married (same-sex or opposite-sex), single, in a domestic partnership, divorced, separated, and widowed.
8. Personal appearance: your outward appearance, subject to business requirements or standards.
9. Sexual orientation: homosexuality, heterosexuality, and bisexuality.

¹ Title III of the DCHRA permits the Commission to promulgate procedural regulations, D.C. CODE § 2-1403.01(c), which are set forth at D.C.MUN. REGS. tit. 4, §§ 400-499. More information can be found on the DC OHR website, <https://ohr.dc.gov/complaints/process>.

10. Gender identity or expression: your gender-related identity, appearance, expression or behavior which is different from what you are assigned at birth.
11. Family responsibilities: supporting a person in a dependent relationship, which includes, but is not limited to, your children, grandchildren and parents.
12. Political affiliation: belonging to or supporting a political party.
13. Disability: a physical or mental impairment substantially limiting one or more major life activities (includes HIV/AIDS).

Additional Traits Applicable to Some Areas include:

14. Matriculation (applies to housing, employment and public accommodations): being enrolled in a college, university or some type of secondary school.
15. Familial Status (applies to housing, public accommodations and educational institutions): a parent or guardian with children under 18.
16. Source of Income (applies to housing, public accommodations and educational institutions): origination of a person's finances.
17. Genetic information (applies to employment and public accommodations): Your DNA or family history which may provide information as to a person's predisposition or likely to come down with a disease or illness.
18. Place of Residence or Business (applies to housing and public accommodations): geographical location of home or work.
19. Status as a Victim of an Intrafamily Offense (applies to housing): a person who was subjected to domestic violence, sexual assault and stalking.
20. Credit Information (applies to employment): any written, verbal or other communication of information bearing on an employee's creditworthiness, credit standing, credit capacity or credit history.
21. Status as a Victim or Family Member of a Victim of Domestic Violence, a Sexual Offense, or Stalking* (applies to employment): a person or family member of a person who has experienced domestic violence, a sexual offense, or stalking.

DC Office of Human Rights (“OHR”) Complaint Process

A. Allegations of employment discrimination claims against the DC government must be reported to a certified EEO Counselor:

Before filing an employment discrimination claim against the District at the Office of Human Rights, the complainant must first attempt to resolve the claim by reporting it to a certified EEO Counselor within 180 days of the alleged discriminatory conduct or discovery thereof, unless the District Government employee is alleging unlawful discrimination based on sexual harassment. EEO counseling is not required for claims regarding sexual harassment; individuals may file those claims directly with OHR.

B. Receive an Exit Letter:

Once the complainant has participated in the EEO counseling process, and if efforts to informally resolve the complaint fail, the Counselor will issue, within 30 days of contacting the counselor, an Exit Letter, a copy of which the complainant must bring to OHR when filing the initial complaint (intake questionnaire).²

C. Submit an Intake Questionnaire:

The employee must then submit the intake questionnaire to OHR within 15 days of the date of the exit letter. OHR only has jurisdiction over claims where complainants have complied with the EEO Counseling process. OHR will accept proof of attempt(s) to obtain the exit letter if the EEO Counselor has not issued the Exit Letter within 30 days of the initial interview.³

² Sexual harassment and DC FMLA complaints do not require an Exit Letter or consultation with an EEO Counselor. If a complainant has multiple claims, any claim other than the sexual harassment or DCFMLA claims must still go through EEO Counseling. For example, if a complainant has a sexual harassment claim and a race discrimination claim, the race discrimination claim must be reported to a certified EEO Counselor for resolution before it can be brought to OHR, unless the claim is based on the same facts as the sexual harassment claim and involves the same supervisor. Notwithstanding, OHR shall make decisions on a case-by-case basis consistent with its authority.

³ All District Government services are required to assess the need for and offer foreign language services, as well as provide written translation of relevant documents. OHR coordinates and monitors District Government agencies and departments under the Language Access Act of 2004. D.C. CODE § 2–1931.

The questionnaire requires relevant information about the complaint and is available online. Paper copies are also available at the Office of Human Rights.⁴

D. An Intake Interview will be scheduled:

If, based on the information provided in the Complaint Questionnaire, OHR determines it has jurisdiction, the complainant will be scheduled for an “intake interview” Within two to four weeks. In some cases, OHR may conduct a preliminary intake interview by phone with a complainant to gather additional information about a potential complaint.

E. OHR Drafts Charge of Discrimination:

After the intake interview or other contact with the complainant, if OHR finds there is sufficient information to docket a Charge of Discrimination (“Charge”), OHR will draft the Charge and require the complainant to verify and sign the Charge. Once the Charge is signed and notarized, a docket number will be assigned for case processing. Persons filing a complaint do not have to be residents of the District of Columbia and may do so regardless of their immigration status; however, the alleged discrimination must have taken place within the District of Columbia.

F. Notice of Mediation and Mediation:

Approximately 15 days after a Charge of Discrimination is docketed, OHR will schedule the parties for mediation. Mediation is a dispute resolution process to help the parties reach a voluntary settlement, thereby avoiding the need for further litigation. Under the Human Rights Act, mediation is required for all discrimination cases filed at OHR. If the parties reach an agreement during mediation, OHR will close the case. In the event no settlement agreement is reached, OHR will launch a full investigation of the Charge.

G. Full Investigation:

Investigation by OHR begins 90 days after docketing or if mediation fails, whichever occurs first. The purpose of investigation is to determine whether there is probable cause to believe discriminatory conduct may have occurred. During investigation, OHR will request documents, interview witnesses, and, where appropriate, hold a fact-finding conference.

⁴ OHR may also issue a “split finding” determination where OHR finds probable cause to believe that discriminatory conduct may have occurred with respect to some complainants' claims, and no probable cause on others.

H. Probable Cause Determination

Once the investigation is completed, OHR will issue a “Letter of Determination” (LOD) outlining OHR’s findings (either probable cause OR no probable cause).⁵

1. **PROBABLE CAUSE FINDING:** If OHR finds probable cause to believe discriminatory conduct may have occurred on any of complainants’ claims, the parties will be required to undergo “conciliation” to attempt resolution of the matter. If conciliation fails, the parties will proceed to a formal hearing. Prior to conciliation, the respondent may file a Request for Reconsideration of the probable cause finding.
2. **NO PROBABLE CAUSE FINDING:** If OHR determines that there is no probable cause, the following three options are available to the complainant:
 - a. File a Request for Reconsideration of OHR's determination (If the request is denied, the complainant may file a Petition for Review with the D.C. Superior Court);
 - b. File a Substantial Weight Review with the EEOC within 15 days of the letter of determination if the matter involves EEOC subject matter jurisdiction; or
 - c. File a Petition for Review with the D.C. Superior Court.

I. Conciliation:

If OHR determines that there is probable cause, OHR will schedule the parties for mandatory conciliation. If the parties reach an agreement during conciliation, OHR will close the case.

J. Formal Hearing:

If conciliation does not result in a final settlement agreement, the parties will proceed to a formal hearing. In matters against the District of Columbia government, the parties will proceed to a hearing before an independent hearing examiner who will either conduct a hearing or issue a summary determination (a decision without a hearing), after which the Director of the Office of Human Rights will make a final determination. In complaints involving claims under the D.C. Family and Medical Leave Act, the parties will proceed to a hearing (on those claims) before an independent hearing examiner, after which the Director of the Office of Human Rights will make a final determination.

⁵ OHR may also issue a “split finding” determination where OHR finds probable cause to believe that discriminatory conduct may have occurred with respect to some complainants' claims, and no probable cause on others.

K. Appeal:

Either party may appeal an OHR decision to the D.C. Superior Court within 30 days of the final decision.



Practice Point: The D.C. Commission on Human Rights is authorized to recommend entry of a default judgment when the respondent has been duly served notice of a status conference, the pre-hearing conference, or a hearing and has failed to appear in person or through a representative. *See* D.C. MUN. REGS. tit 4, §§ 405.1(g), 427.1.

Practice Point: The DCHRA provides that where an employer unlawfully discriminated against an employee in violation of the DCHRA, the employee is entitled to “[t]he payment of compensatory damages” D.C. CODE § 2-1403.13(a)(1)(D). Compensatory damages may include back pay, D.C. MUN. REGS. tit. 4, § 201.1, and damages for embarrassment, humiliation, indignity, and pain and suffering, *see Doe v. D.C. Comm’n on Human Rights*, 624 A.2d 440, 447 (D.C. 1993); D.C. MUN REGS. tit. 4, § 211.1.

Practice Point: To be entitled to an award of attorney’s fees under the DCHRA, the complainant must prevail. *See* D.C. CODE § 2-1403.13(a)(1)(E). A complainant prevails if he “succeed[s] on any significant issue in litigation which achieves some of the benefit the [complainant] sought in bringing suit.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1993).

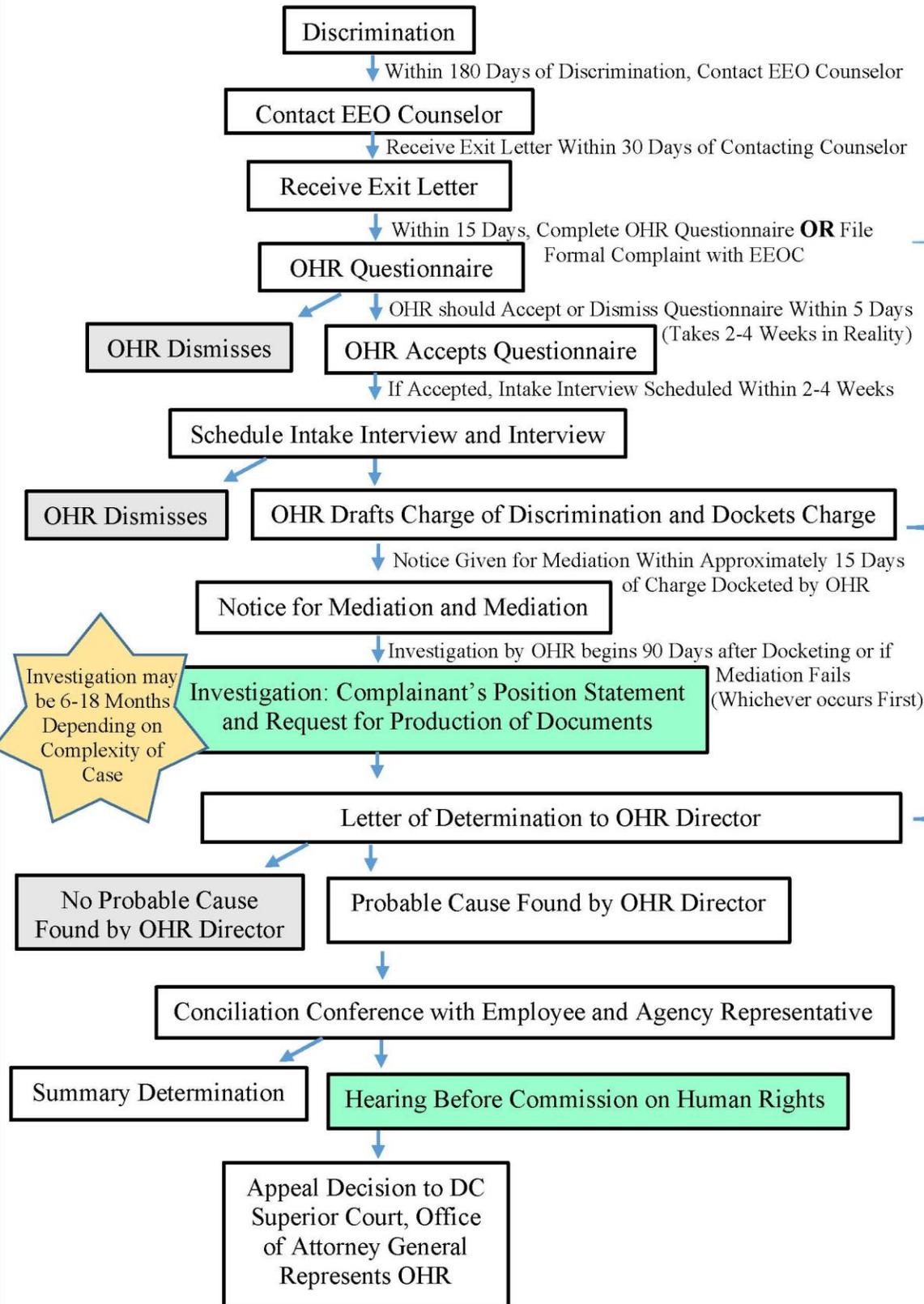


Demonstrative Cases:

Daka, Inc. v. Breiner, 711 A.2d 86, 92 (D.C. 1998): A close reading of D.C. Court of Appeals caselaw can be synthesized so as to suggest that the following four elements are essential to establishing a prima facie case of harassment under the DCHRA: conduct that is (1) severe or pervasive; (2) abusive and hostile; (3) unwelcome; and (4) because of the protected trait.

Peters v. District of Columbia, 873 F. Supp. 2d 158, 189 (D.D.C. 2012): When the comments or actions at issue “expressly focused” on a protected trait or traits, the fourth element of the prima facie case for harassment is satisfied.

OHR Filing Process for DC Government Employees



Intersection with EEOC

Either EEOC (Formal Complaint) **OR** OHR (Questionnaire), **Not Both**

Charge Automatically Cross Filed with EEOC (For Record Keeping Purposes but OHR Processes) Through Work-Sharing Agreement if within 300 Days of Discrimination and Basis is: Disability, Sex, Color, Race, Religion, Age, National Origin, Genetic Information, and/or Reprisal.

If Cross Filed with EEOC, Complainant may Submit a **Request for Substantial Weight Review** to the EEOC Within 15 Days of the Letter of Determination.

What is the Benefit of Cross Filing?

The Complainant can have an Additional Review of OHR's Determination by the EEOC. However, both forums will not otherwise review the complaint. If a complaint was already filed with EEOC, OHR will dismiss the complaint.

*Current employees have 1 year to file a sexual harassment or FMLA complaint and may file directly to OHR. Former employees who left because of alleged sexual harassment have 180 days from time of separation. District employees may go to any Counselor from within or outside his/her agency.

APPENDIX A

29 CFR PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

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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 aggrieved individuals 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 aggrieved individual 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) Aggrieved persons 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 aggrieved person 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 aggrieved person 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 aggrieved persons 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 aggrieved person, the Counselor shall submit a written report within 15 days to the agency

office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. If the matter has not been resolved, the aggrieved person 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 aggrieved person 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 aggrieved person 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 aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, 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 aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual 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 aggrieved individual 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) Definitions. The following definitions apply for purposes of this section:

(1) The term ADA means title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 through 12117), title V of the Americans with Disabilities Act, as amended (42 U.S.C. 12201 through 12213), as it applies to employment, and the regulations of the Equal Employment Opportunity Commission implementing titles I and V of the ADA at part 1630 of this chapter.

(2) The term disability means disability as defined under §1630.2(g) through (l) of this chapter.

(3) The term hiring authority that takes disability into account means a hiring authority that permits an agency to consider disability status during the hiring process, including the hiring authority for individuals with intellectual disabilities, severe physical disabilities, or psychiatric disabilities, as set forth at 5 CFR 213.3102(u); the Veterans' Recruitment Appointment authority, as set forth at 5 CFR part 307; and the 30% or More Disabled Veteran authority, as set forth at 5 CFR 316.302(b)(4), 316.402(b)(4).

(4) The term personal assistance service provider means an employee or independent contractor whose primary job functions include provision of personal assistance services.

(5) The term personal assistance services means assistance with performing activities of daily living that an individual would typically perform if he or she did not have a disability, and that is not otherwise required as a reasonable accommodation, including, for example, assistance with removing and putting on clothing, eating, and using the restroom.

(6) The term Plan means an affirmative action plan for the hiring, placement, and advancement of individuals with disabilities, as required under 29 U.S.C. 791(b).

(7) The term Schedule A hiring authority for persons with certain disabilities means the hiring authority for individuals with intellectual disabilities, severe physical disabilities, or psychiatric disabilities, as set forth at 5 CFR 213.3102(u).

(8) The term Section 501 means section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791).

(9) The term targeted disability means a disability that is designated as a “targeted disability or health condition” on the Office of Personnel Management's Standard Form 256 or that falls under one of the first 12 categories of disability listed in Part A of question 5 of the Equal Employment Opportunity Commission's Demographic Information on Applicants form.

(10) The term undue hardship has the meaning set forth in part 1630 of this chapter.

(b) Nondiscrimination. Federal agencies shall not discriminate on the basis of disability in regard to the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. The standards used to determine whether Section 501 has been violated in a complaint alleging employment discrimination under this part shall be the standards applied under the ADA.

(c) Model employer. The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, advancement, and retention of qualified individuals with disabilities in the federal workforce. Agencies shall also take affirmative action to promote the recruitment, hiring, and advancement of qualified individuals with disabilities, with the goal of eliminating under-representation of individuals with disabilities in the federal workforce.

(d) Affirmative action plan. Pursuant to 29 U.S.C. 791, each agency shall adopt and implement a Plan that provides sufficient assurances, procedures, and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities at all levels of federal employment. An agency fails to satisfy this requirement unless it has adopted and implemented a Plan that meets the following criteria:

(1) Disability hiring and advancement program—(i) Recruitment. The Plan shall require the agency to take specific steps to ensure that a broad range of individuals with disabilities, including individuals with targeted disabilities, will be aware of and be encouraged to apply for job vacancies when eligible. Such steps shall include, at a minimum—

(A) Use of programs and resources that identify job applicants with disabilities, including individuals with targeted disabilities, who are eligible to be appointed under a hiring authority that takes disability into account, consistent with applicable OPM regulations, examples of which could include programs that provide the qualifications necessary for particular positions within the agency to individuals with disabilities, databases of individuals with disabilities who previously applied to the agency but were not hired for the positions they applied for, and training and internship programs that lead directly to employment for individuals with disabilities; and

(B) Establishment and maintenance of contacts (which may include formal agreements) with organizations that specialize in providing assistance to individuals with disabilities, including individuals with targeted disabilities, in securing and maintaining employment, such as American Job Centers, State Vocational Rehabilitation Agencies, the Veterans' Vocational Rehabilitation and Employment Program, Centers for Independent Living, and Employment Network service providers.

(ii) Application process. The Plan shall ensure that the agency has designated sufficient staff to handle any disability-related issues that arise during the application and selection processes, and shall require the agency to provide such individuals with sufficient training, support, and other resources to carry out their responsibilities under this section. Such responsibilities shall include, at a minimum—

(A) Ensuring that disability-related questions from members of the public regarding the agency's application and selection processes are answered promptly and correctly, including questions about reasonable accommodations needed by job applicants during the application and selection processes and questions about how individuals may apply for appointment under hiring authorities that take disability into account;

(B) Processing requests for reasonable accommodations needed by job applicants during the application and placement processes, and ensuring that the agency provides such accommodations when required to do so under the standards set forth in part 1630 of this chapter;

(C) Accepting applications for appointment under hiring authorities that take disability into account, consistent with applicable OPM regulations;

(D) If an individual has applied for appointment to a particular position under a hiring authority that takes disability into account, determining whether the individual is eligible for appointment under such authority, and, if so, forwarding the individual's application to the relevant hiring officials with an explanation of how and when the individual may be appointed, consistent with all applicable laws;

(E) Overseeing any other agency programs designed to increase hiring of individuals with disabilities.

(iii) Advancement program. The Plan shall require the agency to take specific steps to ensure that current employees with disabilities have sufficient opportunities for advancement. Such steps may include, for example—

(A) Efforts to ensure that employees with disabilities are informed of and have opportunities to enroll in relevant training, including management training when eligible;

(B) Development or maintenance of a mentoring program for employees with disabilities; and

(C) Administration of exit interviews that include questions on how the agency could improve the recruitment, hiring, inclusion, and advancement of individuals with disabilities.

(2) Disability anti-harassment policy. The Plan shall require the agency to state specifically in its anti-harassment policy that harassment based on disability is prohibited, and to include in its

training materials examples of the types of conduct that would constitute disability-based harassment.

(3) Reasonable accommodation—(i) Procedures. The Plan shall require the agency to adopt, post on its public Web site, and make available to all job applicants and employees in written and accessible formats, reasonable accommodation procedures that are easy to understand and that, at a minimum—

(A) Explain relevant terms such as “reasonable accommodation,” “disability,” “interactive process,” “qualified,” and “undue hardship,” consistent with applicable statutory and regulatory definitions, using examples where appropriate;

(B) Explain that reassignment to a vacant position for which an employee is qualified, and not just permission to compete for such position, is a reasonable accommodation, and that the agency must consider providing reassignment to a vacant position as a reasonable accommodation when it determines that no other reasonable accommodation will permit an employee with a disability to perform the essential functions of his or her current position;

(C) Notify supervisors and other relevant agency employees how and where they are to conduct searches for available vacancies when considering reassignment as a reasonable accommodation;

(D) Explain that an individual may request a reasonable accommodation orally or in writing at any time, need not fill out any specific form in order for the interactive process to begin, and need not have a particular accommodation in mind before making a request, and that the request may be made to a supervisor or manager in the individual's chain of command, the office designated by the agency to oversee the reasonable accommodation process, any agency employee connected with the application process, or any other individual designated by the agency to accept such requests;

(E) Include any forms the agency uses in connection with a reasonable accommodation request as attachments, and indicate that such forms are available in alternative formats that are accessible to people with disabilities;

(F) Describe the agency's process for determining whether to provide a reasonable accommodation, including the interactive process, and provide contact information for the individual or program office from whom requesters will receive a final decision;

(G) Provide guidance to supervisors on how to recognize requests for reasonable accommodation;

(H) Require that decision makers communicate, early in the interactive process and periodically throughout the process, with individuals who have requested a reasonable accommodation;

- (I) Explain when the agency may require an individual who requests a reasonable accommodation to provide medical information that is sufficient to explain the nature of the individual's disability, his or her need for reasonable accommodation, and how the requested accommodation, if any, will assist the individual to apply for a job, perform the essential functions of a job, or enjoy the benefits and privileges of the workplace;
- (J) Explain the agency's right to request relevant supplemental medical information if the information submitted by the requester is insufficient for the purposes specified in paragraph (d)(3)(i)(I) of this section;
- (K) Explain the agency's right to have medical information reviewed by a medical expert of the agency's choosing at the agency's expense;
- (L) Explain the agency's obligation to keep medical information confidential, in accordance with applicable laws and regulations, and the limited circumstances under which such information may be disclosed;
- (M) Designate the maximum amount of time the agency has, absent extenuating circumstances, to either provide a requested accommodation or deny the request, and explain that the time limit begins to run when the accommodation is first requested;
- (N) Explain that the agency will not be expected to adhere to its usual timelines if an individual's health professional fails to provide needed documentation in a timely manner;
- (O) Explain that, where a particular reasonable accommodation can be provided in less than the maximum amount of time permitted under paragraph (d)(3)(i)(M) of this section, failure to provide the accommodation in a prompt manner may result in a violation of the Rehabilitation Act;
- (P) Provide for expedited processing of requests for reasonable accommodations that are needed sooner than the maximum allowable time frame permitted under paragraph (d)(3)(i)(M) of this section;
- (Q) Explain that, when all the facts and circumstances known to the agency make it reasonably likely that an individual will be entitled to a reasonable accommodation, but the accommodation cannot be provided immediately, the agency shall provide an interim accommodation that allows the individual to perform some or all of the essential functions of his or her job, if it is possible to do so without imposing undue hardship on the agency;
- (R) Inform applicants and employees how they may track the processing of requests for reasonable accommodation;

(S) Explain that, where there is a delay in either processing a request for or providing a reasonable accommodation, the agency must notify the individual of the reason for the delay, including any extenuating circumstances that justify the delay;

(T) Explain that individuals who have been denied reasonable accommodations have the right to file complaints pursuant to 29 CFR 1614.106;

(U) Encourage the use of voluntary informal dispute resolution processes that individuals may use to obtain prompt reconsideration of denied requests for reasonable accommodation;

(V) Provide that the agency shall give the requester a notice consistent with the requirements of paragraph (d)(3)(iii) of this section at the time a request for reasonable accommodation is denied; and

(W) Provide information on how to access additional information regarding reasonable accommodation, including, at a minimum, Commission guidance and technical assistance documents.

(ii) Cost of accommodations. The Plan shall require the agency to take specific steps to ensure that requests for reasonable accommodation are not denied for reasons of cost, and that individuals with disabilities are not excluded from employment due to the anticipated cost of a reasonable accommodation, if the resources available to the agency as a whole, excluding those designated by statute for a specific purpose that does not include reasonable accommodation, would enable it to provide an effective reasonable accommodation without undue hardship. Such steps shall be reasonably designed to, at a minimum—

(A) Ensure that anyone who is authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware that, pursuant to the regulations implementing the undue hardship defense at 29 CFR part 1630, all resources available to the agency as a whole, excluding those designated by statute for a specific purpose that does not include reasonable accommodation, are considered when determining whether a denial of reasonable accommodation based on cost is lawful; and

(B) Ensure that anyone authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware of, and knows how to arrange for the use of, agency resources available to provide the accommodation, including any centralized fund the agency may have for that purpose.

(iii) Notification of basis for denial. The Plan shall require the agency to provide a job applicant or employee who is denied a reasonable accommodation with a written notice at the time of the denial, in an accessible format when requested, that—

(A) Explains the reasons for the denial and notifies the job applicant or employee of any available internal appeal or informal dispute resolution processes;

(B) Informs the job applicant or employee of the right to challenge the denial by filing a complaint of discrimination under this part;

(C) Provides instructions on how to file such a complaint; and

(D) Explains that, pursuant to 29 CFR 1614.105, the right to file a complaint will be lost unless the job applicant or employee initiates contact with an EEO Counselor within 45 days of the denial, regardless of whether the applicant or employee participates in an informal dispute resolution process.

(4) Accessibility of facilities and technology—(i) Notice of rights. The Plan shall require the agency to adopt, post on its public Web site, and make available to all employees in written and accessible formats, a notice that—

(A) Explains their rights under Section 508 of the Rehabilitation Act of 1973, 29 U.S.C. 794d, concerning the accessibility of agency technology, and the Architectural Barriers Act, 42 U.S.C. 4151 through 4157, concerning the accessibility of agency building and facilities;

(B) Provides contact information for an agency employee who is responsible for ensuring the physical accessibility of the agency's facilities under the Architectural Barriers Act of 1968, and an agency employee who is responsible for ensuring that the electronic and information technology purchased, maintained, or used by the agency is readily accessible to, and usable by, individuals with disabilities, as required by Section 508 of the Rehabilitation Act of 1973; and

(C) Provides instructions on how to file complaints alleging violations of the accessibility requirements of the Architectural Barriers Act of 1968 and Section 508 of the Rehabilitation Act of 1973.

(ii) Assistance with filing complaints at other agencies. If an agency's investigation of a complaint filed under Section 508 of the Rehabilitation Act of 1973 or the Architectural Barriers Act of 1968 shows that a different entity is responsible for the alleged violation, the Plan shall require the agency to inform the individual who filed the complaint where he or she may file a complaint against the other entity, if possible.

(5) Personal assistance services allowing employees to participate in the workplace—(i) Obligation to provide personal assistance services. The Plan shall require the agency to provide an employee with, in addition to professional services required as a reasonable accommodation under the standards set forth in part 1630 of this chapter, personal assistance services during work hours and job-related travel if—

(A) The employee requires such services because of a targeted disability;

(B) Provision of such services would, together with any reasonable accommodations required under the standards set forth in part 1630 of this chapter, enable the employee to perform the essential functions of his or her position; and

(C) Provision of such services would not impose undue hardship on the agency.

(ii) Service providers. The Plan shall state that personal assistance services required under paragraph (d)(5)(i) of this section must be performed by a personal assistance service provider. The Plan may permit the agency to require personal assistance service providers to provide personal assistance services to more than one individual. The Plan may also permit the agency to require personal assistance service providers to perform tasks unrelated to personal assistance services, but only to the extent that doing so does not result in failure to provide personal assistance services required under paragraph (d)(5)(i) of this section in a timely manner.

(iii) No adverse action. The Plan shall prohibit the agency from taking adverse actions against job applicants or employees based on their need for, or perceived need for, personal assistance services.

(iv) Selection of personal assistance service providers. The Plan shall require the agency, when selecting someone who will provide personal assistance services to a single individual, to give primary consideration to the individual's preferences to the extent permitted by law.

(v) Written procedures. The Plan shall require the agency to adopt, post on its public Web site, and make available to all job applicants and employees in written and accessible formats, procedures for processing requests for personal assistance services. An agency may satisfy this requirement by stating, in the procedures required under paragraph (d)(3)(i) of this section, that the process for requesting personal assistance services, the process for determining whether such services are required, and the agency's right to deny such requests when provision of the services would pose an undue hardship, are the same as for reasonable accommodations.

(6) Utilization analysis—(i) Current utilization. The Plan shall require the agency to perform a workforce analysis annually to determine the percentage of its employees at each grade and salary level who have disabilities, and the percentage of its employees at each grade and salary level who have targeted disabilities.

(ii) Source of data. For purposes of the analysis required under paragraph (d)(6)(i) of this section, an employee may be classified as an individual with a disability or an individual with a targeted disability on the basis of—

(A) The individual's self-identification as an individual with a disability or an individual with a targeted disability on a form, including but not limited to the Office of Personnel Management's

Standard Form 256, which states that the information collected will be kept confidential and used only for statistical purposes, and that completion of the form is voluntary;

(B) Records relating to the individual's appointment under a hiring authority that takes disability into account, if applicable; and

(C) Records relating to the individual's requests for reasonable accommodation, if any.

(iii) Data accuracy. The Plan shall require the agency to take steps to ensure that data collected pursuant to paragraph (d)(6)(i) of this section are accurate.

(7) Goals—(i) Adoption. The Plan shall commit the agency to the goal of ensuring that—

(A) No less than 12% of employees at the GS-11 level and above, together with employees who are not paid under the General Schedule but who have salaries equal to or greater than employees at the GS-11, step 1 level in the Washington, DC locality, are individuals with disabilities;

(B) No less than 12% of employees at the GS-10 level and below, together with employees who are not paid under the General Schedule but who have salaries less than employees at the GS-11, step 1 level in the Washington, DC locality, are individuals with disabilities;

(C) No less than 2% of employees at the GS-11 level and above, together with employees who are not paid under the General Schedule but who have salaries equal to or greater than employees at the GS-11, step 1 level in the Washington, DC locality, are individuals with targeted disabilities; and

(D) No less than 2% of employees at the GS-10 level and below, together with employees who are not paid under the General Schedule but who have salaries less than employees at the GS-11, step 1 level in the Washington, DC locality, are individuals with targeted disabilities.

(ii) Progression toward goals. The Plan shall require the agency to take specific steps that are reasonably designed to gradually increase the number of persons with disabilities or targeted disabilities employed at the agency until it meets the goals established pursuant to paragraph (d)(7)(i) of this section. Examples of such steps include, but are not limited to—

(A) Increased use of hiring authorities that take disability into account to hire or promote individuals with disabilities or targeted disabilities, as applicable;

(B) To the extent permitted by applicable laws, consideration of disability or targeted disability status as a positive factor in hiring, promotion, or assignment decisions;

(C) Disability-related training and education campaigns for all employees in the agency;

(D) Additional outreach or recruitment efforts;

- (E) Increased efforts to hire and retain individuals who require supported employment because of a disability, who have retained the services of a job coach at their own expense or at the expense of a third party, and who may be given permission to use the job coach during work hours as a reasonable accommodation without imposing undue hardship on the agency; and
- (F) Adoption of training, mentoring, or internship programs for individuals with disabilities.
- (8) Recordkeeping. The Plan shall require the agency to keep records that it may use to determine whether it is complying with the nondiscrimination and affirmative action requirements imposed under Section 501, and to make such records available to the Commission upon the Commission's request, including, at a minimum, records of—
- (i) The number of job applications received from individuals with disabilities, and the number of individuals with disabilities who were hired by the agency;
- (ii) The number of job applications received from individuals with targeted disabilities, and the number of individuals with targeted disabilities who were hired by the agency;
- (iii) All rescissions of conditional job offers, demotions, and terminations taken against applicants or employees as a result of medical examinations or inquiries;
- (iv) All agency employees hired under the Schedule A hiring authority for persons with certain disabilities, and each such employee's date of hire, entering grade level, probationary status, and current grade level;
- (v) The number of employees appointed under the Schedule A hiring authority for persons with certain disabilities who have been converted to career or career-conditional appointments in the competitive service, and the number of such employees who were terminated prior to being converted to a career or career-conditional appointment in the competitive service; and
- (vi) Details about each request for reasonable accommodation including, at a minimum—
- (A) The specific reasonable accommodation requested, if any;
- (B) The job (occupational series, grade level, and agency component) sought by the requesting applicant or held by the requesting employee;
- (C) Whether the accommodation was needed to apply for a job, perform the essential functions of a job, or enjoy the benefits and privileges of employment;
- (D) Whether the request was granted (which may include an accommodation different from the one requested) or denied;
- (E) The identity of the deciding official;
- (F) If denied, the basis for such denial; and

(G) The number of days taken to process the request.

(e) Reporting—(1) Submission to the Commission. On an annual basis, each federal agency shall submit to the Commission for approval, at such time and in such manner as the Commission deems appropriate—

(i) A copy of its current Plan;

(ii) The results of the two most recent workforce analyses performed pursuant to paragraph (d)(6) of this section showing the percentage of employees with disabilities and employees with targeted disabilities in each of the designated pay groups;

(iii) The number of individuals appointed to positions within the agency under the Schedule A hiring authority for persons with certain disabilities during the previous year, and the total number of employees whose employment at the agency began by appointment under the Schedule A hiring authority for persons with certain disabilities; and

(iv) A list of changes made to the Plan since the prior submission, if any, and an explanation of why those changes were made.

(2) Availability to the public. Each agency shall make the information submitted to the Commission pursuant to paragraph (e)(1) of this section available to the public by, at a minimum, posting a copy of the submission on its public Web site and providing a means by which members of the public may request copies of the submission in accessible formats.

(f) Commission approval and disapproval—(1) Basis for approval. If the Commission determines that an agency has adopted and implemented a Plan that meets the requirements set forth in paragraph (d) of this section, the Commission shall approve the Plan.

(2) Basis for disapproval. If the Commission determines that an agency has failed to adopt and implement a Plan that meets the requirements set forth in paragraph (d) of this section, the Commission shall disapprove the Plan as required by 29 U.S.C. 791(b). Failure to achieve a goal set forth in paragraph (d)(7)(i) of this section, by itself, is not grounds for disapproval unless the Plan fails to require the agency to take specific steps that are reasonably designed to achieve the goal.

[82 FR 677, Jan. 3, 2017]

§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 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 aggrieved 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 aggrieved 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 aggrieved person 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 be collected using a method permitted under §1614.203(d)(6)(ii) and §1614.203(d)(6)(iii).

(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; 82 FR 681, Jan. 3, 2017]

§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**

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NAME OF COMPLAINANT,)	
)	
Complainant)	
)	
v.)	EEOC Case No.
)	
)	Agency Case No.
AGENCY HEAD,)	
TITLE,)	
AGENCY)	
Agency)	DATE:
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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 the individual 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 a 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 and location at issue)**.

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.
- 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. If the Agency is unable to locate certain information or the information no longer exists, Complainant requests an affidavit from an Information Security Officer providing the information or indicating that the requested information was destroyed.
- H. 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 identify and describe all the EEO training that employees at the **(fill in name where of facility where the discrimination occurred)** were required to undergo during the relevant time period of this case.
7. Please identify and describe all EEO training and/or anti-harassment training that management officials at the **(fill in name where of facility where the discrimination occurred)** were required to undergo during the relevant time period of this case and indicate if and when the alleged discriminating officials have taken the training, when the training was completed and what documentation can verify the training was completed.
8. 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.

9. 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.
10. 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(s) responsible for maintaining the records for the Agency.
11. 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?
12. Please state how the Agency took efforts to preserve documents in this case through a litigation hold or other means, please describe in detail all efforts you undertook towards the preservation of records.
13. If the data was destroyed, please indicate which Agency policy and National Archives Record Act schedule permitted destruction of the data. (Footnote explaining National Archives)
14. Please articulate the clearly defined and controlled conditions in which the Agency Counsel participated in the pre-complaint and investigative stages.

NON-SELECTION QUESTIONS

15. State any and all qualifications necessary for the position of **(fill in the name of the position to which you were not hired)**.
16. 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.
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 their qualifications, as well as identify the individual's protected class as relevant to the instant complaint.
19. Identify all Agency employees who participated in the selection process of the position at issue and what was each individual's role in the selection process.

20. Identify all persons who participated in making the decision not to select the Complainant to the position of **(fill in position at issue)** and the reason each individual gave to not promote Complainant.
21. State the name and position of the individual(s) who made the decision to hire the selectee to the position at issue.
22. Describe the selection process used to make the selection at issue. (For example, was there a selection panel, who convened the panel, was there a referral memo, were there rating and rating sheets, etc.)

PERFORMANCE/SUSPENSION/TERMINATION QUESTIONS

23. Until the date Complainant ceased employment/was demoted at the Agency, identify whether the Complainant was issued a warning, counseling, notice of proposed adverse action, proposed adverse action and/or any other progressive discipline. Please list each action, when it was taken and the names, and position of each responsible management official.
24. Identify who was present when Complainant was suspended/laid off/discharged/demoted and describe in detail any conversation that commenced?
25. Identify individuals who were removed and/or demoted at the Agency under similar circumstances.
26. Does the Agency have policies and/or guidelines relevant **(fill in any policy that you believe has been violated)** and/or the prevention of discrimination based on **(fill in protected bases relevant for this case)**? If yes, please attach copies (i.e. see Document Request No. ____) and state:
 - a. The name of the person(s) responsible for the oversight and administration of the policies and/or guidelines;
 - b. The method, if any, the Agency uses to alert management of these policies and guidelines; and
 - c. The method, if any, the Agency uses to alert employees of these policies and guidelines.

HARASSMENT QUESTIONS

27. Does the Agency have a harassment policy at the location identified in the Complaint?
28. Identify every time that **(fill in name of responsible management official)** was disciplined for harassment or inappropriate conduct, or conduct unbecoming a federal officer, or like/similar violations during that individual's federal employment.
29. Identify every employee **(fill in name of responsible management official)** supervised during the relevant time period. Please include including the (fill in the protected status) relevant to the instant case.

30. Does (**fill in name of responsible management official**) have any authority to hire, fire, promote, transfer, grant leave, and/or issue discipline over Complainant's position?
31. Identify and describe any investigation that the Agency conducted as a result of the Complainant's allegations of harassment pursuant to the Agency's internal Harassment Policies and Procedures. Please identify who conducted the investigation, when was the investigation conducted, who was interviewed, what documents were generated regarding the investigation and when was the investigation completed.
32. For each investigation against (**fill in name or responsible management official**), please identify the individuals interviewed during each investigation, their EEO protected class information relevant to the instant case, and the substance of information provided to the Agency during their interviews.
33. Identify what, if any, steps were taken by the Agency to stop the alleged harassment?

DISABILITY QUESTIONS

34. 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.
35. 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.
36. 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.
37. 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.
38. 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.

39. 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.
40. On what bases did the Agency determine that the Complainant's disability could not be reasonably accommodated?
41. Describe the essential functions of the position of **(fill in the position for which Complainant did not receive appropriate accommodation)**.
42. Identify the individual who is responsible for managing the request for the reasonable accommodation process for the Agency.
43. 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.
44. 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.
45. 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

46. 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.
47. 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/mailed this (fill in) day of (fill in) _____, 20____, to the agency's representative, (fill in name) at (fill in address, fax number, or email address).

(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
XXXX District Office**

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Complainant)	
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v.)	EEOC Case No.
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)	Agency Case No.
AGENCY HEAD,)	
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AGENCY)	
Agency)	DATE:
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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. Provide a copy of all documents the Agency obtained as part of any litigation hold the Agency issued related to the allegations raised in this case.
21. If data was destroyed, please indicate which Agency policy and National Archives Record Act schedule permitted destruction of the data. (Footnote explaining National Archives)
22. 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 fax number).

(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
XXXX District Office**

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NAME OF COMPLAINANT,)	
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Complainant)	
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v.)	EEOC Case No.
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)	Agency Case No.
AGENCY HEAD,)	
TITLE,)	
AGENCY)	
Agency)	DATE:
_____)	

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. Admit that the Agency did not abide by section _____ of the harassment policy.
7. Admit that the Agency did not abide by policy----- when deleting information.
8. Records Retention

9. (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/emailed this (fill in) day of (fill in) _____, 20__, to the agency's representative, (fill in name) at (fill in address, fax number, or email address).

(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
XXXX District Office**

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NAME OF COMPLAINANT,)	
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v.)	EEOC Case No. XXXX XXXX
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**COMPLAINANT'S MOTION TO COMPEL RESPONSE TO REQUESTS FOR
DISCOVERY**

(fill in name)Complainant by and through his undersigned representative (if there is a representative on the case) 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: (choose one from below)

[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 (or Complainant if there is no representative on the case) contacted Agency counsel in a good faith effort to resolve the dispute without intervention from the Administrative Judge. (Choose one from below)

[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,

Complainant (if there is no representative or
Complainant's Representative
(fill in contact information including address, phone
number and email address)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
XXXX District Office**

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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 to Compel and attached order was uploaded to the EEOC Portal/mailed/faxed this (fill in) day of (fill in) _____, 20____, to the agency's representative, (fill in name) at (fill in address, fax number, or email address), and the administrative judge (fill in name) at (fill in address, fax number, or email address).

(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
XXXX District Office**

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**[SAMPLE] COMPLAINANT’S RESPONSES TO AGENCY’S FIRST SET OF
DISCOVERY REQUESTS**

COMES NOW, Complainant [NAME] by and through the undersigned representative and submits the following responses to the Agency’s [DATE] discovery requests.

General Objections:

Complainant makes the following general objections with respect to each and every item of the Agency’s Interrogatories and Requests for Production of Documents. These objections are not waived, even if some objectionable documents are made available to the Agency, nor does Complainant by producing the requested documents, waive objections to his admission into evidence on the grounds of relevance, materiality, or other grounds for objection.

1. Complainant objects to each and every interrogatory and document request as unduly burdensome and oppressive, to the extent that it seeks information and/or the production of materials that have already been made available to the Agency, including without limitation, information and documents the Agency has received as part of the Report of Investigation (ROI).
2. The word usage and sentence structure herein may be that of the representative assisting in preparation of these answers, and thus they do not necessarily purport to be the precise language of the executing party.

3. 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 these answers in the event she obtains additional, better, or different information.
4. Complainant objects to each request to the extent that the inquiry or request is not relevant or necessary to supplement the ROI.
5. Complainant objects to the Agency's requests to the extent that the inquiry or request seeks to require Complainant to provide information not fully known at this time.
6. 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.
7. 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.
8. Without waiving the above objections, Complainant will provide only relevant, non-privileged information currently available, subject only to requirement for supplementation of responses.
9. Many of the Agency's Interrogatories are ambiguous or uncertain. Complainant has responded to such requests to the best of her ability but has not attempted to speculate as to the meaning thereof.
10. 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 these Answers in the event that he obtains additional, better, or different information.
11. Complainant incorporates by reference his General Objections in each of the specific responses set forth below.

Response to Interrogatories

Response to Interrogatory No. 1:

Complainant relies on documents contained in the Report of Investigation (ROI). 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:

Complainant objects to this interrogatory on the basis that it seeks information already contained in the ROI. Notwithstanding this objection, Complainant refers to ROI, Tab X and subparts; Tab Y.

Response to Interrogatory No. 3:

See Response to Interrogatory 2, and ROI at p. ZZ.

Response to Interrogatory No. 4:

See ROI, 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, Complainant refers to ROI, 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 Interrogatory No. 7:

Complainant objects to this interrogatory on the basis that it over broad and unduly burdensome. Notwithstanding this objection, Complainant maintains that the Agency's articulated reasons for the harassment were pretext because (fill in reasons here). *See* ROI at p. ZZ

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 submission several documents that are responsive to the discovery request: (list out dates and titles of documents stamps of e-mails).

Response to Request No. 4:

Complainant objects to this request on the basis that it seeks private medical information. Complainant will produce the requested medical information upon execution of the Stipulated Protective Order submitted with these responses. (See pgs. XX-XX)

Response to Request No. 5:

Complainant objects to this request on the basis that it is repetitious. Notwithstanding this objection, Complainant refers to Response to Request No. 2.

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.)

Objection: Complainant objects to this request for admission on the grounds that it calls for the admission of two facts. Notwithstanding the objection, Complainant denies 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/mailed this (fill in) day of (fill in) _____, 20____, to the agency's representative, (fill in name) at (fill in address, fax number, or email address).

(Fill in name of person who served copy)

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
XXXX District Office**

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Agency)	DATE:
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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 their 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/them 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**

_____ NAME OF COMPLAINANT,)	
)	
Complainant)	
)	
v.)	EEOC Case No.
)	
)	Agency Case No.
AGENCY HEAD,)	
TITLE,)	
AGENCY)	
Agency)	DATE:
_____)	

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)	
)	
v.)	EEOC Case No.
)	
)	Agency Case No.
AGENCY HEAD,)	
TITLE,)	
AGENCY)	
Agency)	DATE:
<hr style="border-top: 1px solid black;"/>)	

DRAFT 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 Complainant's removal and will substitute documentation of a voluntary resignation from the Agency (if applicable).

(8) remove all information from Complainant's 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 after the execution of this Agreement.

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

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 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 style="border-top: 1px solid black;"/>)	
NAME OF COMPLAINANT,)	
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Complainant,)	
)	
v.)	EEOC Case No. XXXX XXXX
)	
)	Agency Case No. XXXX XXXX
AGENCY HEAD,)	
TITLE,)	
AGENCY,)	
Agency.)	DATE: XXXX
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MOTION FOR IMPOSITION OF SANCTIONS

(fill in name), Complainant, (if representative, indicate through their representative, fill in representative name), hereby moves the EEOC to impose sanctions for the Agency’s failure (to provide/produce an impartial) Report of Investigation. 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 (provide/produce an impartial) Report of Investigation 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).

5. EEOC Regulation 29 C.F.R. § 1614.108(b) requires, *inter alia*, that the Agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the complaint. The Commission has noted that one purpose of an investigation is to gather facts upon which a reasonable fact finder may draw conclusions as to whether a violation of the discrimination statutes has occurred. *See* EEOC Management Directive 110 (“MD-110”) at Ch. 6, § IV.B. An investigation must include “a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the Complainant’s group as compared with the treatment of similarly situated employees . . . and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.” *Id.* at § IV.C. (emphasis added). Also, an investigator must identify and obtain “all relevant evidence from all sources regardless of how it may affect the outcome.” MD-110, Ch. 6, § VI.D.
6. Under 29 C.F.R. § 1614.108(c)(1), the parties have a duty to cooperate with the EEO investigator. It is well established that a complainant, agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the EEO investigator deems necessary to properly develop the factual record. Failure of an agency witness to cooperate with an EEO investigator’s request, without showing good cause, may result in sanctions imposed by the Commission on appeal. 29 C.F.R. §§ 1614.108(c)(3) and 1614.404(c).
7. EEOC Regulation 29 C.F.R. § 1614.109(f)(3) specifically sets forth the types of sanctions an AJ may take when required by the appropriate circumstances. An AJ may: (1) draw an adverse inference that the requested information would have reflected unfavorably on the non-complying party; (2) consider the requested information to be established in favor of the opposing party; (3) exclude other evidence offered by the non-complying party; (4) issue a decision fully or partially in favor of the opposing party; or (5) take other action deemed appropriate. *Id.*
8. An Administrative Judge may sanction an agency for failing to develop an impartial and appropriate by issuing *an order* to the agency or requesting the documents, records,

comparative data, statistics, or affidavits with such order or request making clear that sanctions may be imposed and the type of sanction that could be imposed for failure to comply with the order unless the agency can show good cause for that failure. *Miguelina S. v. Dept. of Justice*, 2020 WL 634893, 120 LRP 5134 (EEOC January 27, 2020).

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 Agency to issue an impartial, complete and appropriate Report of Investigation within 30 calendar days;
- C. **ORDER** that failure of the Agency to issue said Report within the prescribed time will result in sanctions against the Agency to include:
 - 1) The Agency paying for Complainant’s discovery cost including but not limited to:
 - a) Costs for conducting depositions such as a court reporter, deposition transcript(s), and any related fees;
 - b) Costs for copying, printing and sending document requests, interrogatories, and admissions;
 - 2) Default Judgment in Complainant’s favor;
 - 3) Reasonable attorney’s fees including but not limited to travel and incidental costs; and,
- D. **ORDER** other sanctions as deemed 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. XXXX XXXX

Agency Case No. XXXX XXXX

DATE: XXXX

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 uploaded to the EEOC Portal and/or (mailed/faxed/emailed) on the ____ day 20__, to the agency's representative, (fill in name) at (fill in address, fax number, or email address) and the (fill in EEOC Office and Judge) at (fill in address, fax number, or AJ email address).

(Fill in name of person who served copy)

APPENDIX E

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
XXXX District Office

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NAME OF COMPLAINANT,)	
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Complainant)	
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v.)	EEOC Case No.
)	
)	Agency Case No.
AGENCY HEAD,)	
TITLE,)	
AGENCY)	
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Agency)	DATE:
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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. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. UNDISPUTED FACT NO.1. Citation.
2. UNDISPUTED FACT NO.2. Citation.

III. MATERIAL FACTS IN DISPUTE

1. MATERIAL FACT NO.1. Citation.
2. MATERIAL FACT NO.2. Citation.
3. MATERIAL FACT NO.3. Citation.

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 (1st 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 Vena H. v. Department of Homeland Security*, EEOC Appeal No. 2020005332 (February 15, 2022) citing *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 (2nd. 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 (9th 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 (2nd 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 (7th 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 (8th 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.*

The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." *Pedersen v. Dept. of Justice, Federal Bureau of Prison*, EEOC Appeal No. 05940339 (1995); *Bang v. Postmaster General*, EEOC Appeal No. 01961575 (1998).

In *Pedersen*, 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 *Pedersen* 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. For the reasons set out below, summary judgment must be denied.

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 uploaded to the EEOC Portal and/or mailed/faxed/emailed this (fill in) day of (fill in) _____, 20__, to the agency's representative, (fill in name) at (fill in address, fax number, or email address), and to the administrative judge (fill in name) at (fill in address, fax number, or email address).

(Fill in name of person who served copy)