

# Addressing Sexual Orientation Discrimination In Federal Civilian Employment: A Guide to Employee's Rights

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## Introduction

Executive Order 13087, issued on May 28, 1998, prohibits discrimination based upon sexual orientation within Executive Branch civilian employment. The Executive Order states this policy uniformly by adding sexual orientation to the list of categories for which discrimination is prohibited. The other categories are race, color, religion, sex, national origin, handicap, and age. On May 2, 2000, Executive Order 13153 added "status as a parent" to the list of categories for which discrimination is prohibited.

It is the policy of the Federal Government to provide an equal opportunity to all of its employees. Federal employees should be able to perform their jobs in workplaces free from discrimination-whether that discrimination is based on color, religion, sex, national origin, handicap, age or sexual orientation. The President's Executive Order states, as a matter of Federal policy, that a person's sexual orientation should not be the basis for the denial of a job or a promotion. As the Nation's largest employer, the Federal Government sets an example for other employers that employment discrimination based upon sexual orientation is not acceptable.

Existing Federal law prohibits discrimination in certain employment decisions when the decisions are based upon conduct that does not adversely affect employee performance. Federal employees should be able to perform their jobs in workplaces free from discrimination.

The new Executive Order amends section 1 of Executive Order 11478 (1969), which now reads, in part, as follows:

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, or sexual orientation through a continuing affirmative program in each executive department and agency. This policy of equal employment opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government, to the extent permitted by law.

## **Purpose**

The purpose of this booklet is to make Federal employees aware of how to obtain help if they believe they have been discriminated against based upon sexual orientation. Executive Order 13087 states the Executive Branch's policy but does not create any additional enforcement rights, such as the ability to proceed before the Equal Employment Opportunity Commission. The Executive Order does not authorize affirmative action programs. There are, however, existing administrative and legal remedies available to Federal employees who believe they have been victims of discrimination based upon sexual orientation. This booklet is designed to make employees and applicants aware of existing bases for assistance and to aid them in finding the agencies that can help them. It is not designed as a comprehensive guide, but as a general overview.

## **Agency Commitment**

Federal agencies, as well as their managers, should commit themselves to promoting a work environment that is free from discrimination based upon sexual orientation in accordance with Executive Order 13087. Agencies should distribute the President's Executive Order to their employees and should notify them about avenues of redress. Employees should be encouraged to report to their supervisor instances of discrimination. When made aware of problems, supervisors should consult with their human resources office or agency legal counsel to ensure that appropriate steps are taken. All reports of incidents of sexual orientation discrimination should be taken seriously and addressed. In some circumstances, this may involve taking corrective steps or disciplining those who discriminate, as appropriate.

## **Legal Protections**

### **Legal Protections - Office of Special Counsel (OSC)**

#### **Prohibited Personnel Practice**

The Civil Service Reform Act of 1978 describes prohibited personnel practices. One of them, contained in 5 U.S.C. § 2302(b)(10), prohibits any employee who has authority to

take certain personnel actions from discriminating for or against employees or applicants for employment on the basis of conduct that does not adversely affect employee performance. OPM has interpreted this statute to prohibit discrimination based upon sexual orientation. Sexual orientation means homosexuality, bisexuality, or heterosexuality.

## **Where to Seek Help**

When applicants or employees believe that a prohibited personnel practice has been committed against them that constitutes discrimination based upon sexual orientation, they may seek assistance under certain circumstances from:

- [Merit Systems Protection Board](#)
- [Office of Special Counsel](#)
- [Negotiated Grievance Procedure](#)
- [Agency Grievance Procedure](#)

Employees and applicants may not seek relief from the Equal Employment Opportunity Commission or file a discrimination complaint under title VII of the Civil Rights Act of 1964, as amended, because that law does not prohibit discrimination based upon sexual orientation.

Most of the available procedures require employees or applicants to raise the allegations within a specific time frame from the date that the alleged discrimination occurred. The following sections provide basic and general information about these procedures and the circumstances under which each can be used. Under some circumstances, more than one procedure may be available, and the choice of one procedure may preclude the use of others.

You should review the rules and procedures specific to your agency and those issued by agencies that decide complaints and appeals before you decide whether and how to proceed.

*A cautionary note: The Federal employee appeals process can, at times, seem confusing because of the overlapping authority of several different agencies and different appeal routes and time limitations. This guide is intended to be a general introduction to possible remedies for discrimination based upon sexual orientation. It is not intended to be a substitute for legal advice on the best course of action for a particular employee. Although much of this information is available to you directly from either your agency or those agencies mentioned in this guide, you might also consult with an attorney experienced in Federal employment issues or, where applicable, a knowledgeable union officer.*

## **I. Merit Systems Protection Board (MSPB)**

If you wish to appeal from an agency action, you should contact the MSPB at the addresses listed on page 7 as soon as possible after the action was taken to determine whether it is an action upon which the MSPB may rule.

The MSPB is an independent body that hears, among other things:

- Appeals from certain agency personnel actions, which are set forth in regulations contained in section 1201.3 of title 5, Code of Federal Regulations. These include removals, suspensions for more than 14 days, and reductions in grade and pay of certain Federal employees who possess tenure.
- Cases brought by the Special Counsel involving alleged prohibited personnel practices.

These two procedures for bringing cases before the MSPB are more fully outlined below.

### **Appeals**

When employees or applicants challenge one of the actions described above by filing an appeal within the jurisdiction of MSPB, they may also allege that the personnel action being appealed was based upon a prohibited personnel practice. If the employee establishes that it is more likely than not that this was the basis for the agency's personnel action, the personnel action will not be sustained.

### **Cases Brought by the Special Counsel**

If the personnel action is not one appealable to MSPB, employees and applicants must seek the assistance of the Office of Special Counsel, which has authority to investigate and to petition MSPB on behalf of the employee or applicant. The procedures for seeking the assistance of the Office of Special Counsel are described beginning on page 8.

### **Appeal Procedures**

Very generally, an MSPB appeal proceeds as follows:

A person files an appeal with one of the MSPB's regional offices. The addresses of the regional offices are contained in MSPB's regulations.

The administrative judge assigned to the case determines whether an appeal is filed within the time limits and whether the agency personnel action complained of properly may be the subject of an appeal.

If an appeal meets these requirements, the employee or applicant has the right to choose between a hearing or a decision on the written record.

When an administrative judge issues a decision either the employee or applicant or the agency may ask the full MSPB to review any part of the decision that is thought to be erroneous.

Employees or applicants may seek judicial review of an MSPB decision. An agency may not. However, the United States Office of Personnel Management (OPM) may seek judicial review when the Director of OPM believes that the MSPB's decision is erroneous and will have a substantial impact on civil service law.

The procedures that MSPB follows are contained in Title 5, Code of Federal Regulations, Part 1201.

### **For Additional Information about the Merit Systems Protection Board**

MSPB has a web site at [www.mspb.gov](http://www.mspb.gov). You may contact the MSPB's headquarters at (202) 653-7200 or (800) 209-8960, or by mail at: Merit Systems Protection Board, 1120 Vermont Avenue, NW, Washington, DC, 20419. Copies of the MSPB's regulations are available at any MSPB office, agency personnel offices, most public libraries, and on the MSPB web site. The web site also makes available MSPB decisions, forms for filing appeals or petitions for review, and general information about the Board.

The address of MSPB Regional Offices can be found at Appendix II, 5 CFR, Part 1201.

### **Conclusion**

We hope that this booklet will provide some important information to those who believe they have been the victims of discrimination.

This guidance should be widely distributed to employees and should be made available for review in central locations. Dissemination of information on procedural remedies is of great importance to employees who may feel victimized by discrimination. But of primary importance is creating an atmosphere of fairness to employees. They should be secure in the knowledge that the Federal agency for which they work will not treat them differently or less favorably on account of sexual orientation or any other consideration unrelated to merit.

Through the equitable treatment of employees the Federal Government can set an example for the nation that we serve.