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Part V

Equal Employment Opportunity Commission

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29 CFR Part 1614

Federal Sector Equal Employment Opportunity; Final Rule

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN 3046-AA66

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

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SUMMARY: This rule revises the Equal Employment Opportunity Commission's federal sector complaint processing regulations to implement the recommendations made by its Federal Sector Workgroup. The rule revises procedures throughout the complaint process, addressing the continuing perception of unfairness and inefficiency in the process. The Commission is requiring that agencies make available alternative dispute resolution programs, and is revising the counseling process, the bases for dismissal of complaints and the procedures for requesting a hearing. EEOC is providing administrative judges with authority to dismiss complaints and issue decisions on complaints. Agencies will have the opportunity to issue a final order stating whether they will implement the administrative judge's decision. The Commission is also revising the class complaint procedures, the appeals procedures, and the attorney's fees provisions.

DATES: Effective Date: This final rule will become effective on November 9, 1999.

Applicability Dates: The requirement in Secs. 1614.102(b)(2) and 1614.105(b)(2) will apply on January 1, 2000 for agencies that do not currently have ADR programs. All actions taken by agencies and by the Commission after November 9, 1999 shall be in accordance with this final rule.

FOR FURTHER INFORMATION CONTACT: Nicholas M. Inzeo, Deputy Legal Counsel, Thomas J. Schlageter, Assistant Legal Counsel or Kathleen Oram, Senior Attorney, Office of Legal Counsel, 202-663-4669 (voice), 202-663-7026 (TDD). This final rule is also available in the following

formats: large print, braille, audio tape and electronic file on computer disk. Requests for the final rule in an alternative format should be made to EEOC's Publication Center at 1-800-669-3362.

SUPPLEMENTARY INFORMATION:

Introduction

The Equal Employment Opportunity Commission, as part of an ongoing effort to evaluate and improve the effectiveness of its operations, established the Federal Sector Workgroup, which was composed of representatives from offices throughout the Commission. The Workgroup focused on the effectiveness of the EEOC in enforcing the statutes that
prohibit workplace discrimination in the federal government: section 717 of Title VII of the Civil Rights Act of 1964, which prohibits discrimination against applicants and employees based on race, color, religion, sex and national origin; section 501 of the Rehabilitation Act of 1973, which prohibits employment discrimination on the basis of disability; section 15 of the Age Discrimination in Employment Act, which prohibits employment discrimination based on age; and the Equal Pay Act, which prohibits sex-based wage discrimination.

The Workgroup reviewed and evaluated EEOC's administrative processes governing its enforcement responsibilities in the federal sector and, after consulting with affected agencies and groups of stakeholders, developed recommendations to improve its effectiveness. In addition, the review sought to implement the goals of Vice President
Gore's National Performance Review (NPR), including eliminating unnecessary layers of review, delegating decision-making authority to front-line employees, developing partnership between management and labor, seeking stakeholder input when making decisions, and measuring performance by results.

The Commission drafted a Notice of Proposed Rulemaking (NPRM) that was circulated to all agencies for comment pursuant to Executive Order 12067 and subsequently published in the Federal Register on February 20, 1998. The Notice proposed changes to the Commission's federal sector complaint processing regulations at 29 CFR Part 1614 to implement the regulatory recommendations of the Federal Sector Workgroup. 63 FR 8594 (1998). It sought public comment on those proposals.

The Commission received over sixty comments on the NPRM. Federal agencies and departments submitted 19 comments. Ten comments were

submitted by civil rights groups and attorneys groups and law firms, four were submitted by federal employee unions and union representatives, one by an association of federal EEO executives, and one was submitted by a Member of Congress. EEOC also received 27 comments from individuals, including federal employees, attorneys and other interested persons. The Commission has carefully considered all of the comments and, as stated in the February Notice, also considered the comments of agencies made during the interagency comment period. The Commission has made a number of changes to the proposals contained in the NPRM in response to the comments. In making these changes, the Commission intends to continue its efforts to reform the federal sector
discrimination procedures. While the Commission believes that these changes will make the procedures fairer, the Commission will continue to seek improvements in the procedures. The comments on the NPRM and all of the changes to the proposals are discussed more fully below.

Alternative Dispute Resolution

In the NPRM, the Commission proposed to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process. In addition, EEOC proposed to require that counselors advise aggrieved persons at the initial counseling session that they may choose between participation in the ADR program offered by the agency and the traditional counseling activities provided for in the current regulation.

The commenters generally supported both proposals, agreeing that providing an ADR mechanism in the pre-complaint stage of the EEO process will resolve more claims earlier in the process. Many of the agency commenters emphasized their need for flexibility in developing their ADR programs. Small agencies, in particular, requested that they have the authority to determine on a case-by-case basis whether to offer ADR to an aggrieved person for his or her claim. Other agencies urged the Commission to ensure that the election provision take into account that ADR should be voluntary for both parties, the aggrieved person and the agency. Commenters also requested that EEOC clarify how the pre-complaint process will operate when ADR is involved and address
the responsibilities of the Counselors throughout that process.

The Commission has revised the ADR and counseling provisions in response to the comments. Agencies will be required to establish or make available an ADR program. The ADR program must be available during

both the pre-complaint process and the formal complaint process. The Commission encourages agencies to use ADR as a valuable tool in resolving EEO disputes at all stages of the EEO process.

Agencies are free to develop ADR programs that best suit their particular

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needs. While many agencies have adopted the mediation model, other resolution techniques are acceptable, provided that they conform to the core principles set forth in EEOC's policy statement on ADR, contained in Management Directive 110. The Commission believes that agencies should have flexibility in defining their ADR programs. EEOC expects that, overall, agencies will develop an array of ADR programs, designed to suit their particular circumstances. Agencies with limited funds and resources could use the services, in whole or in part, of another agency, a volunteer organization or other resources to make available an ADR program.

In keeping with the Commission's emphasis on voluntariness as a component of ADR, agencies may decide on a case-by-case basis whether it is appropriate to offer ADR to individual aggrieved persons. EEOC does not anticipate that ADR will be used in connection with every claim brought to a Counselor. For example, some agencies may wish to limit pre-complaint ADR geographically (if extensive travel would be required), or by issue (excluding, for example, all claims alleging discriminatory termination). Some agencies may wish to exclude class allegations from their ADR programs. Agencies may not, however, exclude entire bases of discrimination from ADR programs. For example, it would be inappropriate for an agency to exclude from its ADR program all claims alleging race discrimination.

In response to a comment, the Commission has revised the regulatory provision governing the initial counseling session. The Commission has removed from section 1614.105(b)(1) the requirement that Counselors advise individuals both orally and in writing of their rights and responsibilities, revising the section to require only that Counselors provide that information in writing. Counselors are encouraged to discuss the rights and responsibilities involved in the EEO process

orally with individuals, but are only required to provide that information to the individuals in writing.

When an agency offers ADR to an individual during the pre-complaint process, the individual may choose to participate in the ADR program at any point in the pre-complaint process. In all cases, the Counselor will conduct an initial counseling session, as currently provided, identifying claims and fully informing individuals about their rights. When ADR is selected, resolution attempts through traditional counseling will be eliminated and the limited inquiry of the traditional counseling will change. Counselors must also inform individuals that if the ADR process does not result in a resolution of the dispute, they will receive a final interview and have the right to file a formal complaint. Management Directive 110 will contain additional guidance on these pre-complaint procedures.

The Commission's intention in requiring an ADR program is that agencies establish informal processes to resolve claims. Thus any activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act. Generally, the agency should have an official at any ADR session with full authority to resolve the dispute. To the extent consultations with other agency officials would be necessary during any session, the agency is accountable for making sure those consultations can be accommodated.

If the ADR attempt succeeds in resolving the claim, the agency must notify the Counselor that the claim was resolved. If the ADR attempt is unsuccessful, the agency must return the claim to the Counselor to write the counseling report. That report will describe the initial counseling session, frame the issues, and report only that ADR was unsuccessful.

Dismissals

In the NPRM, the Commission proposed three changes to the dismissal provision contained in section 1614.107. First, the Commission proposed to remove the provision contained in section 1614.107(h) permitting agencies to dismiss complaints for failure to accept a certified offer

of full relief. As explained in the preamble to the NPRM, the full relief dismissal policy was premised on the view that adjudication of a claim is unnecessary if the agency is willing to make the complainant whole. The regulatory process, however, has been criticized because complainants are placed in the position of risking dismissal of their complaints if they do not believe the offer of their opposing party is an offer of full relief. If a complainant makes the wrong assessment of the offer and EEOC decides on appeal that the agency did offer full relief, the complainant is precluded from proceeding with the complaint or from accepting the offer. In addition, difficulties assessing what constitutes full relief increased when, as a result of the Civil Rights Act of 1991, damages became available to federal employees. The Commission found that offers of full relief must address compensatory damages, where appropriate. Jackson v. USPS, Appeal No. 01923399 (1992); Request No. 05930306 (1993). Unless the agency offers the full amount of damages permitted under the statutory caps in the law, it is virtually impossible for the complainant to assess whether the agency has offered full relief.

The non-agency commenters uniformly supported the proposal to eliminate the full relief dismissal provision. Agency comments were mixed with nearly as many agencies supporting the change as opposing it. For the foregoing reasons, the Commission has decided to remove the failure to accept a certified offer of full relief dismissal basis from the regulations. At the same time, the Commission is retaining the provision from the NPRM that permits agencies to make an offer of resolution in a case. This offer of resolution is similar, but not identical, to the procedure under Rule 68 of the Federal Rules of Civil Procedure for an offer of judgment, and is discussed in greater detail below.

In the NPRM, EEOC proposed to add two dismissal provisions to section 1614.107. One of the new provisions will require dismissal of complaints that allege dissatisfaction with the processing of a previously filed complaint (spin-off complaints). As was explained in the NPRM, EEOC's regulations at 29 CFR Part 1613, which were superseded by 29 CFR Part 1614 in 1992, expressly permitted complainants to file

separate complaints alleging dissatisfaction with agencies' processing of their original complaints. 29 CFR 1613.262 (1991). The procedure resulted in the filing of multiple spin-off complaints. The Commission recognized the need to limit these complaints, and did not include the Part 1613 provision in Part 1614. Guidance was provided in Management Directive 110. Spin-off complaints continued to be filed, however, despite there being no provision in either the regulations or the management directive permitting the filing of a separate complaint on this issue.

The comments on the proposal to add a dismissal provision for spin-off complaints fell into three categories. Agencies favored the addition. Some individual federal employees and attorneys opposed the dismissal provision and others encouraged EEOC to provide detailed guidance in Management Directive 110 on how to handle spin-off allegations outside of the EEO process.

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The Commission continues to believe that any alleged unfairness or discrimination in the processing of a complaint can--and must--be raised during the processing of the underlying complaint and there is ample authority to deal with such allegations in that process. The spin-off allegations are so closely related to the underlying complaint
that a separate complaint would result in redundancy, duplication of time and waste of resources. Such allegations need to be addressed within the over-all context of the initial complaint while that complaint is still pending. The Commission has decided to add the provision requiring dismissal of spin-off complaints to ensure that a balance is maintained between fair and nondiscriminatory agency processing of complaints and the need to eliminate the multiple filing of burdensome complaints about the manner in which an original complaint was processed.

In conjunction with this regulatory change, the Commission will issue detailed companion guidance in Management Directive 110 addressing the procedures to be followed to resolve allegations of dissatisfaction with the complaints process quickly and effectively. Individuals who are dissatisfied with the processing of a complaint will be advised to bring this dissatisfaction to the attention of the official responsible for the complaint, whether it be an investigator, the agency EEO manager, an EEOC administrative judge, or the Commission's Office of Federal Operations on appeal. The allegation of dissatisfaction, and any appropriate evidence, will then be considered

during the processing of the existing complaint by the individuals responsible for that step of the process, who will be required to take appropriate action. If any official throughout the process becomes aware of a systemic problem of discriminatory complaint processing, that official may refer the matter to the Complaints Adjudication Division of the Office of Federal Operations at EEOC.

Proper handling of spin-off allegations is important because such allegations involve the overall quality of the complaints process and implicate the resources devoted to those allegations. The procedures in
the Management Directive will ensure that any evidence of discriminatory or improper handling will be considered as part of the claim before the agency or Commission without unnecessarily adding complaints to the system. When an individual presents a counselor, an agency official, or the Commission with a spin-off allegation, the complainant shall be advised where and how to have the allegation of dissatisfaction made part of the existing complaint record. The Commission believes that agency and Commission resources should not be used to process the allegation as a separate complaint because many of these allegations involve evidentiary matters or disagreements with agency decisions made in the processing of the underlying complaint. Counselors, investigators and agency officials are required to note these allegations of dissatisfaction in the complaint record so that reviewing entities can ensure that the allegation was properly addressed. As a result, individuals who file separate complaints will have such complaints dismissed by the agency or by the Commission. The Commission has decided to delegate appellate decision-making authority for appeals from dismissals of spin-off complaints to the Office of Federal Operations to ensure expeditious handling of any such appeals.

The second new dismissal provision proposed by the Commission in the NPRM provides for dismissal of complaints through strict application of the criteria set forth in Commission decisions where there is a clear pattern of abuse of the EEO process. The proposed section would codify the Commission's decisions in Buren v. USPS, Request No. 05850299 (1985), and subsequent cases, in which the Commission has defined ``abuse of process'' as a clear pattern of misuse of the EEO process for ends other than those that it was designed to accomplish. The Commission has stated that it has the inherent power to control and prevent abuse of its processes, orders, or procedures.

Comments from agencies generally supported the proposal to add abuse of process as a basis for dismissal, while non-agency commenters opposed it or, while supporting its purpose, expressed concern that

agencies would invoke this authority too frequently based arbitrarily on the number of complaints filed by an individual. Several commenters,
including agencies and individuals, suggested the criteria for dismissal be clearly set forth in the regulation. A few agencies thought the criteria should be expanded beyond those set forth in the Commission's decisions and that the Commission should provide for sanctions for complainants who abuse the process. Some non-agency commenters maintained that only administrative judges should have the authority to dismiss complaints for abuse of process because agencies will abuse their discretion under this provision.

The Commission has decided to include this dismissal provision in its regulation with additional language defining abuse of process as ``a clear pattern of misuse of the EEO process for a purpose other than
the prevention and elimination of employment discrimination'' and setting forth the factors found in Commission decisions. The Commission
reiterates that dismissing complaints for abuse of process should be done only on rare occasions because of the strong policy in favor of preserving complainants' EEO rights whenever possible. Kleinman v. Postmaster General, Request No. 05940579 (1994). Evaluating complaints for dismissal for abuse of process requires careful deliberation and application of strict criteria. Agencies must analyze whether a complainant's behavior evidences an ulterior purpose to abuse the EEO process. Improper purposes would include circumventing other administrative processes such as the labor-management dispute process; retaliating against the agency's in-house administrative machinery; or overburdening the EEO complaint system, which is designed to protect individuals from discriminatory practices. Hooks v. USPS, Appeal No. 01953852 (1995). Evidence of numerous complaint filings, in and of itself, is an insufficient basis for making a finding of abuse of process. Id. However, as stated in the regulation, evidence of multiple
complaint filings combined with the subject matter of the complaints (such as frivolous, similar or identical allegations; lack of specificity in the allegations; and allegations involving matters previously resolved) may be considered in determining whether a complainant has engaged in a pattern of abuse of the EEO process. See Goatcher v. USPS, Request No. 05950557 (1996).

The Commission will require strict adherence to these criteria. With respect to the argument that only administrative judges should have the authority to dismiss complaints for abuse of process, the

Commission sees no reason to treat this basis for dismissal differently
than the others listed in section 1614.107 by disallowing it to agencies. The Commission believes that review by the Commission on appeal will fully safeguard complainants against arbitrary or unjust dismissals.

The Commission believes that the new dismissal provisions for spin-off complaints and abuse of process will improve the efficiency and effectiveness of the EEO process. In addition, dealing summarily with abuse of process complaints will make the process fairer both for agencies that must process

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complaints and for complainants who raise bona fide allegations by focusing resources on bona fide allegations.

Partial Dismissals

In the NPRM, the Commission proposed changes to the regulations to eliminate interlocutory appeals of partial dismissals of complaints. Currently, where an agency dismisses part of a complaint, but not the entire complaint, the complainant has the right to immediately appeal the partial dismissal to EEOC. The Commission provided for interlocutory appeals of partial dismissals in Part 1614, hoping to streamline the process and avoid holding two or more hearings on the same complaint. Multiple hearings could have occurred absent an interlocutory appeal when EEOC reversed an agency's partial dismissal after a hearing was held on the rest of the complaint. The Commission believes that this result can be accomplished without the unintended delays or fragmentation of complaints that may have resulted from implementation of the current provision. The Commission proposed to amend section 1614.401 to remove the right to immediately appeal the dismissal of a portion of a complaint. In addition, the Commission proposed to add a paragraph to the dismissals section, section 1614.107, explaining how to process complaints where a portion of the complaint, but not the entire complaint, meets one or more of the standards for dismissal contained in that section.

Comments on eliminating interlocutory appeals for partial dismissals were mixed. Many commenters, agencies and others, supported the proposal believing that it will simplify the process. The commenters who opposed the change expressed concerns that there will be

no investigatory record of the portion of a complaint dismissed by an agency but reinstated by the administrative judge or the Office of Federal Operations. Some agencies questioned how the administrative judge will be able to evaluate a partial dismissal if there is no record on that part of the complaint.

The Commission believes that eliminating interlocutory appeals of partial dismissals will result in a more efficient complaint process and will help avoid fragmentation of complaints. The Commission has decided, therefore, to finalize the proposals without change. The concerns raised by some of the commenters are addressed by the procedure contained in new section 1614.107(b). If an agency determines
that a portion of a complaint, but not all of the complaint, meets one or more of the standards for dismissal contained in section 1614.107(a), the agency must document the file with its reasons for believing that the portion of the complaint meets the standards for dismissal. Accordingly, the agency must fully explain its reasons for dismissing that portion of the complaint, and, if appropriate, include any evidence or documents necessary to support that conclusion. The agency's rationale and any record supporting that rationale must be sufficiently developed for an administrative judge or the Office of Federal Operations to evaluate the appropriateness of the partial dismissal without further investigation or inquiry. The agency will then investigate the remainder of the complaint.

If the complainant requests a hearing, the administrative judge will, as soon as practicable, evaluate the reasons given by the agency for believing a portion of the complaint meets the standards for dismissal. If the administrative judge believes that the agency's reasons are not well taken, the entire complaint or all of the portions
not meeting the standards for dismissal will continue in the hearing process. Where a portion of a complaint is reinstated in the hearing process and the investigatory record from the agency is incomplete as to the portion the agency dismissed, the administrative judge will oversee supplementation of the record by discovery or any other appropriate method. Administrative judges will no longer remand complaints or portions of complaints for supplemental investigations by
the agency, but will ensure that the record is sufficiently developed during the hearing process.

The administrative judge's decision on the partial dismissal will become part of the decision on the complaint. Where a complainant requests a final decision from the agency without a hearing, the

agency
will issue a decision addressing all claims in the complaint, including
its rationale for dismissing claims, if any, and its findings on the merits of the remainder of the complaint. The complainant may appeal the agency's final action, including any partial dismissals, to the EEOC. If the Office of Federal Operations finds that a dismissal was improper, it will give the complainant the choice between a hearing and
an agency final decision on the claim.

Offer of Resolution

The Commission proposed to add this provision, limiting attorney fees and costs when a complainant rejects an offer and subsequently obtains less relief, in place of the dismissal for failure to accept full relief. The purpose of the offer of resolution is to provide incentive to settle complaints and to conserve resources where settlement should reasonably occur. Some commenters preferred the full relief dismissal to the proposed offer of resolution. Two stated that the relief offered should be compared to the relief obtained, rather than to the decision obtained, in order to determine which is more favorable. A few commenters asked for clarification of what the offer must contain, for example, suggesting that it must contain attorney's fees. Several commenters raised concerns that a complainant might not have enough information to judge whether the offer is reasonable or may
not fully appreciate the significance of the offer if the offer is made
early in the process. Others questioned how non-monetary remedies would
be evaluated for determining whether the relief awarded was more favorable than that offered. Some commenters objected that the ``interest of justice'' exception was too vague; some asked that it be defined in the regulation while others suggested that it be deleted for
that reason. Finally, several commenters believed the proposed provision was a good alternative to the dismissal for failure to accept
full relief.

After considering these comments, the Commission has decided that the offer of resolution is an appropriate alternative to and preferable

to the dismissal for failure to accept full relief, but has made several changes to the provision to address the commenters' concerns. Simply to clarify, we have revised the provision so that the relief offered is compared with the final relief obtained rather than with the
decision when determining which is more favorable. That formulation is more practicable and expresses the Commission's original intent. We have also added a sentence stating that the agency's offer, to be effective, must include attorney's fees and costs that have been incurred and must specify any non-monetary relief. With regard to monetary relief, an agency may make a lump sum offer or it may itemize the amounts and types of monetary relief being offered.

We have revised the offer of resolution provision to include a two-tiered approach. An offer of resolution can be made to a complainant who is represented by an attorney at any time from the filing of a formal complaint until 30 days before a hearing. If, however, the complainant is not represented by an attorney, an offer cannot be made before the parties have received notice that an administrative

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judge has been assigned. We will include model language in the Management Directive that agencies are required to include in each offer of resolution.

We note that, when comparing the relief offered in an offer of resolution with that actually obtained, we intended that non-monetary as well as monetary relief would be considered. Although a comparison of non-monetary relief may be inexact and difficult in some cases, non-monetary relief can be significant and cannot be overlooked.

The Commission believes that equitable considerations may make it unjust to apply the offer of resolution provision in particular cases and, thus, the interest of justice exception is necessary to prevent the denial of fees in those circumstances. We do not envision many circumstances in which the interest of justice provision will apply. One example, however, of appropriate use of the exception would be where the complainant received an offer of resolution, but was informed
by a responsible agency official that the agency would not comply in good faith with the offer (e.g., would unreasonably delay implementation of the relief offered). The complainant did not accept the offer for that reason, and then obtained less relief than was contained in the offer of resolution. We believe that it would be unjust to deny attorney's fees and costs in this case.

Fragmentation

In the NPRM, the Commission requested public comment on the issue of fragmentation of complaints in the federal sector EEO process. Specifically, the Commission asked whether regulatory changes are necessary to correct the fragmentation problem. EEOC believes that agencies are not properly distinguishing between factual allegations in
support of a legal claim and the legal claim itself, resulting in the fragmentation of some claims that involve a number of different allegations. Certain kinds of claims are especially susceptible to fragmentation, for example, harassment claims and continuing violation claims. Fragmentation of claims is undesirable both because it unnecessarily multiplies complaints and can improperly render non-meritorious otherwise valid and cognizable claims.

The Commission received some comments on the fragmentation issue. Commenters recommended the elimination of remands by administrative judges, the elimination of partial dismissals (see discussion above), and the revision of the consolidation procedures in the regulation. Commenters also suggested that EEO Counselors need more training to recognize the difference between claims and allegations.

The Commission has revised the regulation in several places to address the fragmentation problem. Section 1614.108(b) has been amended
to replace the phrase ``matter alleged to be discriminatory'' with the word ``claim.'' The Commission believes that agencies may be interpreting ``matter'' to mean something less than a claim. Where a complainant raises a claim of retaliation or a claim involving terms and conditions of employment, subsequent events or instances involving the same claim should not be filed as separate complaints, but should be treated as part of the first claim. For the same reasons, the Commission has revised section 1614.603 to remove the word ``allegations'' and replace it with ``claims.''

The Commission is removing from the hearings section the provision permitting administrative judges to remand issues to agencies for counseling or other processing. The Commission intends that administrative judges will have full responsibility for complaints after they enter the hearing stage and should no longer remand them to the agencies. This change and others involving hearings are discussed more fully below.

Finally, the Commission is adding a provision permitting amendment of complaints, and is revising the consolidation section of the

regulation. Section 1614.106 now permits complainants to amend complaints to add issues or claims that are like or related to the original complaint any time prior to the conclusion of the investigation. After requesting a hearing, complainants may seek leave from the administrative judge to amend a complaint to add issues or claims that are like or related to the original complaint by filing a motion to amend. The Commission has amended section 1614.606, which governs joint processing and consolidation of complaints, to require that agencies consolidate two or more complaints filed by the same complainant. The current consolidation provision is permissive only. Moreover, the current provision, the Commission believes, may serve to discourage consolidation of complaints because it provides that the date of the first filed complaint controls the applicable complaint processing time frames. Under this provision, if a complainant filed a second complaint 175 days after the first complaint, the current regulation would provide the agency with only 5 days to investigate the
second complaint if it were consolidated with the first complaint. As part of the revision to the consolidation section, the Commission provides in the final rule that when a complaint has been consolidated with an earlier filed complaint the agency must 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 a 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. If a complainant requests a hearing on consolidated complaints prior to the agency's completion of the investigation, the administrative judge will decide how best to insure an appropriate record, whether by staying the hearing process for some period of time during which the agency can finish its investigation or by supplementation of the record through discovery or other methods ordered by the administrative judge. When an administrative judge becomes aware that one or more complaints in the agency process should be consolidated with a complaint in the hearing process, the administrative judge may consolidate all claims at the hearing stage or
hold the complaint in the hearing process until the others are ready for hearing.

Management Directive 110 will contain additional guidance on amendment of complaints, consolidation of complaints, and fragmentation, including what constitutes a cognizable claim under the employment discrimination statutes.

Hearings

The Commission proposed several changes to the hearings provisions in the Notice of Proposed Rulemaking, the most significant being the proposal to make administrative judge's decisions final in complaints referred to them for hearing. The Commission received dozens of comments on this proposal, with the majority of agency commenters opposing it and the non-agency commenters overwhelmingly favoring it. A number of agencies challenged EEOC's statutory authority to make administrative judges' decisions final, arguing that section 717(c) of Title VII requires that agencies take final action on EEO complaints before a complainant may appeal to EEOC. In addition, an agency argued that agency final action is required to trigger federal court suit rights. Section 717(c) permits an individual to file a lawsuit in federal court in four instances, including within 90 days of receipt of notice of final

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action. One agency suggested that EEOC could make administrative judges' decisions final by moving the hearing process to the appellate stage. Agencies also expressed concern about EEOC's resources, believing that there will be an increase in requests for hearings if administrative judges' decisions are made final. Agencies also questioned the quality and consistency of administrative judges' decisions in opposing the change. Several agencies complained that they would be unable to defend themselves if administrative judges' decisions were made final.

Several agencies, however, supported the proposal. One noted that EEOC's statistics demonstrate a problem with the EEO process government-wide that undermines the confidence of complainants in the system and creates a perception of unfairness. The civil rights groups, unions and attorneys' groups that commented on the proposal strongly supported it and some noted that it is the most important change proposed by EEOC in the NPRM.

The Commission has carefully considered all of the comments on this issue. The Commission strongly believes that allowing agencies to reject or modify an administrative judge's findings of fact and

conclusions of law and to substitute their own decision leads to an unavoidable conflict of interest and creates a perception of unfairness
in the federal EEO system. While the Commission believes that its interpretation of the statute regarding the Commission's authority is correct, the Commission has decided to revise the proposal in order to make needed improvements in the procedures while recognizing the concerns expressed by the agencies. At the same time the Commission will preserve the functional goal of the earlier proposal: agencies will no longer be able to simply substitute their view of a case for that of an independent decision-maker.

In response to comments from agencies that the Office of Federal Operations was upholding agency decisions that reversed administrative judge's decisions finding discrimination, we made two independent inquiries of EEOC's information systems. The Commission had not previously studied that information or reported it, although it had collected it. The first inquiry showed that in 1994 and 1996, there were 80 administrative judges' decisions favorable to complainants that
were reversed by the agency, appealed to the Office of Federal Operations, and for which the Office of Federal Operations issued a decision on the merits. Of those 80 decisions, EEOC upheld the administrative judge in 53 instances and upheld the agency in 27 instances. In the second inquiry, we found that in fiscal year 1998, there were 157 decisions by the Office of Federal Operations reviewing administrative judges' decisions adverse to agencies. Of those decisions, 135 (86%) affirmed the administrative judge in whole, 8 (5%)
reversed in whole or in part, and 14 (9%) modified the administrative judge's decision. These inquiries demonstrated that the arguments made by the agencies were not supported by the facts. EEOC upholds administrative judges' decisions in a significant majority of all cases.

The final rule provides that administrative judges will issue decisions on all complaints referred to them for hearings. Agencies will have the opportunity to 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 will notify the complainant whether or not the agency will fully implement the decision
of the administrative judge and will contain notice of the complainant's suit and appeal rights. If the agency's final order does

not fully implement the decision of the administrative judge, the agency must simultaneously file an appeal of the decision with EEOC. In this way, agencies will take final action on complaints referred to administrative judges by issuing a final order, but they will not introduce new evidence or write a new decision in the case. Agencies will have an additional 20 days to file a brief in support of their appeal.

To parallel the provision on interim relief in section 1614.502 (b), we are adding a provision requiring an agency to provide interim relief in limited circumstances when the agency appeals. When the agency issues a final order notifying the complainant that it will not fully implement the administrative judge's decision, the case involves removal, separation or suspension continuing beyond the date of the order, and the administrative judge's decision provided for retroactive restoration, the agency must comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position stated by the administrative judge pending the outcome of the appeal. In response to agency comments, we have revised the regulation to more closely track the MSPB's interim relief provision, including a provision permitting agencies to 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. Prospective pay and benefits must be provided, however. In addition, we have noted in the regulation that an employee may decline an offer of interim relief, and a grant of interim relief does not insulate a complainant from subsequent disciplinary or adverse action for another reason. Interim relief does not apply in cases where the complainant alleges that she or he was not retained beyond the period of a temporary appointment which expired prior to the appeal or that the temporary position was not converted to a permanent position. For example, where the Census hires temporary employees and the temporary appointment would have expired prior to the appeal, or the employee was not converted to a career position, the interim relief provision would not apply.

In another proposed change to the hearings process in the NPRM, we

proposed that at the end of the investigation or after 180 days, complainants who want to request a hearing will send their requests directly to the EEOC office instead of to the agency EEO office in order to eliminate delays. Almost all of the commenters agreed with this proposal. A few commenters asked that complainants be required to notify the agency at the same time that they make the request to EEOC. That requirement was already contained in the proposal so no change is being made. We have made some minor changes to the provision. We added a requirement that all requests for hearings must be in writing. The proposal stated that EEOC would request the complaint file after it received a request for hearing. The final rule has been revised to state that the agency must forward the file within 15 days of the date of receipt of the request for hearing. Since the agency will be receiving notice directly from the complainant when a hearing is requested, eliminating the request from EEOC and the time incident to preparation of that letter will result in a more efficient process. If any agency receives a request for a hearing that has not also been submitted to EEOC, the agency should forward the request along with the
file to EEOC and should advise the complainant of its actions and of the requirement that requests be submitted directly to EEOC.

In response to comments, the Commission has decided to revise section 1614.109(a) to better explain the administrative judge's responsibilities in the hearing process and to remove the current provision permitting

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administrative judges to remand for counseling issues that are like or related to those issues raised in the complaint. Section 1614.109(a) now provides that upon appointment, the administrative judge will assume full responsibility for adjudication of the complaint, including
overseeing the development of the record. The Commission intends that the administrative judge will take complete control of the case once a hearing is requested. The new sentence clarifies that the agency's authority to dismiss a complaint ceases once a hearing is requested. Administrative judges will preside over any necessary supplementation of the record in the hearing process without resort to remands of complaints to agencies for additional investigations. Remands of complaints to agencies for supplemental investigations have proliferated, resulting in fragmentation or unwarranted delays. The changes to the regulation will eliminate these remands and improve the

timeliness and efficiency of the complaint process.

In the NPRM, the Commission proposed to add a new section 1614.109(b) providing that administrative judges have the authority to dismiss complaints during the hearing process for all of the reasons contained in section 1614.107. Nearly all commenters, agencies and others, supported this proposal. In response to comments, the Commission has revised the regulation to provide that administrative judges may dismiss complaints on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.

The Commission has made several minor revisions to the hearings section of the regulations. In response to a comment, we have added a new section (f)(1) providing that the administrative judge must serve all orders to produce evidence on both parties. We have revised section 1614.109(i) to provide that the time frame for issuing a decision will run from the administrative judge's receipt of the complaint file from the agency, rather than, as currently provided, from receipt by EEOC of a request for a hearing. In addition, the Commission has revised the section to provide that administrative judges send the hearing record, rather than the entire record, to the parties with the final decision. Finally, the Commission has removed the requirement that administrative judges send final decisions and the record to the parties by certified mail. This will save the Commission scarce resources.

Procedures for Handling Clearly Meritless Cases

The growing inventory of cases pending at agencies, in the hearings units and on appeal to the Commission causes delays across the board. The problem is exacerbated by the allocation of scarce resources to meritless cases. Many commenters representing all points of view identified this situation as an urgent priority, and the Federal Sector Workgroup devoted considerable attention to the problem. The Workgroup noted the widespread concern among stakeholders that the system is overburdened by meritless complaints and misused as a forum for workplace disputes that do not involve EEO matters. Its Report concluded that ``Government resources should be targeted to addressing colorable claims of discrimination. Excessive resources devoted to non-meritorious claims of discrimination undermines the credibility of the process and impairs the rights of those with meritorious claims.'' The

Commission agrees.

Among the measures proposed by the Commission in its NPRM to address this problem were two provisions to give administrative judges additional procedures for quickly resolving complaints that are inappropriately in the EEO process or that lack merit. First, the Commission proposed to give administrative judges the authority to dismiss complaints during the hearing process for all of the reasons contained in the dismissal section, 29 CFR 1614.107, including for failure to state a claim. As discussed above, the Commission has included this proposed section 1614.109(b), which most commenters supported, in its final rule.

The second proposal was a provision for decisions without a hearing in cases that lack merit, which would have supplemented administrative judges' existing authority to issue summary judgment decisions currently contained in 29 CFR 1614.109(e). The Commission proposed to add a provision, section 1614.109(g)(4), permitting administrative judges to issue a decision without a hearing where they determine, even though material facts remain in dispute, that there is sufficient information in the record to decide the case, that the material facts in dispute can be decided on the basis of the written record, that there are no credibility issues that would require live testimony in order to evaluate a witness' demeanor and that the case lacks merit.

Almost all non-agency commenters as well as about half of the agency commenters opposed granting administrative judges this new authority, arguing that there must be a hearing if material facts are in dispute. Individual commenters and those representing civil rights groups and unions also doubted that the administrative judge would have sufficient information in the record to decide the case under this procedure because the agency compiles the record and the complainant is likely not to have had an opportunity to develop evidence. Some suggested that complainants have won cases that may have seemed non-meritorious when filed, based on discovery and live testimony at the hearing. Several agency commenters believed the procedure would also adversely affect agencies by leading to erroneous decisions based on incomplete evidence. Agencies also thought it was unclear and difficult to distinguish from traditional summary judgment. A number of agency commenters supported the proposal as an appropriate way to streamline the process and deal with the increasing workload. When the

investigatory record is complete, they argued, a hearing may waste resources and cause agency employees to be absent from work when their testimony is not really necessary.

The Commission has decided that it is not necessary to add this provision at this time. We believe that the problem of meritless complaints can be addressed through appropriate application of the failure to state a claim dismissal basis and the traditional summary judgment provision. Dismissal for failure to state a claim is appropriate when a complaint alleges conduct that does not rise to the level of a violation of the anti-discrimination statutes. Summary judgment under section 1614.109(e) is appropriate for complaints that state a claim but that involve no genuine dispute over material facts. Continued processing of cases that should have been dismissed for failure to state a claim or decided on summary judgment contributes to the growing inventory and the perception that the system gives too much
consideration to trivial matters. Such cases should be resolved more quickly at earlier stages in the process using existing legal standards. The Commission summarizes these standards below and intends to provide more detailed guidance in Management Directive 110.

Dismissal for Failure to State a Claim: Existing section 1614.107(a) requires that agencies dismiss a complaint that fails to state a claim under section 1614.103. Under the new section 1614.109(b), administrative judges may dismiss complaints for the same reasons

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as contained in section 1614.107. In determining whether a complaint states a claim, the proper inquiry is whether the conduct as alleged would constitute an unlawful employment practice under the EEO statutes. Cobb v. Department of the Treasury, Request No. 05970007 (March 13, 1997). See Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268-9 (1998)(referencing cases in which courts of appeals considered whether various employment actions were sufficient to state a claim under the civil rights laws).

When a complainant does not challenge agency action or inaction with respect to an employment decision or a specific term, condition or
privilege of employment, but alleges a hostile and discriminatory working environment, the severity of the alleged conduct must be evaluated to determine whether the complaint is actionable under the statutes. As the Supreme Court has stated, ``Conduct that is not

severe
or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile
or abusive--is beyond Title VII's purview.'' Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993); see Meritor Savings Bank, FSB
v. Vinson, 477 U.S. 57, 67 (1986).

In Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), the Court reemphasized that conduct must rise above a certain minimum level
to be actionable: `` `[S]imple teasing,' * * * offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the `terms and conditions of employment.' '' 118 S. Ct. at 2283 (citations omitted). To determine whether an environment is sufficiently hostile or abusive, courts must look at all
of the circumstances, including the frequency and severity of the conduct. Id. These standards should ``ensure that Title VII does not become a `general civility code.' * * * Properly applied, they will filter out complaints attacking `the ordinary tribulations of the workplace'' * * *.'' Id. at 2283-84 (citations omitted).

The Commission also has repeatedly stated that isolated comments, petty slights, and trivial annoyances are not actionable. See EEOC Compliance Manual Section 8, ``Retaliation,'' No. 915.003 (May 20, 1998) at 8-13; EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915.050 (March 19, 1990) at 14; EEOC Enforcement Guidance on Harris v. Forklift Systems, Inc., No. 915.002 (March 8, 1994) at 6 n.4; see also, e.g., Cobb v. Department of the Treasury, supra.; Moore v. United States Postal Service, Appeal No. 01950134 (April 17, 1997); Backo v. United States Postal Service, Request No. 05960227 (June 10, 1996); Phillips v. Department of Veterans Affairs, Request No. 05960030 (July 12, 1996); Miller v. United States Postal Service, Request No. 05941016 (June 2, 1995); Banks v. Department of Health and Human Services, Request No. 05940481 (February 16, 1995) . However, a persistent pattern of harassing conduct or a particularly severe individual incident, when viewed in light of the work environment as a whole, may constitute a hostile environment. See, e.g., Brooks v. Department of the Navy, EEOC Request No. 05950484 (June
25, 1996).

The Commission cautions that before dismissing a complaint the administrative judge must ensure that the claim has not been

fragmented
inappropriately into more than one complaint. As discussed above under the heading ``Fragmentation,'' a series of subsequent events or instances involving the same claim should not be treated as separate complaints, but should be added to and treated as part of the first claim.

Summary Judgment: The problem identified by the Workgroup can also be addressed through more effective use of the existing summary judgment authority. Summary judgment is proper when ``material facts are not in genuine dispute.'' 29 CFR 1614.109(e). Only a dispute over facts that are truly material to the outcome of the case should preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (only disputes over facts that might affect the outcome
of the suit under the governing law, and not irrelevant or unnecessary factual disputes, will preclude the entry of summary judgment). For example, when a complainant is unable to set forth facts necessary to establish one essential element of a prima facie case, a dispute over facts necessary to prove another element of the case would not be material to the outcome. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23
(1986).

Moreover, a mere recitation that there is a factual dispute is insufficient. The party opposing summary judgment must identify the disputed facts in the record with specificity and demonstrate that there is a dispute by producing affidavits or records that tend to disprove the facts asserted by the moving party. In addition, the non-moving party must explain how the facts in dispute are material under the legal principles applicable to the case. 29 CFR 1614.109(e)(2); Anderson, 477 U.S. at 257; Celotex, 477 U.S. at 322-24; Patton v. Postmaster General, Request No. 05930055 (1993) (summary judgment proper where appellant made only a general pleading that his job performance was good but set forth no specific facts regarding his performance and identified no specific inadequacies in the investigation).

Class Complaints

The Federal Sector Workgroup identified a series of concerns with the class complaint process. It found that despite studies indicating that class-based discrimination may continue to exist in the federal government, recent data reflect that very few class complaints are filed or certified at the administrative level. While an effective

administrative process for class complaints offers several important advantages over litigation in federal court, including informality, lower cost, and speed of resolution, the Workgroup found that the current process does not adequately address class-based discrimination in the federal government. As a result, complainants often have elected
to pursue their complaints in federal court.

Class actions play a particularly vital role in the enforcement of the equal employment laws. They are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices. The
courts have long recognized that class actions ``are powerful stimuli to enforce Title VII,'' providing for the ``removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.'' Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). The class action device exists, in large part, to vindicate the interests of civil rights plaintiffs. See 5 James W. Moore, Moore's Federal Practice
Sec. 23.43[1][a], at 23-191 (3d ed. 1997).

These same policies apply with equal force in the federal sector. Accordingly, the Commission is making several changes in its regulation
to strengthen the class complaint process. The purpose of these changes
is to ensure that complaints raising class issues are not unjustifiably
denied class certification in the administrative process and that class
cases are resolved under appropriate legal standards consistent with the principles applied by federal courts.

In the NPRM, the Commission proposed four regulatory changes to the
class complaint procedures found at 29

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CFR 1614.204. The Commission proposed to revise section 1614.204(b) to provide that a complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are

class implications raised in an individual complaint. If a complainant moves for class certification after completing counseling, the complainant will not be required to return to the counseling stage. Individual commenters and those representing civil rights groups uniformly endorsed the proposed change. Some agency commenters supported the change but asked that the regulation define ``reasonable point in the process''; some suggested that this point be during the investigation or within a short time after distribution of the agency investigative file, rather than during discovery. Other agencies opposed the change, arguing that it would entail additional investigative costs, cause delays and invite abuse by complainants seeking to bypass the counseling process by making frivolous class allegations. They maintained that a complainant should have to elect between a class or an individual claim at the pre-complaint stage. If a
complainant can move for class certification on the eve of hearing, they argued, the agency would be required to put the individual complaint on hold and start its investigation all over again as a class
case. Others objected only to eliminating counseling, as that is how the complainant is informed of his or her rights and responsibilities as class agent.

The Commission believes that this revision is an important step toward removing unnecessary barriers to class certification of complaints that are properly of a class nature. The Commission has consistently recognized that its decisions on class certification must be guided by the complainant's lack of access to pre-certification discovery on class issues; this is different from the situation of a federal court Rule 23 plaintiff who does have access to pre-certification discovery on class issues. Similarly, an individual complainant often will not have reason to know at the counseling stage,
and sometimes even after the agency's investigation, that the challenged action actually reflects an agency policy or practice generally applicable to a class of similarly situated individuals.

Because of the importance of discovery, the Commission has decided not to place the restrictions suggested by some of the commenters on the time at which a complainant may seek class certification. The Commission intends that ``reasonable point in the process'' be interpreted to allow a complainant to seek class certification when he or she knows or suspects that the complaint has class implications, i.e., it potentially involves questions of law or fact common to a class and is typical of the claims of a class. Normally, this point

will be no later than the end of discovery at the hearing stage. The complainant must seek class certification within a reasonable time after the class nature of the case becomes apparent. The administrative judge will deny class certification if the complainant has unduly delayed in moving for certification. In response to the comments, the Commission has added language to this effect in the regulation. The Commission disagrees with those commenters who advocated returning the complaint for additional counseling. It will be the responsibility of the agency or administrative judge, as appropriate, to ensure that the class agent is advised of his or her obligations at the time the complainant moves for certification. The Commission believes it is impracticable and unproductive to require the complainant to return to counseling at this stage.

A request for class certification made after the filing of an individual complaint but before the issuance of the notice required by section 1614.108(f) will be forwarded to an EEOC administrative judge for a decision on whether to accept or dismiss a class complaint. The administrative judge's decision will be appealable to the Office of Federal Operations. The filing of an appeal will not stay further proceedings, although either party may request that the administrative judge stay the administrative process pending a decision on appeal.

The Commission proposed in the Notice of Proposed Rulemaking to amend section 1614.204(d) to provide that administrative judges would issue final decisions on whether a class complaint will be accepted (or certified) or dismissed. Currently, administrative judges make recommendations to agencies on acceptance or dismissal. For the same reasons noted in the discussion of administrative judges' decisions above, the Commission has decided to provide that administrative judges will issue decisions to accept or dismiss class complaints, and agencies will take final action by issuing a final order, and, simultaneously appealing the decision to EEOC if the final order does not fully implement the decision of the administrative judge. Some agency commenters said they supported making certification decisions final only if the agency is given the right to an interlocutory appeal. That was the Commission's intent. The Commission has revised current section 1614.401(b) (redesignated section 1614.401(c)), which sets forth appeal rights in all the situations that might arise in class cases, to include agency interlocutory appeals from administrative judges' certification decisions.

In the proposed rule, the Commission proposed to amend section 1614.204(g)(2) to require that administrative judges must approve class settlement agreements pursuant to the ``fair and reasonable'' standard, even when no class member has asserted an objection to the settlement. Some agency commenters supported this proposal while most others disagreed, arguing that it would add an unnecessary layer of review when the parties are satisfied with the settlement and that adequate safeguards exist in section 1614.204(g)(4), which gives dissatisfied class members the right to petition to vacate a settlement, and 1614.204(a)(2), which requires the class agent to fairly and adequately represent the class.

Because it believes that the administrative judge's approval of settlements in all cases is the best way to protect the interests of the class, the Commission has decided to add this proposal to its regulation. As one agency commenter noted, class agents sometimes seek to settle their individual claims without full regard for the interests of the class. The change makes the regulations consistent with the practice in federal courts where the court must approve any settlement of a class case under a fair and reasonable standard. Thus, the same standard applies whether or not any petitions to vacate the resolution have been filed. In response to the suggestion of one agency, the Commission has elaborated upon the standard by revising the regulation to follow the language used by the Court of Appeals for the District of Columbia Circuit in Thomas v. Albright, 139 F.3d 227, 233 (1998), which held that to approve a settlement under Rule 23, a district court must find that it is ``fair, adequate, and reasonable to the class as a whole.'' The court is to evaluate the terms of the settlement in relation to the strength of the plaintiffs' case, and should not reject a settlement merely because individual class members contend that they would have received more had they prevailed after a trial. 139 F.3d at 231, 232. See also Manual for Complex Litigation (Third) (1995) Secs. 30.41-.42.

The Commission also has made additional revisions to the procedures for notice and approval of settlements contained in section 1614.204(g)(4) to

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reflect the changes in the administrative judge's authority. Currently, any member of the class who is dissatisfied may petition the agency EEO Director to vacate the resolution because it benefits only the class agent or is otherwise not fair and reasonable. The administrative judge issues a recommended decision, and the agency makes the final decision whether to vacate the resolution. 29 CFR 1614.204(g)(4). In the new section 1614.204(g)(4), a class member may petition the administrative judge to vacate the resolution. The administrative judge reviews the notice of resolution and considers any petitions filed. The administrative judge must issue a decision vacating or approving the settlement on the basis of whether it is fair, adequate and reasonable to the class as a whole. A decision to vacate a settlement, as well as a decision to approve settlement over the objections of petitioning class members, is appealable to the Office of Federal Operations.

Finally, the Commission proposed to amend section 1614.204(l)(3) in the proposed rule to clarify the burdens of proof applicable to individual class members who believe they are entitled to relief. The change makes explicit that the burdens enunciated in Teamsters v. United States, 431 U.S. 324 (1977), and subsequent lower court decisions apply. In Teamsters, the Court stated that where a finding of discrimination has been made, there is a presumption of discrimination as to every individual who can show he or she is a member of the class and was affected by the discrimination during the relevant period of time. 431 U.S. at 361-62. Lower courts have held that this presumption may be rebutted only by clear and convincing evidence that the class member is not entitled to relief. See McKenzie v. Sawyer, 684 F.2d 62, 77-78 (D.C. Cir. 1982); Trout v. Lehman, 702 F.2d 1094, 1107 (D.C. Cir. 1983), vacated on other grounds, 465 U.S. 1056 (1984); United States v. City of Chicago, 853 F.2d 572, 575 (7th Cir. 1988); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1559 (11th Cir.), cert. denied, 479 U.S. 883 (1986); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 444-45 (5th Cir.), cert. denied, 419 U.S. 1033 (1974); Reynolds v.

Alabama Department of Transportation, 996 F. Supp. 1156, 1195 (N.D. Ala. 1998). Other courts, however, have held that the standard is preponderance of the evidence. See Wooldridge v. Marlene Indus. Corp., 875 F.2d 540, 549 (6th Cir. 1989); Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 470 n.8 (8th Cir. 1984); Sledge v. J.P. Stevens & Co., Inc., 585 F.2d 625, 637 (4th Cir. 1978); Richerson v. Jones, 551 F.2d 918, 923-25 (3d Cir. 1977).

Comments on this provision were divided, with non-agency commenters uniformly endorsing it and most agency commenters objecting that ``clear and convincing'' was too high a standard, inappropriate for a class case, and a misreading of Teamsters. The objecting commenters wanted the standard to be preponderance of the evidence.

The Commission has decided to retain the ``clear and convincing'' standard and emphasizes that this regulatory revision merely codifies the longstanding rule in the federal sector, see McKenzie v. Sawyer, supra. In 1992, when the Commission first issued its Part 1614 regulation, we considered the burden of proof issue with respect to relief when discrimination has been found. The Commission determined at that time that no change was required to its requirement, included in the predecessor Part 1613 regulation and in the new section 1614.501, that relief should be provided to an individual when discrimination is found unless clear and convincing evidence indicates that the personnel action at issue would have been taken even absent discrimination. See 57 Fed. Reg. 12634, 12641 (April 10, 1992); 29 CFR 1614.501. The Commission concluded that the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which held that an employer could avoid liability in a mixed motive case under a preponderance of the evidence standard, did not require a change in the regulation. As we then noted, the Hopkins decision cited and distinguished the Commission's Part 1613 regulation on the basis that it relates to proof at the relief stage rather than the liability stage. 490 U.S. at 253-54. The Commission further noted that the relief provision in the regulation ``will be applied most often to determining whether class members are entitled to individual relief after a class finding of discrimination, but it is also applicable to individual cases where there has been a finding of discrimination.'' 57 FR at 12641.

The Commission is now making this presumption explicit in its revised class regulation. The Commission believes that requiring proof

at the ``clear and convincing'' level when the agency has been found to have engaged in classwide discrimination furthers the remedial and deterrent purposes of the statutes. ``By making it more difficult for employers to defeat successful plaintiffs'' claims to retroactive relief, the higher standard of proof may well discourage unlawful conduct by employers. . . . In addition, the higher standard of proof is justified by the consideration that the employer is a wrongdoer whose unlawful conduct has made it difficult for the plaintiff to show what would have occurred in the absence of that conduct.'' Toney v. Block, 705 F.2d 1364,1373 (D.C. Cir. 1983) (Tamm, J., concurring); see also Teamsters, 341 U.S. at 359 n.45, 372.

Thus, agencies are required to show by clear and convincing evidence that any class member is not entitled to relief, as is provided currently in sections 1614.501(b) and (c). To be presumptively entitled to relief, the class member first must have filed a written claim pursuant to section 1614.204(l)(3) making a specific, detailed showing that the claimant is a class member who was affected by the discriminatory policy or practice, and that the discriminatory action took place within the period of time for which class-wide discrimination was found. To reflect the administrative judge's new role and to provide a procedure for resolving issues related to individual relief, the Commission additionally has revised section 1614.204(l)(3) to state that the administrative judge may hold a hearing or otherwise supplement the record on a claim filed by a class member.

In response to a comment, we have clarified that the agency or the Commission may find classwide discrimination, and provide a remedy, for any policy or practice in existence within 45 days of the class agent's initial contact with the counselor. We also note, as we stated when Part 1614 was promulgated in 1992, that the 45-day time limit in section 204(l)(3) defining the period for which class-wide discrimination can be found is not intended to limit the two-year time period for which back pay can be recovered by a class member. See 57 FR 12634, 12644 (April 10, 1992); 29 CFR 1614.204(l)(3). Under the continuing violation theory, moreover, incidents occurring earlier than 45 days before contact with the counselor must also be remedied provided that the initial contact with the counselor was timely and

the
earlier incidents were part of the same continuing policy or practice found to have been discriminatory. That is, where contact with the counselor is timely as to one of the events comprising the continuing violation, then the counseling contact is timely as to the entire violation.

Appeals

In the proposed rule, the Commission proposed two different appeal briefing schedules, depending on the matter

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being appealed: 30 days to file both a notice of appeal and any statement or brief in support of the appeal from a dismissal (a ``procedural'' appeal); and 30 days to file a notice of appeal and an additional 30 days thereafter to file a brief or statement in support of an appeal from a final decision (a ``merits'' appeal). Those who commented on this section were nearly unanimous that this distinction was confusing and that there should be a single briefing schedule. The Commission has revised the regulation to provide that a complainant must file an appeal within 30 days of receipt of the agency dismissal or final action, and any supporting statement or brief shall be filed within 30 days of the filing of the notice of appeal. In cases where there has been a decision by an administrative judge, agencies must 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. If the final order does not fully implement the administrative judge's decision, agencies must simultaneously file an appeal with the EEOC. They have an additional 20 days to file a brief in support of that appeal. The final regulation also provides that briefs or statements in support of an appeal and papers filed in opposition to an appeal can be filed by facsimile, provided that they are no more than 10 pages in length. Briefs and statements longer than 10 pages must be mailed or delivered in person.

In response to the Commission's statement in the NPRM that the Commission will strictly apply appellate time frames, a number of commenters suggested that provision be made for extending the appellate
time limits for good cause shown. Part 1614 already provides that regulatory time limits ``are subject to waiver, estoppel and equitable tolling.'' 29 CFR Sec. 1614.604(c).

Most commenters agreed with the Commission's proposal that the Office of Federal Operations be empowered to impose sanctions or otherwise take appropriate action regarding any party who fails, without good cause shown, to comply with appellate procedures or to respond fully and timely to a Commission request for information. Some commenters were concerned that this provision could unfairly impact unrepresented complainants. To the extent an unrepresented complainant fails to comply due to mistake, lack of knowledge, or misunderstanding,
the Commission will take such factors into consideration when determining whether good cause has been shown.

Most commenters also agreed with the proposed appellate standards of review --factual findings rendered by administrative judges after a hearing will be subject to a substantial evidence standard of review; all other decisions will be subject to a de novo review. No new evidence will be considered on appeal unless the evidence was not reasonably available during the hearing process. As we noted in the preamble to the proposed rule, the substantial evidence standard does not preclude meaningful review of factual findings. Moreover, applying the de novo standard of review to the factual findings in administrative judges' final decisions after hearings would be an inefficient use of EEOC's limited resources.

Finally, the Commission proposed to revise the reconsideration process to approximate the process used by the MSPB, reallocate some resources to the improvement of the appellate process and discourage automatic requests for reconsideration whenever a party loses on appeal. Parties may still request reconsideration but it will only be granted, in the discretion of the Commission, if the requester has demonstrated that the appellate decision involved a clearly erroneous interpretation of material fact or law, or the appellate decision will have a substantial impact on the policies, practices or operations of the agency. The comments received were mixed. The unfavorable comments were mostly from agencies although many other agencies favored the change. The objectors raised the same objections discussed in the preamble to the proposed rule. After considering all comments, we have decided to adopt the proposed rule without change. The proposal makes the reconsideration procedure available for those cases where the requestor demonstrates that there are errors of fact or law that would affect the outcomes of the cases and for those cases that will have a substantial impact. By preserving the Commission's discretion, it also will allow the Commission to reallocate its resources to the improvement of the appellate process.

Attorney's Fees

In its NPRM, the Commission proposed two changes to the attorney's fees regulatory scheme: administrative judges would be authorized to determine the amount of the fee award, not just entitlement to the award; and attorney's fees and costs would be available to prevailing complainants for services rendered prior to the filing of the formal complaint (e.g., during the counseling and ADR phases). Most commenters were in favor of the former change. Comments were split on the latter change; agencies were opposed and plaintiffs' attorneys and employees were in favor of the proposal.

The commenters opposed to an administrative judge determining the amount of attorney's fees and costs to be awarded generally were concerned that an administrative judge would not be able to assess adequately the reasonableness of the time spent by an attorney working on the complaint prior to the hearing. The Commission believes that an administrative judge is in a comparable position to a federal district court judge in making a determination of attorney's fees. To address this concern, though, the Commission has clarified section 1614.501(e)(2) to provide that, when a decision-making authority, that is, an agency, an administrative judge, or the Commission, determines that a complainant is entitled to an award of attorney's fees and costs, the complainant's attorney shall submit a statement of fees and costs to the decision-making authority. The agency may respond to and comment on the statement of fees and costs. The decision-making authority will then determine the amount of fees and costs to be awarded. The Commission believes this procedure will best facilitate the determination of the amount of attorney's fees and costs to be awarded, once an entitlement to a fee award has been determined. The Commission has also updated the discussion in the regulation on calculating fees. Management Directive 110 will contain additional guidance on attorney's fees.

The Commission received many comments on the second change to the attorney's fees provisions, allowing fees for services rendered prior to the formal complaint filing. Agencies expressed significant concern about the proposal, arguing that the change would render the preliminary complaint processing phase more formal and adversarial. The decision was made to provide that agencies are not required to pay for attorney's fees for services rendered during the pre-complaint process unless an administrative judge issues a decision finding discrimination, the agency issues a final order disagreeing with the

finding, and EEOC upholds the administrative judge's finding on appeal.
In addition, the agency and the complainant can agree that the agency will pay attorney's fees for pre-complaint process representation. These changes were made to preserve the incentive to resolve matters during the

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pre-complaint process and, at the same time, to create the incentive for agencies to accept administrative judges' decisions, unless they are clearly erroneous.

Matters of General Applicability

The Commission proposed to amend section 1614.103(b) of the regulations to include the Public Health Service Commissioned Corps and the National Oceanic and Atmospheric Administration Commissioned Corps in the coverage of part 1614. As we noted in the preamble to the NPRM, we intended these changes to clarify coverage of these employees and be consistent with the determination of the Solicitor General, in connection with litigation, that Commissioned Corps members are covered by federal sector anti-discrimination statutes. Congress amended the Public Health Service Act, however, in Public Law 103-183, and, as a result, we have decided not to finalize the amendment to section 1614.103(b) adding the Public Health Service Commissioned Corps. We are making final the inclusion of the National Oceanic and Atmospheric Administration Commissioned Corps. In the final rule, the Commission is also amending section 1614.103(b) to make the regulation consistent with the changes made to section 717(a) by the Congressional Accountability Act of 1995, Pub. L. 104-1, Sec. 201(c), 109 Stat. 8, and the Workforce Investment Act of 1998, Pub. L. 105-220, Sec. 341(a), 112 Stat. 936, 1092. These Acts amended the scope of coverage of section 717, eliminating the legislative branch and adding several agencies. We are amending section 1614.103(b) to remove the legislative branch from coverage and to add the Government Printing Office and the

Smithsonian Institution to Part 1614 coverage.

Some commenters suggested that the Commission adopt its private sector charge prioritization procedures in whole or in part in the federal sector. We are making one change to the regulation related to those comments. The current regulation requires a full and fair investigation of every complaint that is not dismissed. Some have interpreted it to require the same amount of investigative effort in each case. That interpretation is not reasonable or desirable and is inconsistent with EEOC's private sector charge prioritization procedures. The Commission believes that the proper scope of an investigation should be dictated by the facts at issue and that a cookie-cutter, one-size-fits-all approach wastes resources and needlessly delays resolution of that complaint and all other complaints. The investigation and the amount of effort expended should be appropriate to determine the issues raised by the complaint. To remedy the misconception that more is required, we have revised sections 1614.106(e)(2) and 1614.108(b) to remove the word ``complete''
and replace with ``appropriate.'' An appropriate investigation is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.

Based on comments the Commission received pertaining to the administrative EEO process in general, the Commission has decided to fine-tune certain sections. In section 1614.604, which pertains to methods of filing and the computation of time limits, the Commission is
replacing the phrase ``delivered in person'' with the word ``received.'' This change is intended to ensure that a document will be
deemed timely if it is received on or before the applicable due date regardless of the manner in which it is transmitted or delivered.

Section 1614.605(d), pertaining to service of papers and computation of time when a complainant has a representative, has been modified. Under the current language, if a complainant is represented by an attorney, correspondence is to be served only on the attorney. The section has been revised to require all papers to be served on both
the attorney and the complainant. Dual notification currently is required under section 1614.605(d) if the representative is a non-attorney. For reasons of consistency, the same service rules will apply
regardless of the status of the representative. Timeframes for receipt of materials shall be computed, however, from the time of receipt by

the attorney where the representative is an attorney.

Regulatory Procedures

Executive Order 12866

In promulgating this final rule, the Commission has adhered to the regulatory philosophy and applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This regulation has been designated as a significant regulation and reviewed by OMB consistent with the Executive Order.

Regulatory Flexibility Act

In addition, the Commission certifies under 5 U.S.C. Sec. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this rule will not have a significant economic impact on a substantial number of small entities, because it applies exclusively to employees and agencies and departments of the federal government. For this reason, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

This regulation contains no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Aged, Civil rights, Equal employment opportunity, Government employees, Individuals with disabilities, Religious discrimination, Sex discrimination.

For the Commission.
Ida L. Castro,
Chairwoman.

Accordingly, for the reasons set forth in the preamble, chapter XIV of title 29 of the Code of Federal Regulations is amended as follows:

PART 1614--[AMENDED]

1. The authority citation for 29 CFR part 1614 continues to read as follows:

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306; E.O. 11478, 3 CFR, 1969 Comp., p. 133; E.O. 12106, 3 CFR, 1978 Comp., p. 263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

2. Section 1614.102 is amended by redesignating paragraphs (b)(2) through (b)(6) as paragraphs (b)(3) through (b)(7), by adding paragraph (b)(2) and by revising paragraph (c)(5) to read as follows:

Sec. 1614.102 Agency program.

* * * * *

(b) * * *

(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.

* * * * *

(c) * * *

(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.

* * * * *

3. Section 1614.103 is amended by removing the word ``and'' at the end of paragraph (b)(3), revising paragraph (b)(4), and adding paragraphs (b)(5) through (b)(7) to read as follows:

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Sec. 1614.103 Complaints of discrimination covered by this part.

* * * * *

(b) * * *

(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; and
(7) The Smithsonian Institution.
* * * * *

4. Section 1614.105 is amended by redesignating paragraph (b) as paragraph (b)(1), revising the first sentence of redesignated paragraph
(b)(1), adding paragraph (b)(2), revising the first sentence of paragraph (d) and revising paragraph (f) to read as follows:

Sec. 1614.105 Pre-complaint processing.

* * * * *

(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 Sec. 1614.108(f), election rights pursuant to Secs. 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to Sec. 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. * * *
(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.
* * * * *

(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.* * *
* * * * *

(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.
* * * * *

5. Section 1614.106 is amended by redesignating paragraph (d) as paragraph (e), adding a new paragraph (d), and revising redesignated paragraph (e) to read as follows:

Sec. 1614.106 Individual complaints.

* * * * *

(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.

6. Section 1614.107 is amended by redesignating paragraphs (a) through (h) as paragraphs (a)(1) through (a)(8), redesignating the

introductory text as paragraph (a) introductory text and revising it, removing the word ``or'' at the end of redesignated paragraph (a)(7), revising redesignated paragraph (a)(8) and adding new paragraphs (a)(9)
and (b) to read as follows:

Sec. 1614.107 Dismissals of complaints.

(a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:
* * * * *
(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.
7. Section 1614.108 is amended by removing the first sentence of paragraph (b) and adding two sentences in its place, revising paragraph
(f) and adding a new paragraph (g) to read as follows:

Sec. 1614.108 Investigation of complaints.

* * * * *

(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. * * *

* * * * *

(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

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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 Sec. 1614.110 from the agency with which the complaint was filed.

(g) 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.

8. Section 1614.109 is amended by revising paragraph (a), redesignating paragraphs (b) through (g) as paragraphs (d) through (i),

adding new paragraphs (b) and (c), removing the introductory text of redesignated paragraph (f) and adding a heading, adding a sentence at the end of redesignated paragraph (f)(1), revising the introductory text of redesignated paragraph (f)(3), in the heading of redesignated paragraph (g) removing the words ``Findings and conclusions'' and adding, in their place the word ``Decisions'', in redesignated paragraphs (g)(2) and (g)(3) removing the phrases ``findings and conclusions'' and adding, in their place, the words ``a decision'', and
revising redesignated paragraph (i) to read as follows:

Sec. 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 Sec. 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.

* * * * *

(f) Procedures.

(1) * * * The administrative judge shall serve all orders to produce evidence on both parties.

* * * * *

(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) 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.

9. Section 1614.110 is revised to read as follows:

Sec. 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 Sec. 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 Sec. 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 Sec. 1614.107, receives a request for an immediate final decision or does not receive a reply to the notice issued under Sec. 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,

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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.

Sec. 1614.201 [Amended]

10. Section 1614.201 is amended by removing the words ``Federal Sector Programs, 1801 L St., NW., Washington, DC 20507'' in the second sentence of paragraph (a) and adding the words ``at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile'' in their place, removing the words ``issued a final decision'' in paragraph (c)(1) and adding the words ``taken final action'' in their place and removing the words ``the issuance of a final decision'' in paragraph (c)(2) and adding the words ``final action'' in their place.

11. Section 1614.204 is amended by revising paragraph (b), removing
the words ``recommend that the agency'' from paragraphs (d)(2), (d)(3),
(d)(4), and (d)(5), removing the word ``recommend'' and adding the word
``decide'' in its place in paragraph (d)(6), revising paragraphs (d)(7), (e)(1), (g)(2), (g)(4), and (l)(3), and removing the word ``agency'' and adding the word ``agent'' in its place in paragraph (j)(7), to read as follows:

Sec. 1614.204 Class complaints.

* * * * *

(b) Pre-complaint processing. An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with Sec. 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 Sec. 1614.105, no additional counseling is required. The administrative judge shall deny class certification when the complainant has unduly delayed in moving for certification.

* * * * *

(d) * * *

(7) The administrative judge shall transmit his or her decision to accept or dismiss a complaint to the agency and the agent. The agency shall take final action by issuing a final order within 40 days of receipt of the hearing record and administrative judge's decision. The final order shall notify the agent whether or not the agency will implement the decision of the administrative judge. If the final order does not implement the decision of the administrative judge, the agency
shall simultaneously appeal the administrative judge's decision in accordance with Sec. 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 Sec. 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) * * * (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.

* * * * *

(g) * * *

(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.

* * * * *

(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.
* * * * *

(l) * * *

(3) When discrimination is found in the final decision 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 decision. 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 the agency found class-wide discrimination in its final decision. 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 decision 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

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subpart D of this part and the applicable time limits.

Sec. 1614.302 [Amended]

12. Section 1614.302 is amended by removing the words ``5 CFR 1201.154(a)'' in paragraph (d)(1)(i) and adding the words ``5 CFR 1201.154(b)(2)'' in their place.

13. Section 1614.401 is amended by redesignating paragraphs (b) through (d) as paragraphs (c) through (e), revising paragraph (a), adding a new paragraph (b), and revising redesignated paragraph (c) to read as follows:

Sec. 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 Sec. 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 a final 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 Sec. 1614.204(g)(4).

* * * * *

14. Section 1614.402 is amended by revising paragraph (a) to read as follows:

Sec. 1614.402 Time for appeals to the Commission.

(a) Appeals described in Sec. 1614.401(a) and (c) must be filed

within 30 days of receipt of the dismissal, final action or decision. Appeals described in Sec. 1614.401(b) must be filed within 40 days of receipt of the hearing file and decision. Where a complainant has notified the EEO Director of alleged noncompliance with a settlement agreement in accordance with Sec. 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.
* * * * *

15. Section 1614.403 is revised to read as follows:

Sec. 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 19848, Washington, DC 20036, 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.

16. Section 1614.404 is amended by adding a new paragraph (c) to read as follows:

Sec. 1614.404 Appellate procedure.

* * * * *

(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.

17. Section 1614.405 is amended by revising the third sentence of paragraph (a), by removing the words ``certified mail, return receipt requested'' from the last sentence of paragraph (a) and adding the words ``first class mail'' in their place and revising paragraph (b) to read as follows:

Sec. 1614.405 Decisions on appeals.

(a) * * * 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 Sec. 1614.109(i) shall be based on a substantial evidence standard of review. * * *

(b) A decision issued under paragraph (a) of this section is final within the meaning of Sec. 1614.407 unless the Commission reconsiders 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.

Sec. 1614.407 [Removed]

Secs. 1614.408 through 1614.410 [Redesignated as Secs. 1614.407 through 1614.409]

18. Section 1614.407 is removed and Secs. 1614.408 through 1614.410
are redesignated as Secs. 1614.407 through 1614.409.
19. Redesignated Sec. 1614.407 is amended by removing the words ``final decision'' from paragraph (a) and adding the words ``final action'' in their place and by removing the words ``a final decision has not been issued'' from paragraph (b) and adding the words ``final action has not been taken'' in their place.
20. Section 1614.501 is amended by revising the last sentence of the introductory text of paragraph (e)(1), and revising paragraphs (e)(1)(iv) and (e)(2)(i), the first sentence of paragraph (e)(2)(ii)(A)
and paragraph (e)(2)(ii)(B) to read as follows:

Sec. 1614.501 Remedies and relief.

* * * * *
(e) Attorney's fees or costs--(1) * * * In a decision or final action, the agency, administrative judge, or Commission may award the applicant or employee

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reasonable attorney's fees (including expert witness fees) and other costs incurred in the processing of the complaint.
* * * * *

(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) * * * (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. * * *

(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.
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21. Section 1614.502 is amended by revising the first sentence of

paragraph (a), revising the introductory text of paragraph (b), revising paragraph (b)(2) and adding a new paragraph (b)(3) to read as follows:

Sec. 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. * * *

(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.

* * * * *

(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.

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Sec. 1614.504 [Amended]

22. Section 1614.504 is amended by removing the words ``final decisions'' from the section heading and adding the words ``final action'' in their place, removing the words ``A final decision'' from

the second sentence of paragraph (a) and adding the words ``Final action'' in their place, and removing the word ``final'' from the third sentence of paragraph (a) and the second sentence of paragraph (b).

23. Section 1614.505 is added to subpart E to read as follows:

Sec. 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

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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.

Sec. 1614.603 [Amended]

24. Section 1614.603 is amended by removing the word ``allegations'' from the last sentence and adding the word ``claims'' in its place.

Sec. 1614.604 [Amended]

25. Section 1614.604 is amended by removing the words ``delivered in person'' and adding the word ``received'' in their place in paragraph (b).

26. Section 1614.605 is amended by revising the second sentence of paragraph (d) to read as follows:

Sec. 1614.605 Representation and official time.

* * * * *

(d) * * * 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.

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27. Section 1614.606 is revised to read as follows:

Sec. 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.

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