EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE EEO MD - 110

EFFECTIVE DATE: November 9, 1999

TO THE HEADS OF FEDERAL AGENCIES

1. SUBJECT. FEDERAL SECTOR COMPLAINTS PROCESSING MANUAL

2. PURPOSE. The purpose of this Directive is to provide federal agencies with Commission policies, procedures, and guidance relating to the processing of employment discrimination complaints governed by the Commission's regulations in 29 C.F.R. Part 1614. Federal agencies covered by 29 C.F.R. Part 1614 are responsible for developing and implementing their own equal employment programs, including alternative dispute resolution programs, and complaint processing procedures consistent with the Commission's regulations. It is the Commission's responsibility to direct and further the implementation of the policy of the government of the United States to provide equal opportunity in federal employment and to prohibit discrimination in employment because of race, color, religion, sex, national origin, age, disability, or retaliation. Pursuant to its obligations and statutory authority, the commission issues such rules, regulations, orders, and instructions, including management directives, as it deems necessary and appropriate to carry out its responsibilities to communicate federal equal employment opportunity management policy, requirements, guidance and information to federal agencies. The Commission's instructions are directive in nature, and heads of federal agencies are responsible for prompt and effective compliance with Commission Management Directives and Bulletins. This complaint processing manual will ensure that agency personnel responsible for complaints processing are in possession of all current Commission guidance materials so that the Commission's policies, procedures, and regulations are consistently and uniformly applied government-wide. The manual consists of several chapters with subject matter headings identified in the table of contents. Some chapters are issued in connection with specific sections of the regulations. Other chapters include guidance and direction on topics, which we know from our experience processing complaints under previous regulations, are needed and are applicable to Part 1614. The manual will be supplemented by new and revised materials, as they are issued. The manual has been prepared in loose leaf form to facilitate the insertion of new and the removal of outdated materials. The Commission is hopeful that this manual will be helpful to federal agency personnel in administering the discrimination complaint process.

3. SUPERSESSION. The directive superceded EEO MD - 110 issued November 10, 1992, and EEO MD - 110 Change One, issued October 16, 1995.

4. AUTHORITY. This Directive is issued pursuant to EEOC's obligations and authority under section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; sections 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791 and 794a; section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; section 6(d) of the Fair Labor Standards Act of 1938, as amended (the Equal Pay Act), 29 U.S.C. § 206(d); Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321(1078) and Executive Order

11478, 3. C.F.R. § 803 (1966-1970 Compilation) reprinted in 42 U.S.C. § 2000e note, issued in 1969 and 12106, 44 Fed. Reg. 1053 (1979).

5. POLICY INTENT. The policy objective of this Directive is to ensure that federal agency personnel responsible for processing employment discrimination complaints do so consistently and in accordance with the Commission's regulations set out in 29 C.F.R. Part 1614, and with the guidance, policies, and procedures contained in this Directive and in the attached manual.

6. APPLICABILITY AND SCOPE. The provisions of this Directive apply to all Federal agencies covered by 29 C.F.R. Part 1614

7. RESPONSIBILITIES. Heads of federal agencies are responsible for ensuring that employment discrimination complaints are processed fairly, promptly, and in strict accordance with the complaint processing procedures set out in 29 C.F.R. Part 1614 and with the guidance incorporated in paragraph eight of this Directive. Since the commission's guidance is binding in nature, federal agencies are required to comply with it.

8. POLICIES AND PROCEDURES. The Commission's specific policies, procedures and guidance related to the processing of federal sector employment discrimination complaints are contained in this Complaints Processing Manual. All statements of guidance upon which the Commission votes and which the Commission approves becomes Commission guidance. Care has been taken to delineate any agency action which is suggested rather than required by Commission policy. All time frames stated herein are in calendar days.

9. INQUIRIES. Unless otherwise specifically noted in the manual, further information concerning this Directive or guidance contained in the attached manual may be obtained by contacting:

   Equal Employment Opportunity Commission
   Office of Federal Operations
   Federal Sector Programs
   1801 L Street, N. W.
   Washington, D. C. 20507
   Telephone: (202) 663-4599
   TDD: (202) 663-4593

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Date Ida L. Castro
Chairwoman

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CHAPTER 1

AGENCY AND EEOC AUTHORITY AND RESPONSIBILITY

I. FEDERAL AGENCY

Each federal agency shall appoint a Director of Equal Employment Opportunity (EEO Director), who shall be under the immediate supervision of the agency head. 29 C.F.R. § 1614.102(b)(4).[(1)] The EEO Director shall be responsible for the implementation of a continuing affirmative employment program to promote equal employment opportunity and to identify and eliminate discriminatory practices and policies. The EEO Director cannot be placed under the supervision of the agency's Director of Personnel or other officials responsible for executing and advising on personnel actions.

II. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission is authorized to issue rules, regulations, orders, and instructions pursuant to section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(b); section 15(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(b); section 505(a)(1) of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(1); the Fair Labor Standards Act, 29 U.S.C. 201 et seq.; Executive Order 12067, 43 Fed. Reg. 28,967 (1978); and Executive Order 11478, 34 Fed. Reg. 12,985 (1969), as amended by Executive Order 12106 (1979). It is pursuant to that authority that the EEOC issues this Management Directive.

III. EEO DIRECTOR - INDEPENDENT AUTHORITY AND REPORTING RELATIONSHIPS

Federal agencies shall place the EEO Director in a direct reporting relationship with the head of the agency. By placing the EEO Director in a direct reporting relationship to the head of the agency, the agency underscores the importance of equal employment opportunity to the mission of each federal agency and ensures that the EEO Director is able to act with the greatest degree of independence. Placing the EEO Director under the authority of others within the agency may undermine the EEO Director's independence, especially where the person or entity to which the EEO Director reports is involved in or would be affected by the actions of the EEO Director in the performance of his/her implementation of the agency program set forth in 29 C.F.R. § 1614.102.

Agencies must avoid conflicts of position or conflicts of interest as well as the appearance of such conflicts. For example, the same agency official(s) responsible for executing and advising on personnel actions may not also be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint processes. Those processes often challenge the motivations and impacts of personnel actions and decisions. In order to maintain the integrity of the EEO investigative and decision making processes, those functions must be kept separate from the personnel function.

Heads of agencies must not permit intrusion on the investigations and deliberations of EEO complaints by agency representatives and offices responsible for defending the agency against EEO complaints. Maintaining distance between the fact-finding and defensive functions of the agency enhances the credibility of the EEO office and the integrity of the EEO complaints process. Legal sufficiency reviews of EEO matters must be handled by a functional unit that is separate and apart from the unit which handles agency representation in EEO complaints. The Commission requires this separation because impartiality and the appearance of impartiality is important to the credibility of the equal employment program.

For example, it would be intrusive for the individual who represented the agency in an equal employment hearing to have authority to approve decisions with respect to resolution in the same or related cases. Impartiality or appearance of impartiality is undermined where members of the office where the representative is employed have the legal sufficiency function with respect to cases in which a colleague served as agency representative.

IV. DELEGATION OF AUTHORITY TO RESOLVE DISPUTES

The agency must designate an individual to attend settlement discussions convened by an EEOC Administrative Judge or to participate in alternative dispute resolution (ADR) attempts. Agencies should include an official with settlement authority at all ADR meetings. The probability of achieving resolution of a dispute improves significantly if the designated agency official has the authority to agree immediately to a resolution reached between the parties. If an official with settlement authority is not present at the settlement or ADR negotiations, such official must be immediately accessible to the agency representative during settlement discussions or ADR.

V. SPECIAL EMPHASIS PROGRAM

The head of the agency designates Equal Employment Opportunity Officer(s) and such Special Emphasis Program Managers, clerical, and administrative support as may be necessary to carry out the functions described in Part 1614 in all organizational units of the agency and at all agency installations. 29 C.F.R. § 1614.102(b)(4).

Special Emphasis Program Managers may include managers of the Program for People with Disabilities, the Federal Women's Program, Hispanic Employment Program and such other programs as may be required by the Office of Personnel Management or the particular agency.

An agency head may delegate authority under this part to one or more designees. § 1614.607.

VI. EEO OFFICIALS CANNOT SERVE AS REPRESENTATIVES

EEO officials must have the confidence of the agency and its employees. It is inconsistent with their neutral roles for EEO counselors, EEO investigators, EEO officers, and EEO program managers to serve as representatives for agencies or complainants. Therefore, persons in these positions cannot serve as representatives for complainants or for agencies in connection with the processing of discrimination complaints. See § 1614.605(c) (disqualification of representatives for conflict of duties).

1. The term "federal agency" or "agency," as used in this Management Directive, applies to military departments as defined in 5 U.S.C. § 102, executive agencies as defined in 5 U.S.C. § 105, the U.S. Postal Service, Postal Rate Commission, Tennessee Valley Authority, the National Oceanic and Atmospheric Administration Commissioned Corps, the Government Printing Office, and the Smithsonian Institution. See 29 C.F.R. § 1614.103(b). The term also may include such other agencies, administrations, bureaus (etc.) as may be established within the above-listed that are given the authority to establish a separate unit tasked with implementing an agency program consistent with the requirements of 29 C.F.R. § 1614.102. Where such agencies, administrations, bureaus (etc.) have been so authorized, the EEO Director shall be under the immediate supervision of the head of the agency, administration, bureau (etc.), who, in turn, should report to either the EEO Director within the parent organization or to the head of such organization.

CHAPTER 2

EQUAL EMPLOYMENT OPPORTUNITY PRE-COMPLAINT PROCESSING

I. INTRODUCTION

A. Counseling Generally

The aggrieved person starts the equal employment opportunity (EEO) process by meeting with an EEO Counselor.[(1)] The Counselor plays a vital role in ensuring prompt and efficient processing of the formal complaint. This section of the Management Directive provides Commission guidance and procedures that EEO Counselors should follow when presented with both individual and class claims of discrimination.[(2)]

B. Full-Time Counselors

Agencies should use full-time EEO Counselors whenever possible. The employment and use of full-time EEO Counselors leads to the development of a professional corps of EEO Counselors who are better able to service the federal applicant and employee community. EEOC also encourages agencies to use the step-by-step guide at Appendix A to develop or refine its own counseling procedures.

C. EEO Counselor Training Requirements

Continuing education and training for employees working in federal sector EEO is vitally important to further the goals and objectives of equal employment opportunity. This Chapter establishes mandatory training requirements for Counselors.

D. ADR and EEO Counseling

Alternative dispute resolution (ADR) and EEO counseling are essential to achieving early resolution of the claim. The opportunity for informal resolution is important. ADR provides a means of improving the efficiency of the federal EEO complaint process by attempting early informal resolution of EEO disputes.

Aggrieved individuals who seek pre-complaint counseling must be fully informed of:

1. how the agency ADR program works;
2. the opportunity to participate in the program where the agency agrees to offer ADR in a particular case; and
3. the right to file a formal complaint if ADR does not achieve a resolution.

II. MANDATORY EEO COUNSELOR TRAINING REQUIREMENTS

A. Minimum Requirements

To ensure quality counseling throughout the federal sector, EEOC requires that new EEO Counselors receive a minimum of thirty-two (32) hours of EEO Counselor training prior to assuming counseling duties.

Individuals currently serving as Counselors may also benefit from such training. Agencies have the discretion to determine whether this training should be made available to current counseling staff. **All** EEO Counselors are required, however, to receive at least eight hours of continuing EEO counseling training every year.

EEOC has developed training courses to satisfy this requirement, and offers them to agencies through the EEOC Revolving Fund Program on a fee-for-service basis. Agencies may also develop their own courses to satisfy this requirement, or contract with others to provide training, as long as the training meets the standards set forth by the Commission.

B. **Initial Thirty-Two Hour Training for New EEO Counselors**

New EEO Counselors must receive training in the following areas before an agency assigns them to provide EEO counseling to aggrieved persons:

1. an overview of the entire EEO process set forth under 29 C.F.R. Part 1614, emphasizing important time frames in the EEO process and providing an overview of counseling class complaints and analyzing fragmentation issues (see Chapter 5, Section III of this Management Directive for a discussion of fragmentation);

2. a review of the roles and responsibilities of an EEO Counselor, as described in this Chapter and in the Appendices to this Management Directive;

3. an overview of the statutes that EEOC enforces, including Title VII of the Civil Rights Act of 1964, as amended (Title VII), the Rehabilitation Act of 1973, as amended, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act of 1967, as amended (ADEA), and the Equal Pay Act of 1963 (EPA), explaining the theories of discrimination, including the disparate treatment, adverse impact, and reasonable accommodation theories, and providing more detailed instruction concerning class actions and issues attendant to fragmentation;

4. a review of the practical development of issues through role-playing or other practices designed to have attendees practice providing EEO counseling, including the initial in-take session with an aggrieved person; identifying claims; writing reports; and attempting resolution;

5. a review of other procedures available to aggrieved persons, such as the right to go directly to court under the ADEA; mixed case processing issues, including the right of election; class complaints processing issues; and the negotiated grievance procedure, including the right of election; and

6. an overview of the remedies, including compensatory damages, attorney's fees, and costs available to prevailing parties.

C. **Continuing Training**

All Counselors are required to receive at least eight hours of continuing Counselor training every year to keep EEO Counselors informed of developments in EEO practice, law, and guidance, as well as to enhance and develop counseling skills. Accordingly, agencies should conduct a needs assessment to determine specific areas for training. The Commission anticipates that this training will include segments on legal and policy updates, regulatory and statutory changes, and counseling skills development.

III. THE EEO COUNSELING PROCESS

The Roles and Responsibilities of an EEO Counselor

The Commission has developed a guide for EEO counseling that agencies may use in developing or refining their own procedures. (See Appendix A.) The Commission also recognizes that agencies use many forms of ADR.

Where an aggrieved person seeks EEO counseling, the Counselor must ensure that the complainant understands his/her rights and responsibilities in the EEO process, including the option to elect ADR. The EEO Counselor must perform several tasks in **all** cases, regardless of whether the individual ultimately elects the ADR option, including:

1. Advise the aggrieved person about the EEO complaint process under 29 C.F.R. Part 1614. The EEO counselor should explain the agency ADR program, indicating either that the program is available to the aggrieved individual or that the EEO counselor will advise the individual whether the program will be made available. The EEO Counselor further should explain that if the ADR program is available, the aggrieved individual will have to exercise an election option, and decide whether to seek pre-complaint resolution through the ADR process or through the traditional EEO counseling process. In this regard, the EEO Counselor should inform the aggrieved individual about the differences between the two processes.

2. Determine the claim(s) and basis(es) raised by the potential complaint.

3. Conduct an inquiry during the initial interview with the aggrieved person for the purposes of determining jurisdictional questions. This includes determining whether there may be issues relating to the timeliness of the individual's EEO Counselor contact and obtaining information relating to this issue. It also includes obtaining enough information concerning the claim(s) and basis(es) so as to enable the agency to properly identify the legal claim raised if the individual files a complaint at the conclusion of the EEO counseling process.

4. Use of the term "initial interview" in this context is not intended to suggest that during the **first** meeting with the aggrieved person an EEO Counselor must obtain all of the information s/he needs to determine the claim(s) or basis(es). Nor does it mean that where the person decides to exercise his/her ADR option, the EEO Counselor is foreclosed from contacting the person to obtain such additional information as s/he needs for this specific purpose.

5. Seek a resolution of the dispute at the lowest possible level, unless the aggrieved person elects to participate in the agency's ADR program where the agency agrees to offer ADR

in a particular case. If the dispute is resolved in counseling, the EEO Counselor must document the resolution.

6. Advise the aggrieved person of his/her right to file a formal discrimination complaint if attempts to resolve the dispute through EEO counseling or ADR fail to resolve the dispute.

7. Prepare a report sufficient to document that the EEO Counselor undertook the required counseling actions and to resolve any jurisdictional questions that arise.

PROVIDING INFORMATION TO THE AGGRIEVED PERSON

. Provide Required Written Notice

At the initial session or as soon as possible thereafter, the EEO Counselor must provide **all** aggrieved persons written notice of their rights and responsibilities. § 1614.105(b). The Commission has set forth this information in the "EEO Counselor Checklist," appended to the Management Directive in Appendix B.

A. Provide Information On Other Procedures as Required

Depending upon the facts and circumstances of the particular case, an aggrieved person may have options other than the Part 1614 procedure available in pursuit of a discrimination claim. The individual, in some cases, may have to elect the process s/he wishes to pursue. Election options apply in age discrimination complaints, mixed case complaints, Equal Pay Act complaints, and claims where certain negotiated grievance procedures apply. EEO Counselors must be familiar with these procedures and be able to identify such cases when the aggrieved person first seeks counseling. See Appendices C and D.[3] Other procedures apply where the complainant alleges sexual orientation discrimination.[4]

B. Statutes and Regulations

EEO Counselors must have a good working knowledge of the complaint processing regulations in Part 1614 and a familiarity with federal anti-discrimination statutes, including:

1. Title VII of the Civil Rights Act of 1964, as amended

   Title VII prohibits discrimination based on race, color, religion, sex, and national origin. It also prohibits reprisal or retaliation for participating in the discrimination complaint process or for opposing any employment practice that the individual reasonably and good faith believes violates Title VII.

2. Age Discrimination in Employment Act of 1967, as amended (ADEA)

   The ADEA prohibits discrimination in employment on the basis of age (40 years or older). It also prohibits retaliation against individuals exercising their rights under the statute. Unlike Title VII and the Rehabilitation Act, the ADEA allows

persons claiming age discrimination to go directly to court without going through an agency's administrative complaint procedures. If, however, a complainant chooses to file an administrative complaint, s/he must exhaust administrative remedies before proceeding to court. As with Title VII complaints, a complainant exhausts administrative remedies 180 days after filing a formal complaint or 180 days after filing an appeal with the Commission if the Commission has not issued a decision.

3. Rehabilitation Act of 1973, as amended

The Rehabilitation Act prohibits discrimination on the basis of mental and physical disabilities, as well as retaliation for exercising rights under the Act. The Rehabilitation Act requires that agencies make reasonable accommodations to the known physical or mental limitations of a qualified disabled applicant or employee unless the agency can demonstrate that the accommodations would impose an undue hardship on the operation of its program. (Congress amended the Rehabilitation Act of 1973 in October 1992 to provide that the standards used to determine whether non-affirmative action employment discrimination has occurred shall be the standards applied under Title I of the Americans With Disabilities Act. See § 503(b) of the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat 4344 (October 29, 1992); 29 U.S.C. § 791(g).)

4. Fair Labor Standards Act of 1938, as amended (Equal Pay Act of 1963)(EPA)

The EPA prohibits sex-based wage discrimination. It prohibits federal agencies from paying employees of one sex lower wages than those of the opposite sex for performing substantially equal work. Substantially equal work means that the jobs require equal skills, effort, and responsibility, and that the jobs are performed under similar working conditions.[5] It also prohibits retaliation for exercising rights under the Act.

5. Commission Regulations, Guidelines, and Policy Directives

The Commission has issued regulations that address the application of federal nondiscrimination law to the federal government. The regulations governing the processing of federal sector discrimination complaints are contained in Title 29 of the Code of Federal Regulations (C.F.R.), Part 1614. The regulations set out the Counselor's obligations enumerated in Section II of this Chapter.

Other Commission regulations and guidelines address the substantive provisions of federal nondiscrimination law. For example, 29 C.F.R. Part 1630 sets forth Commission regulations applicable to the Rehabilitation Act. EEO Counselors should be familiar with Part 1630 in order properly to counsel individuals who present claims of disability discrimination.[6] The Commission also has issued enforcement guidance on discrete issues and areas of nondiscrimination law, such as "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors," issued June 18, 1999; and "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act," issued March 1, 1999. These documents and others are available

on the EEOC web site at "www.eeoc.gov" in the Enforcement Guidance and Related Documents section.

DETERMINE THE CLAIM(S) AND BASIS(ES) OF THE POTENTIAL COMPLAINT

. **Determining the Claim(s)**

1. Fragmentation

The EEO Counselor plays a crucial role in the complaint process. As discussed in more detail in Chapter 5, Section III of this Management Directive, EEO counselors must assist the complainant in articulating the claim so as to avoid fragmenting the claim. EEO Counselors must review the materials set forth in Section III of Chapter 5 and become familiar with the concept of fragmentation to ensure the proper identification of the claims set forth in a request for EEO counseling or in other documents that the EEO Counselor may prepare.

2. Identifying the claim(s)

At the initial interview, the Counselor must determine what action(s) the agency has taken or is taking that causes the aggrieved person to believe s/he is the victim of discrimination. This first step is essential to proceeding with the inquiry and resolution attempt and, if resolution is not achieved, essential to a focused investigation and hearing.

Before the Counselor begins the inquiry, s/he must be certain that the claim(s) are clearly defined and the aggrieved person agrees on how the agency defines the claim(s) that are to be the subject of the inquiry and subsequent attempts at resolution, whether through counseling or ADR. The Counselor must also determine, based on his/her understanding of the claims whether special procedures apply.

If a claim is like or related to a previously filed complaint, then the complaint should be amended to include that claim. If the claim is not like or related to a previously filed complaint, the claim should be processed as a separate complaint. Commission regulations require that agencies consolidate complaints for processing unless it is impossible to do so. See 1614.606. In a process set forth in Chapter 5, Section III.B of this Management Directive, a complainant shall be instructed to submit a letter to the agency's EEO Director or Complaints Manager (or a designee) describing the new incident(s) and stating that s/he wishes to amend his/her complaint to include the new incident(s). The EEO Director or Complaints Manager shall review the request and determine the correct handling of the amendment in an expeditious manner.

A. **Determining the Basis(es)**

The aggrieved person must believe s/he has been discriminated against on the basis of race, color, sex (including equal pay), religion, national origin, age (40 and over), disability, or in retaliation for having participated in activity protected by the various civil

rights statutes. The EEO Counselor should determine if the aggrieved person believes that his/her problem is the result of discrimination on one or more of the bases.

B. **When the Basis(es) is not Covered by the EEO Regulations**

If it is clear that the aggrieved person's problem does not involve a basis(es) covered by the regulations, the EEO Counselor should inform the aggrieved person and, if possible refer him/her to an appropriate source. If the aggrieved person insists that s/he wants to file a discrimination complaint, the Counselor should issue the notice of final interview. Under no circumstance should the Counselor attempt to dissuade a person from filing a complaint.

PROCEDURES UPON INITIATION OF EEO COUNSELING

. **Conducting the Inquiry**

After the Counselor has determined the basis(es) and claims, s/he should conduct a limited inquiry. The purpose of the limited inquiry is to obtain information to determine jurisdictional questions if a formal complaint is filed and is performed regardless of whether the aggrieved person subsequently chooses ADR. The limited inquiry also is used to obtain information for settlement purposes if the person chooses EEO counseling over ADR or does not have the right to elect between EEO counseling and ADR.

While the scope of the inquiry will vary based on the complexity of the claims, the inquiry is limited and not intended to substitute for the fact finding required in the formal stage. The Counselor must at all times control the inquiry. If the aggrieved person or agency personnel raise objections to the scope or nature of the inquiry, the Counselor shall seek guidance and assistance from the EEO Officer. If the Counselor has problems with the inquiry, s/he should immediately notify the EEO Officer.

Appendix A includes suggested methods for conducting the inquiry. This guidance may be used to supplement established procedures.

A. **Seeking Resolution**

In almost all instances, informal resolution, freely arrived at by all parties involved in the dispute, is the best outcome of a counseling action. In seeking resolution, the Counselor must listen to and understand the viewpoint of both parties so that s/he is able to assist the parties in achieving resolution. The Counselor's role is to facilitate resolution, not develop or advocate specific terms of an agreement. The Counselor must be careful not to inject his/her views on settlement negotiations.[(7)]

Appendix A includes suggested methods for seeking resolution. This guidance may be used to supplement established agency procedures.

B. **Resolution**

1. Resolution of the Dispute

If during the course of the EEO Counselor's limited inquiry, the agency and the aggrieved person agree to an informal resolution of the dispute, the terms of the resolution should be reduced to writing and signed by both parties to help ensure that the agency and the aggrieved person have the same understanding of the terms of the resolution. The Commission recommends that the EEO Counselor, with the knowledge and guidance of the EEO Officer or Director, set forth the terms of the informal resolution in a letter transmitted to the parties. The letter should state clearly the terms of the informal resolution and should notify the aggrieved person of the procedures available under § 1614.504 in the event that the agency fails to comply with the terms of the resolution. Appendix E is a recommended format for the resolution agreement.

The EEO Counselor shall transmit a signed and dated copy to the EEO Officer. The EEO Officer shall retain the copy for one year or until s/he is certain that the agreement has been implemented.

2. Failure to Resolve the Dispute

The aggrieved person may not be satisfied with the agency's proposed resolution of the dispute, or the agency officials may not agree to the aggrieved person's suggestions. If informal resolution is not possible, the Counselor must hold a final interview with the aggrieved person within 30 days of the date the aggrieved person brought the dispute to the Counselor's attention, unless the aggrieved person consented to an extension of time, not to exceed 60 days. If the dispute is not resolved at the end of the extended time period, the Counselor must advise the aggrieved party in writing of his/her right to file a complaint.

The 30-day EEO counseling period (or as extended by agreement of the aggrieved party) commences when the aggrieved person first contacts the EEO Counselor or the appropriate agency office in which the EEO Counselor works and by exhibiting an intent to begin the EEO process. The unavailability of an EEO Counselor to meet with the aggrieved person for a period of time after such initial contact does not toll the 30-day counseling period. Absent agreement from the aggrieved person to extend the time period, the EEO counselor must issue the notice of final interview at the end of the 30-day period.

C. **Issuing the Notice of Final Interview**

During the final interview with the aggrieved person, the EEO Counselor should discuss what occurred during the EEO counseling process in terms of attempts at resolution. The Counselor must not indicate whether s/he believes the discrimination complaint has merit. Since EEO counseling inquiries are conducted informally and do not involve sworn testimony or extensive documentation, the Counselor 1) cannot make findings on the claim of discrimination, and 2) should not imply to the aggrieved person that his/her interpretation of the claims of the case constitutes an official finding of the agency on the claim of discrimination. See Appendix F for a sample notice of final interview.

1. Right to Pursue the Claim Through the Formal Process

If the dispute has not been resolved to the satisfaction of the aggrieved person, the Counselor must tell the aggrieved person that s/he has the right to pursue the claim further through the formal complaint procedure. It is the aggrieved person, and not the EEO Counselor, who must decide whether to file a formal complaint of discrimination.

2. Requirements of the Formal Complaint

The Counselor must inform the aggrieved person that the complaint:

a. Must be in writing;

b. Must be specific with regard to the claim(s) that the aggrieved person raised in EEO counseling and that the complainant wishes to pursue;

c. Must be signed by complainant or complainant's attorney; and

d. Must be filed within **fifteen (15) calendar days** from the date s/he receives the notice of final interview. A postmark dated within the requisite 15 days will be evidence of timely filing.

3. Name(s) of Person(s) Authorized to Receive Complaints

The Counselor shall provide the aggrieved person with the names of persons authorized to receive complaints of discrimination. The Counselor shall inform the aggrieved person (or his/her representative) that the complaint must be mailed or personally delivered to one of the authorized persons.

4. File May Be Seen by Persons Needing Access and Any Confidentiality May Be Lost During Formal Process

The Counselor should explain that once the formal EEO complaint is filed, the complaint file, or part of it, may be shared with those who are involved and need access to it. This includes the EEO Officer, agency EEO officials, and possibly persons whom the aggrieved person has identified as being responsible for the actions that gave rise to the complaint. The identity of the aggrieved person does not remain confidential in the formal complaint process.

5. Provide the Aggrieved Person with a Written Notice of His/Her Right to File a Discrimination Complaint

a. The notice must specify that an aggrieved person has **15 calendar days** after receipt of the notice of final interview to file a formal complaint (including a class complaint).

b. The notice must also advise the aggrieved person of the appropriate official with whom to file a complaint and of complainant's duty to inform the agency immediately when the complainant retains counsel or a representative.

6. The EEO Counselor must advise the complainant of his/her duty to inform the agency of a change of address if s/he should move during the pendency of the EEO process and the possible consequences for not doing so.

PROCEDURES UPON ELECTION OF THE ADR PROGRAM

. **Election Between EEO Counseling and ADR**

At the initial counseling session, or within a reasonable time thereafter as established by the agency, the aggrieved person must elect between having the dispute(s) about which s/he contacted the EEO Counselor handled through the agency's traditional EEO counseling procedures or handled through the agency's ADR procedure(s) where the agency agrees to offer ADR in the particular case. The election must be made in writing on a form developed by the agency and the form will be attached to the EEO Counselor's report discussed below. The aggrieved person's election to proceed through counseling or ADR is final.

A. Completing the ADR Process

Where the agency agrees to offer ADR in a particular case, and the aggrieved person elects the ADR procedure, the pre-complaint processing period shall be ninety (90) days. See § 1614.105(f). Once the aggrieved person elects ADR, the EEO Counselor should complete the intake functions of counseling (that is, obtaining the information needed to determine the basis(es), claim(s), and timeliness) before referring the dispute for ADR processing through procedures developed by the agency. Agencies are strongly encouraged to go outside the agency to obtain the services of a neutral for an ADR program. In the event that an agency uses one of its own employees as a neutral, it must assure the neutrality and impartiality of the neutral. If EEO Counselors are used as neutrals in an ADR program, an agency must assure that a Counselor never serve as a neutral in the same case in which he or she served as a Counselor. Furthermore, an agency may use EEO Counselors as ADR coordinators if, and only if, the EEO Counselors have received professional training in the agency's ADR program. Agencies should be aware that utilizing EEO Counselors as neutrals may create confusion, both with the aggrieved individual and the Counselor, as to what role the Counselor is playing in a particular case.[(8)] Therefore, agencies should, wherever possible, designate certain individuals as either EEO Counselors or ADR neutrals, and in all cases agencies must clearly communicate to the aggrieved individual the role played by the EEO Counselor in his or her particular case. If the dispute is resolved during the ADR process, the resolution must be documented and the EEO Counselor informed of the resolution. If the dispute is not resolved within the 90-day period authorized for ADR, the agency's ADR coordinator, or other appropriate ADR official, will notify the EEO Counselor and the Counselor will issue the notice of right to file a discrimination complaint required by § 1614.105(d). See Section VI.D of this Chapter.

B. Filing of Complaint and Preparation of the EEO Counselor's Report Where ADR Fails

When advised that an aggrieved person has filed a formal complaint, the EEO Counselor initially contacted by the aggrieved person will submit a written report pursuant to § 1614.105(c). The report will contain relevant information about the aggrieved person,

jurisdiction, claims, bases, requested remedy, and the Counselor's checklist as specified in the sample EEO Counselors Report in Appendix G to this Management Directive. The report need not provide, however, a summary of the informal resolution attempt other than to indicate that the aggrieved person elected either traditional EEO counseling or the ADR program and that the dispute was not resolved through either procedure.

THE COUNSELOR'S REPORT

. **Time Limits**

The Counselor must submit to the office designated to accept formal complaints and to the complainant the report of inquiry. This must be done within fifteen (15) days after notification by the EEO Officer or other appropriate official that a formal complaint has been filed. It is essential that the Counselor maintain his/her record of counseling so that this regulatory time limit is met.

A. **Contents of Report**

The report must include:

1. A precise description of the claim(s) and the basis(es) identified by the complainant;

2. Pertinent documents gathered during the inquiry, if any;

3. Specific information bearing on timeliness of the counseling contact;

4. If timeliness appears to be a factor, an explanation for the delay; and

5. An indication as to whether an attempt to resolve the complaint was made.

The agency should also retain a copy of the Counselor's report for availability in the event that the original Counselor's report, submitted to the office designated to accept formal complaints, is lost or misplaced. All notes, drafts and other records of counseling efforts will be maintained by the agency after counseling is completed for a period extending to four years after resolution of the case**.**

Appendix G is a recommended format for a Counselor's report.

B. **Confidentiality of Negotiations for Resolution or ADR**

In order to facilitate resolution attempts, all parties involved in resolution must be free to explore all avenues of relief. Offers and statements made by parties cannot be used against either party if resolution attempts fail. The Counselor will not report any discussions that occur during negotiations for resolution.

COUNSELING CLASS ACTION COMPLAINTS

Occasionally, an EEO Counselor may need to provide EEO counseling to an aggrieved person or group of individuals seeking to represent a class of persons.[(9)] A class is defined as a group of

employees, former employees, or applicants who alleged that they have been or are being adversely affected by an agency personnel policy or practice that discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, or disability. See § 1614.204; see also Chapter 8 of this Management Directive for further guidance.

The aggrieved person(s) comes to the EEO Counselor as a class agent representing the group. A class inquiry must be brought to the attention of an EEO Counselor by a class agent **within forty-five (45) calendar days** of the date when the specific policy or practice adversely affected the class agent or, if a personnel action, within 45 days of the effective date of that action.

The EEO counseling requirements for class claims are the same as those for individual claims of discrimination, but the facts must be framed to meet the requirements of § 1614.204.

It is strongly recommended that, if class allegations are raised or an individual approaches an EEO Counselor as a class agent for counseling, the EEO Counselor immediately contact the EEO Officer, or designated person, for advice and guidance.

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1. The Commission consistently has held that a complainant may satisfy the criterion of EEO Counselor contact by initiating contact with any agency official logically connected with the EEO process, even if that official is not an EEO Counselor, and by exhibiting an intent to begin the EEO process. See Kinan v. Department of Defense, EEOC Request No. 05990249 (May 6, 1999); Floyd v. National Guard Bureau, EEOC Request No. 05890086 (June 22, 1989).

2. All time frames set out in this Management Directive are stated in calendar days unless otherwise indicated.

3. See Chapter 4, Section III.A, of this Management Directive, for additional guidance on the election process applicable to mixed case complaints.

4. The EEOC does not have jurisdiction over claims of sexual orientation discrimination. Federal agencies are barred from discriminating on this basis under Executive Order 11478, as amended by Executive Order 13087 (May 28, 1998), and individuals alleging discrimination on this basis should consult with appropriate agency EEO or personnel officials to determine how to process such claims. Individuals also may seek guidance from the Office of Personnel Management.

5. Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. EPA complaints are processed under Part 1614. In the alternative, an EPA complainant may go directly to a court of competent jurisdiction on the EPA claim.

6. The Commission has issued guidelines covering all of the substantive bases of prohibited discrimination. EEO Counselors should be familiar with 29 C.F.R. Part 1604 (Guidelines on Sex Discrimination) and Appendix to Part 1604, (Questions and Answers on the Pregnancy Discrimination Act); Part 1605 (Guidelines on Religious Discrimination); Part 1606 (Guidelines on National Origin Discrimination); Part 1620 (The Equal Pay Act); and Part 1625 (the Age Discrimination in Employment Act).

7. As noted in Appendix B, at point "b," the EEO Counselor acts as a neutral and not as an advocate for either the aggrieved person or the agency. When the aggrieved person seeks advice from the EEO Counselor, the Counselor should remind him/her of the right to representation.

8. EEO Counselors serving as ADR neutrals should be aware of the obligations imposed on neutrals by the Administrative Dispute Resolution Act of 1996. See Chapter 3, Section IV of this Management Directive.

9. This need may arise in the course of counseling an individual where the EEO Counselor identifies allegations of class discrimination.

CHAPTER 3

ALTERNATIVE DISPUTE RESOLUTION

I. INTRODUCTION

Statutes enforced by EEOC and executive orders encourage the use of Alternative Dispute Resolution (ADR) in resolving employment disputes.

EEOC's revised regulations at 29 C.F.R. § 1614.102 (b)(2) require agencies to establish or make available an alternative dispute resolution program. The ADR program must be available during both the pre-complaint process and the formal complaint process. The Commission has developed an ADR Policy which sets forth core principles regarding the use of ADR. A copy of the EEOC's ADR Policy Statement is included as Appendix H to this Management Directive. EEOC regulations extend the counseling period where ADR is used. See § 1614.105 (f).

Agencies and complainants have realized many advantages from utilizing ADR. ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually satisfactory fashion. ADR usually costs less and uses fewer resources than do traditional administrative or adjudicative processes, particularly processes that include a hearing or litigation. Early resolution of disputes through ADR can make agency resources available for mission-related programs and activities. The agency can avoid costs such as court reporters and expert witnesses. In addition, employee morale can be enhanced when agency management is viewed as open-minded and cooperative in seeking to resolve disputes through ADR.

EEOC will review an agency's program and its ADR policies, upon request, for consistency with 29 C.F.R. Part 1614 and is available to provide guidance to assist agencies in developing their ADR programs. If you would like assistance in the development of an ADR program from the EEOC, please contact the Director of Special Services, Office of Federal Operations, at 202-663-4599 (TDD (202) 663-4593).

II. DEVELOPING ADR PROGRAMS

A. Program Design - Flexibility and Incorporating Core Principles

Agencies may be flexible in designing their ADR programs to fit their environment and workforce, provided the programs conform to the core principles set forth in EEOC's policy statement on ADR. Additionally, programs should be designed to provide the maximum opportunity for all parties to freely express their positions and interests in resolving disputes. Agency managers must be aware that they have a duty to cooperate in an ADR process once the agency has determined that a matter is appropriate for ADR.

Agencies must build fairness into their programs. Fairness requires voluntariness, neutrality, confidentiality, and enforceability. In addition, an ADR program must be flexible, and include training and evaluation components. These "core principles" are derived from EEOC's ADR Policy Statement (located at Appendix H) and are discussed more fully in Section VII of this Chapter.

In designing an ADR program, the following factors should be considered.

1. Choosing Among ADR Techniques

   While mediation is the most popular form of ADR currently being used in the federal sector, there are numerous other forms available for consideration (see Section VIII of this Chapter). Agencies should carefully consider the needs of their workforce when selecting among techniques and choose the technique or techniques that are most likely to result in the earliest successful resolution of work place disputes.

   EEOC does not mandate the use of a particular ADR technique, e.g., mediation, in an agency's ADR program. The Commission does require that, regardless of the ADR technique(s) an agency selects, the method be used in a manner that is consistent with the core principles outlined in Section VII of this Chapter. Further, the ADR program must not diminish an individual's right to pursue his or her claim under the 1614 process should ADR not resolve the dispute. For example, an ADR program may not require an individual to waive his/her right to an investigation, a hearing, or to appeal the final decision to the EEOC.

2. Time Frames

   An ADR program must be designed around the time frames of the EEO regulations. For example, section 1614.105(f) provides that where an agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be ninety (90) days. This time frame must be met to be consistent with the regulation. If the dispute is not resolved in this time frame, the aggrieved must be advised of the right to file a formal complaint and that the Part 1614 process will continue. Similarly, if an individual enters into an ADR procedure after a formal complaint is filed, the time period for processing the complaint may be extended by agreement for not more than 90 days. If the dispute is not resolved, the complaint must be processed within the extended time period.

3. Representation of the Parties

   Aggrieved individuals have the right to representation throughout the complaint process, including during any ADR process. While the purpose of ADR is to allow the parties to fashion their own resolution to a dispute, it is important that any agency dispute resolution procedure provide all parties the opportunity to bring a representative to the ADR forum if they desire to do so.

4. Dealing with Non-EEO Issues

   Although agency EEO ADR programs are designed to address disputes arising under statutes enforced by the EEOC, the Commission has found that many work place disputes brought to the process often include non-EEO issues. In designing their ADR programs, agencies may provide sufficient latitude for the parties to raise and address both EEO and non-EEO issues (issues that do not fall under the

jurisdiction of EEO laws, statutes and regulations) in the resolution of their disputes. However, if resolution of the matter is unsuccessful in ADR, non-EEO issues and issues not brought to the attention of the Counselor cannot be included in the formal complaint unless the issue is like or related to issues raised during EEO counseling.

Nothing said or done during attempts to resolve the complaint through ADR can be made the subject of an EEO complaint. Likewise, an agency decision not to engage in ADR, or not to make ADR available for a particular case, or an agency failure to provide a neutral, cannot be made the subject of an EEO complaint.

5. Matters Inappropriate for ADR

The Administrative Dispute Resolution Act of 1996 (ADRA) and the EEOC ADR Policy Statement recognize that there are instances in which ADR may not be appropriate or feasible. See 5 U.S.C. § 572(b). Agencies have discretion to determine whether a given dispute is appropriate for ADR. Agencies may decide on a case-by-case basis whether it is appropriate to offer ADR. Agencies may also limit ADR in other ways, such as geographically (if extensive travel would be required), or by issue. However, agencies may not decline to offer ADR to particular cases because of the bases involved (i.e., race, color, religion, national origin, sex, age, disability, or retaliation).

6. Collective Bargaining Agreements and the Privacy Act

Agencies must be mindful of obligations they may have under collective bargaining agreements to discuss development of ADR programs with representatives of appropriate bargaining units. Agencies must also be mindful of the prohibitions on the disclosure of information about individuals imposed by the Privacy Act. All pre- and post-complaint information is contained in a system of records subject to the Act. Such information, including the fact that a particular person has sought counseling or filed a complaint, cannot be disclosed to a union unless the complaining party elects union representation or gives his/her written consent.

B. Offering ADR During the Counseling Stage

Under § 1614.102(b)(2), agencies are required to establish or make available an alternative dispute resolution program including during the pre-complaint processing period. As mentioned in Section III of this Chapter, § 1614.105(b)(2) requires that the agency fully inform aggrieved persons of their right to choose between participation in an ADR program and the counseling activities provided for by paragraph C of this section. (See Chapter 2 of this Management Directive for additional guidance concerning the election between EEO Counseling and ADR.)

C. ADR After the Complaint is Filed

The EEOC encourages agencies to focus their ADR programs on resolving work place disputes as early in the process as possible. Agencies must design their ADR programs to

allow the parties to pursue ADR techniques after an EEO complaint is filed or during or at the end of the investigation. Section 1614.108(b) states: "Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints."

D. ADR Throughout the Complaint Process

Unless the agency has determined that a particular case is inappropriate for ADR, the agency must offer ADR at all stages of the EEO process: counseling, after filing formally and prior to a hearing. Agencies are encouraged to design their ADR programs to make dispute resolution procedures available to the parties throughout the complaint process. The Commission also suggests that agencies actively encourage the parties, particularly management, to continue attempting to resolve disputes throughout the complaint process, whether through ADR or any other means of informal settlement.

ADR attempts may also be made by EEOC Administrative Judges prior to arranging a hearing. (See Chapter 7 in this Management Directive.) ADR techniques and neutrals may be employed at this point in the process as well. ADR may even be beneficial at the appellate stage of the administrative process. These attempts also must comport with the core principles set forth in this Chapter.

E. Explanation of Procedural and Substantive Alternatives

Agency ADR programs should be designed to ensure that parties are informed of all of the various steps in the EEO process before beginning the actual ADR proceeding. An informed choice is necessary to the success of the ADR proceeding, but an additional value is that once parties choose ADR over other alternatives, they have made a commitment to its success.

The aggrieved individual has already received substantial information from an EEO Counselor about the administrative EEO process and about other appropriate statutory or regulatory forums, such as the Merit Systems Protection Board or a negotiated grievance process. Both parties need to know that litigation or further administrative adjudication generally costs more than ADR. Also, both parties should be informed that the ADR process is more flexible. In addition, the parties should know that the outcome in other forums will be decided not by the parties but by a third person, while in ADR the parties maintain considerable control over the process and decide their own outcome.

III. PROVIDING INFORMATION

The information provided to aggrieved individuals at the counseling stage largely determines whether they will utilize the ADR process. Aggrieved individuals need information about all aspects of ADR in order to make an informed choice between ADR and the administrative process.

A. Agencies Must Fully Inform the Employees About the Counseling Process and the ADR Program

Section 1614.105(b)(2), which covers pre-complaint processing, requires that the EEO Counselor advise the aggrieved person that s/he may choose between participation in the ADR program offered by the agency and the traditional EEO counseling procedures provided for in the regulation. Before the aggrieved person makes a choice between counseling and ADR, the Counselor must fully inform the person about the counseling process and the ADR program. (See Chapter 2 of this Management Directive for additional guidance concerning the election between EEO Counseling and ADR.) If the agency's ADR program allows aggrieved individuals to go directly into the ADR process without first meeting with the Counselor, the meeting with the agency's ADR contact person will serve as the meeting with the Counselor. The ninety (90) day pre-complaint processing period will begin to run from the first contact with the ADR contact person. The agency's ADR contact person must provide to the aggrieved individual the same information EEO Counselors are required to provide to the aggrieved individuals.

An ADR contact person who serves in lieu of an EEO counselor may not serve as a neutral in those cases where s/he has provided EEO counseling and must meet all of the training requirements of an EEO counselor and fully carry out the Counselor's roles and responsibilities. (See Chapter 2 of this Management Directive for guidance on the qualifications, roles, and responsibilities of an EEO Counselor.)

B. Providing Information About the Agency ADR Program

1. The EEO Counselor should provide the aggrieved person with information about the agency ADR program, including but not limited to the following:

   a. A definition of the term "Alternative Dispute Resolution (ADR)" - the definitions in this Chapter can be used;

   b. An explanation of the stages in the EEO process at which ADR is available;

   c. A thorough description of the particular ADR technique(s) used in the agency's program;

   d. A thorough description of how the program is consistent with the ADR core principles in ensuring fairness (including the right to representation), which requires voluntariness, neutrality, confidentiality, and enforceability;

   e. An explanation of procedural and substantive alternatives, as described in this Chapter; and

   f. Information regarding all of the time frames involved in both the administrative process and the ADR process.

   g. Information about the agency's ADR program may be provided to the aggrieved person through discussions, memoranda, video presentations, booklets or pamphlets.

C. Informing the Employee about Filing Rights

At the time the aggrieved person chooses to participate in the agency's ADR program, the person shall have been advised by the Counselor of his or her rights and responsibilities in the EEO complaint process, as set forth in § 1614.105(b).

If the agency's ADR program allows aggrieved individuals to go directly into the ADR process without first meeting with the Counselor, the meeting with the agency's ADR contact person will serve as the meeting with the Counselor. The ninety (90) day pre-complaint processing period will begin to run from the first contact with the ADR contact person. The agency's ADR contact person must also advise the aggrieved of his or her rights and responsibilities in the EEO complaint process, as set forth in § 1614.105(b) as well as determine the issues and bases of the matter and matters affecting timeliness and jurisdiction.

D. The Role of the Counselor

When an individual elects to participate in the ADR process, the Counselor who advised the aggrieved of his/her rights and responsibilities is precluded from attempting to resolve the matter.

1. If ADR is Chosen

The Counselor (or the ADR contact) of the aggrieved individual should provide the following information to the aggrieved person once ADR is chosen.

a. Successful resolution

The Counselor shall advise the aggrieved person that if the dispute is resolved during the ADR process, the terms of the agreement must be in writing and signed by both the aggrieved person and the agency. See § 1614.603.

b. Unsuccessful Resolution

The Counselor shall advise the aggrieved person that if the matter concludes without a resolution under the ADR program, or if the matter has not been resolved ninety (90) days from the contact with the EEO Counselor, the aggrieved person will receive a final interview and have the right to file a formal complaint.

In the event there is no resolution, the agency must ensure that a Counselor's report is prepared and the aggrieved person is given a final interview and informed of the right to file a formal complaint. In addition to the usual items required by the report, with respect to ADR the report must indicate that ADR failed. No other information regarding the ADR session is to be provided.

Nothing said or done during attempts to resolve the complaint through ADR, including the failure by the agency to provide a neutral, can be made the subject of an EEO complaint.

The Counselor should have no further involvement in resolving the matter until he or she is advised of the outcome of the ADR process.

2. If ADR is not chosen

The Counselor must advise the aggrieved person that if s/he does not choose to participate in the agency's ADR program, the dispute(s) about which he/she contacted the EEO Counselor will be handled through the agency's traditional EEO counseling procedures.

IV. **NEUTRALS**

The ADRA defines a neutral as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy." 5 U.S.C. § 571(9). The Act further states that a neutral is a

permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

5 U.S.C. § 573 (a).

a. Sources

The Commission, in its policy statement on ADR, provides that ADR proceedings are most successful where a neutral or impartial third party, with no vested interest in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. An agency should also consider the aggrieved person's perception of the third party's impartiality in appointing a neutral for an ADR proceeding. In order to be effective, the participants in an ADR program must perceive the neutral as completely impartial. Therefore, agencies are strongly encouraged to go outside the agency in obtaining the services of a neutral. An external neutral provides the best assurance of impartiality and the greatest likelihood of a successful mediation. In the event that an agency uses one of its own employees as a neutral, it must assure the neutrality and impartiality of the neutral. If EEO Counselors are used as neutrals, the agency must assure that a Counselor must never serve as a neutral in the same matter in which he or she has served as a Counselor. The Alternative Dispute Resolution Act (ADRA), imposes certain requirements on neutrals which may not apply to EEO Counselors. Furthermore, agencies should also be aware that having EEO Counselors switching roles between performing traditional EEO counseling and performing in other ADR programs can be confusing both to complainants and Counselors as to what their role is in a particular case. To avoid this confusion, agencies must clearly communicate to the complainant the function being performed by the agency employee, whether EEO counseling or ADR. To the extent possible, agencies are encouraged to designate individuals as either EEO Counselors or ADR neutrals, and limit the switching of roles between the EEO and ADR programs.

An agency may use neutrals for its ADR program, subject to their qualifications, from the following sources:

1. Other federal agencies (through a federal neutral sharing program or other arrangement); or

2. Private organizations, private contractors, bar associations, or individual volunteers.

EEOC discourages EEO Counselors from acting as neutrals because of the perception of bias in favor of the agency. Additionally, neutrals are often privy to confidential information, which may compromise their ability to serve as a Counselor. Therefore, EEOC recommends against using Counselors as neutrals except as a last resort and only where the Counselor meets the qualifications required in this directive. Counselors may not serve as neutrals in a dispute in which they have provided counseling to the aggrieved individual. Additionally, investigators may not serve as a neutral in a case they are investigating. Likewise, neutrals should not serve as Counselors or investigators in cases in which they serve as neutrals.

With increasing frequency, Federal Executive Boards (FEB) throughout the nation are developing pools of neutrals who are available for federal agency EEO dispute resolution. Information about FEBs and other associations who may be able to provide neutrals can be obtained by contacting the ADR representative in one of EEOC's District Offices. EEOC recommends that agencies disclose their source of neutrals to the parties.

b. Qualifications

1. Training in ADR Theory and Techniques

Any person who serves as a neutral in an agency's ADR program must have professional training in whatever dispute resolution technique(s) the agency utilizes in its program. The Commission will accept as sufficient such training as is generally recognized in the dispute resolution profession. For example, the Interagency Program on Sharing Neutrals administered by the Department of Health and Human Services requires the following expertise: 1) at least 20 hours of basic mediation skills training; 2) at least three co-mediations with a qualified mediator or five independent mediations and positive evaluations from a qualified trainer/evaluator; and 3) at least two references from two qualified mediators or trainer/evaluators.

- Knowledge of EEO Law

Any person who serves as a neutral in an agency's ADR program must be familiar with the following EEO laws and areas:

b. The entire EEO process pursuant to 29 C.F.R. Part 1614, including time frames;

c. The Civil Service Reform Act and the statutes that EEOC enforces (including Title VII of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, as amended, the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended);

d. The theories of discrimination (e.g. disparate treatment, adverse impact, harassment and reasonable accommodation); and

e. Remedies, including compensatory damages, costs and attorney's fees.

c. Role of the Neutral

In any ADR proceeding conducted under this Directive, the neutral's duty to the parties is to be "neutral, honest, and to act in good faith." EEOC Policy Statement. The neutral must also act consistently with the ADRA and:

Ensure that ADR proceedings are conducted consistent with EEO law and Part 1614 regulations, including time frames;

Ensure that proceedings are fair, consistent with the core principles in Section VII of this Chapter, particularly providing the parties the opportunity to be represented by any person of his/her choosing throughout the proceeding;

Ensure that an agency representative participating in the ADR proceeding has the authority and responsibility to negotiate in good faith and that a person with authority to approve or enter into a settlement agreement is accessible to the agency's representative;

Ensure enforceability of any agreement between the parties, including preparation of the written settlement agreement if the parties reach resolution and ensuring that the agreement includes the signatures of the appropriate agency representative and aggrieved person;

Ensure confidentiality, including destroying all written notes taken during the ADR proceeding or in preparation for the proceeding; and

Ensure neutrality, including having no conflict of interest with respect to the proceeding (e.g., material or financial interest in the outcome, personal friend or co-worker of a party, supervisory official over a party) unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

d. Promoting Trust

Trust fosters the open and frank communication between the parties that is an essential factor in reaching a fair resolution of an EEO complaint. Once the individual has chosen ADR to attempt resolution, the ADR neutral can develop the parties' trust by:

Providing full information about the ADR proceeding as soon as possible, including information on its impartiality, the relative merits of ADR as compared with the traditional form of complaint processing, and the confidentiality of the ADR process;

Giving the parties the opportunity to request and obtain relevant information from one another, so that they have sufficient information to make informed decisions; and

Explaining the safeguards that are in place to protect parties from pressures to resolve the complaint (see Section VII A, below).

RESOLUTIONS MUST BE IN WRITING

If the agency and the aggrieved person agree to a resolution of the matter, EEOC regulations require that the terms of the resolution be reduced to writing and signed by both parties in order that the agency and the aggrieved person have the same understanding of the terms of the resolution. See § 1614.603. The written agreement must state clearly the terms of the resolution and contain the procedures available under § 1614.504 in the event that the agency fails to comply with the terms of the resolution. Written agreements must comply with EEOC's Enforcement Guidance on non-waivable employee rights under EEOC enforced statutes. Additionally, any written agreement settling a claim under the Age Discrimination in Employment Act (ADEA) must also comply with the requirements of the Older Workers Benefit Protection Act of 1990 (OWBPA) Pub. L. 101- 433 (1990), the ADEA, subsection (f), 29 U.S.C. § 626(f) and EEOC's regulations regarding Waiver of Rights and Claims Under the ADEA at 29 C.F.R. Part 1625. Neither the ADRA nor EEOC's core principles require the parties to agree that a settlement must be confidential.

The agency representative shall transmit a signed and dated copy of the resolution to the EEO Director. The EEO Director shall retain the copy for one year or until the EEO Director is certain that the agreement has been fully implemented, whichever is later.

OPERATION OF ADR PROGRAMS

. **Written Procedures**

The agency must establish written procedures detailing the operation of its ADR program. The written procedures should include, at a minimum, the following information:

The type or types of ADR that the agency offers;

The stages of the EEO process at which ADR is being made available, e.g. at the pre-complaint stage, post-complaint stage etc.;

The time frames involved in both the administrative process and the ADR process;

The source or sources of neutrals;

Those matters where ADR is not available;

Assurance to the aggrieved party that ADR is voluntary and that she or he may terminate the ADR procedure at any time and return to the EEO process;

Assurance to the aggrieved party that its ADR program is fair and that she or he has the right to representation;

An assurance to the aggrieved party with respect to confidentiality, neutrality and enforceability;

An assurance that the agency will make accessible an individual with settlement authority and that no responsible management official or agency official directly involved in the case will serve as the person with settlement authority.

A. **Training Managers and Supervisors**

In order to encourage the successful operation of ADR throughout the agency, all managers and supervisors should receive ADR training, either through an agency-conducted program or through an external source such as another federal agency or a private contractor. The ADR training should include the following:

The ADR Act and its amendments, with emphasis on the federal government's interest in encouraging mutual resolution of disputes and the benefits associated with utilizing ADR;

The EEOC's regulations and Policy Guidance with respect to ADR: §§ 1614.102(b)(2), 1614.105(f), 1614.108(b), and 1614.603 (voluntary settlement attempts);

The operation of the ADR method or methods that the agency employs;

Exposure to other ADR methods, including interest-based mediation, if this method is not already in use by the agency; and

Drafting the settlement agreement, including the notice provision pursuant to § 1614.504 where the aggrieved party believes the agency failed to comply with the terms of the settlement agreement.

B. **Recordkeeping**

Pursuant to the EEOC's authority set forth in 29 C.F.R. § 1614.602(a) to collect Federal complaints processing data and pursuant to the agency's obligation to report EEO activity to the EEOC, the Commission requires agencies to maintain a record of ADR activity for annual reporting to the EEOC no later than October 31st of each year. This information will be provided to EEOC on Form 462.

ADR CORE PRINCIPLES

Through use of ADR, it has been found that there are certain requirements that are absolutely necessary for the successful development of any ADR program. These requirements are sometimes referred to as "core principles." These core principles are derived from EEOC's ADR Policy Statement, located at Appendix H.

. **Fairness**

Any program developed and implemented by an agency must be fair to the participants, both in perception and reality. Fairness should be manifested throughout the ADR proceeding by, at a minimum: providing as much information about the ADR proceeding to the parties as soon as possible; providing the right to be represented throughout the ADR proceeding; and providing an opportunity to obtain legal or technical assistance

during the proceeding to any party who is not represented. Fairness also requires the following elements:

Voluntariness

Parties must knowingly and voluntarily enter into an ADR proceeding. An ADR resolution can never be viewed as valid if it is involuntary. Nor can a dispute be actually and permanently resolved if the resolution is involuntary. Unless the parties have reached a resolution willingly and voluntarily, some dissatisfaction may survive after the ADR proceeding. Such dissatisfaction could lead to dissatisfaction with other aspects of the workplace, or even to charges that the resolution was coerced or reached under duress.

In addition, aggrieved parties should be assured that they are free to end the ADR process at any time, and that they retain the right to proceed with the administrative EEO process if they decide that they prefer that process to ADR and resolution has not been reached. Both parties should be reassured that no one can force a resolution on them, not agency management or EEO officials, and not the third party neutral. Finally, parties are more likely to approach a resolution voluntarily when they know of their right to representation at any time.

Neutrality

To be effective, an ADR proceeding must be impartial and must be independent of any control by either party, in both perception and reality. Using a neutral third party as a facilitator or mediator assures this impartiality. A neutral third party is one who has no stake in the outcome of the proceeding. For example, he or she might be an employee of another federal agency who knows none of the parties and whose type of work differs from that of the parties. Or he or she may be an employee within the same agency as long as he or she can remain neutral regarding the outcome of the proceeding. The agency must ensure at all times the independence and objectivity of the neutral.

Confidentiality

Confidentiality is essential to the success of all ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in § 574 of ADRA, specifically exempting qualifying dispute resolution communications from disclosure under the Freedom of Information Act. Parties who know that their ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of ADR information. For implementation and reporting purposes, the details of a resolution can be disseminated to specific offices with a need to have that information. As noted above in Section V, neither the ADRA nor EEOC's core principles require the parties to agree that a settlement must be confidential.

Confidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution, and by any neutral third party involved in the proceeding. The EEOC encourages agencies to issue clear, written policies protecting the confidentiality of what is said and done during an ADR proceeding.

Enforceability

Enforceability is a key principle upon which a successful ADR program depends. Section 1614.504 provides that: "Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties." The regulation sets forth specific procedures for enforcing such a settlement agreement. Agreements resolving claims of employment discrimination reached through ADR are enforceable through this procedure.

A. **Flexibility**

The ADR program must be flexible enough to respond to the variety of situations individual agencies face. There is not necessarily one ADR model which will work for all of an agency's programs or all of its offices within the same program. Because agencies have different missions and cultures, they have flexibility in designing their ADR programs. Agencies must also exercise flexibility in implementing the ADR program. This flexibility will allow agencies to adapt to changing circumstances that could not have been anticipated or predicted at the time the program was initially implemented.

B. **Training and Evaluation**

An ADR program, to be successful, will require that the agency provide appropriate training and education on ADR to its employees, managers and supervisors, neutrals and other persons protected under the applicable laws.

An evaluation component is essential to any ADR program and should be in place before an ADR program is implemented. The evaluation will assist in determining whether the ADR program has achieved its goals and will provide feedback on how the program might be made more efficient and achieve better results.

ADR TECHNIQUES AND DEFINITIONS

As stated previously, § 1614.102(b)(2) requires that all agencies establish or make available an ADR program for the equal employment opportunity process. Numerous ADR techniques are available for use by agencies in their programs. All agencies should be familiar with the following terms and techniques utilized by ADR professionals.

. **Alternative Dispute Resolution**

Alternative Dispute Resolution is a term used to describe a variety of approaches to resolving conflict rather than traditional adjudicatory methods or adversarial methods.

Examples of traditional adjudicatory methods include litigation, hearings, and agency administrative processing and appeals.

A. **Mediation**

Mediation is presently the most popular form of ADR in use by agencies in employment related disputes. Mediation is the intervention in a dispute or negotiation of an acceptable, impartial and neutral third party, who has no decision-making authority. The objective of this intervention is to assist the parties to voluntarily reach an acceptable resolution of the issues in dispute.

A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution.

Mediators differ in their degree of directiveness or control in their assistance in disputing parties. Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution. Regardless of how directive the mediator is, the mediator performs the role of catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute.

B. **Facilitation**

Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute). The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter.

The facilitator generally works with all of the participants at once and provides procedural directions as to how the group can efficiently move through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. The facilitator focuses on procedural assistance and remains impartial to the topics under discussion.

C. **Fact Finding**

Fact finding is the use of an impartial expert (or group) selected by the parties, by the agency, or by an individual with the authority to appoint a fact finder, in order to determine what the "facts" are in a dispute. The fact finder may be authorized only to investigate or evaluate the matter presented and file a report establishing the facts in the matter. In some cases, he or she may be authorized to issue either a situation assessment or a specific procedural or substantive recommendation as to how a dispute might be resolved. If used as an ADR technique, the findings of fact must remain confidential in order to comply with the core principles mentioned above.

Fact finding used as an agency ADR technique is different from the many fact finding methods referred to in § 1614.108(b) that agencies may employ to investigate formal complaints in the administrative process. For example, oral or written communications which occur during an ADR proceeding such as fact finding (or some other ADR technique) are generally treated as confidential. 5 U.S.C. § 574. However, information which is developed during the investigation of a complaint through the use of fact finding methods mentioned in § 1614.108(b) is not treated as confidential.

D. **Early Neutral Evaluation**

Early Neutral Evaluation uses a neutral or impartial third party to provide an objective evaluation, sometimes in writing, of the strengths and weaknesses of a case. Under this method, the parties will usually make informal presentations to the neutral party to highlight their respective cases or positions.

E. **Ombuds**

Ombuds are individuals who rely on a number of techniques to resolve disputes. These techniques include counseling, mediating, conciliating, and fact finding. Usually, when an ombud receives a complaint, s/he interviews parties, reviews files, and makes recommendations to the disputants. Typically, ombuds do not impose solutions. The power of the ombud lies in his/her ability to persuade the parties to accept his/her recommendations. Generally, an individual not accepting the proposed solution of the ombud is free to pursue a remedy in other forums for dispute resolution.

F. **Settlement Conferences**

Settlement Conferences may be conducted by a settlement judge (for example an EEOC Administrative Judge) or referee and attended by representatives for the opposing parties and/or the parties themselves in order to reach a mutually acceptable settlement of the disputed matter. Agencies are not precluded from having their own settlement conferences without an Administrative Judge provided the parties agree. Attendance is mandatory at a settlement conference ordered by an Administrative Judge. The failure of any party to comply with an order of an Administrative Judge may result in sanctions.

The role of a settlement judge is similar to that of a mediator in that s/he assists the parties procedurally in negotiating an agreement. Such judges may have much stronger authoritative roles than mediators, since they may provide the parties with specific substantive and legal information about what the disposition of the case might be if it were to go to court or hearing. They also provide the parties with possible settlement ranges for their consideration. In the event a settlement is not reached, the case is then processed by Administrative Judges other than the settlement judge. Because these conferences are not conducted by the Administrative Judge hearing the case on the merits, the traditional ex parte constraints are not applicable.

G. **Minitrials**

Minitrials involve a structured settlement process in which each side to a dispute presents abbreviated summaries of their case before the parties and/or their representatives who

have authority to settle the dispute. The summaries contain explicit data about the legal bases and the merits of a case.

The process generally follows more relaxed rules for discovery and case presentation than might be found in a court or other administrative proceedings and usually the parties agree on specific limited periods of time for presentations and arguments.

H. **Peer Review**

Peer Review is a problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. The decision is usually not binding on the employee, and s/he would be able to seek relief in traditional forums for dispute resolution if dissatisfied with the decision. The principal objective of peer review is to resolve disputes early before they become formal complaints or grievances.

Typically, the panel is made up of employees and managers who volunteer for this duty and who are trained in listening, questioning, and problem-solving skills as well as the specific policies and guidelines of the panel. A peer review panel may be a standing group of individuals who are available to address whatever disputes employees might bring to the panel at any given time. Other panels may be formed on an ad hoc basis through some selection process initiated by the employee, e.g., blind selection of a certain number of names from a pool of qualified employees and managers.

I. **Combinations of Techniques**

Often techniques may be combined to provide advantageous aspects of more than one method. For example, if in a mediation the mediator finds that the parties are able to speak directly to each other in a productive way, the mediator may utilize the facilitator role and follow-up with the mediator role later. In some cases, fact finding may precede a facilitation or mediation session. Agencies are not limited to using only one method or technique in their ADR programs. They may find that using various methods in combination may also yield fruitful results and be very effective in reaching resolution.

CHAPTER 4

PROCEDURES FOR RELATED PROCESSES

I. INTRODUCTION

As noted in Chapter 2, Section IV.B and Appendix C of this Management Directive, different procedures apply to certain related processes. The relationship between 29 C.F.R. Part 1614 EEO

complaints, Merit Systems Protection Board (MSPB) actions, grievances filed pursuant to negotiated grievance procedures, notices of intent to sue in Age Discrimination in Employment Act (ADEA) complaints and the alternative available in Equal Pay Act (EPA) complaints are set out more specifically here. All time frames in this Chapter are expressed in calendar days.

II. MIXED CASE COMPLAINTS AND APPEALS - 29 C.F.R. § 1614.302

A. Definitions

A "mixed case complaint" is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or reprisal related to or stemming from an action that may be appealed to the MSPB. The complaint may contain only a claim of employment discrimination or it may contain additional non-discrimination claims that the MSPB has jurisdiction to address. A "mixed case appeal" is an appeal filed directly with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or reprisal. There is no right to a hearing before an EEOC Administrative Judge on a mixed-case complaint.

B. Procedures

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

1. Standing

a. The following employees generally have a right to appeal to the MSPB and, therefore, to initiate a mixed case complaint or appeal:[(1)]

(1) competitive service employees not serving a probationary or trial period under an initial appointment;

(2) career appointees to the Senior Executive Service;

(3) non-competitive service veterans preference eligible employees with one or more years of current continuous service (e.g., postal employees and attorneys with veterans preference); and

(4) non-preference eligible excepted service employees who have completed their probationary period or with two or more years of current continuous service (e.g., attorneys).

b. The following employees generally do not have a right to appeal to the MSPB:

(1) probationary employees (but see 5 C.F.R. § 315.806, allowing appeals alleging discrimination based on party affiliation, marital status, procedural deficiencies);

(2) certain non-appropriated fund activity employees;[(2)]

(3) employees serving under a temporary appointment limited to one year or less; and

(4) employees of the Central Intelligence Agency, the General Accounting Office, the United States Postal Service, the Postal Rate Commission, the Panama Canal Commission, the Tennessee Valley Authority, and the Federal Bureau of Investigation.

2. Appealable Actions

a. Most appealable actions fall into the following six categories:

(1) reduction in grade or removal for unacceptable performance;

(2) removal, reduction in grade or pay, suspension for more than fourteen (14) days, or furlough for thirty (30) days or less for cause that will promote the efficiency of the service;

(3) separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of a reduction-in-force;

(4) reduction-in-force action affecting a career appointee in the Senior Executive Service;

(5) reconsideration decision sustaining a negative determination of competence for a general schedule employee; and

(6) disqualification of an employee or applicant because of a suitability determination.

b. See Appendix I for a more complete listing of appealable actions.

3. Election to Proceed is Required

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

b. Whatever action the individual files first is considered an election to proceed in that forum. § 1614.302(b). Filing a formal EEO complaint constitutes an election to proceed in the EEO forum. Contacting an EEO Counselor or receiving EEO counseling does **not** constitute an election.

c. Where an aggrieved person files an MSPB appeal and timely seeks counseling, counseling may continue pursuant to § 1614.105, at the option of the parties. In any case, counseling must be terminated with notice of rights pursuant to § 1614.105(d), (e), or (f).

4. Procedures for Handling Dual Filing

a. Where the agency does not dispute MSPB jurisdiction

(1) If an individual files a mixed case appeal with the MSPB before filing a mixed case complaint with the agency, and the agency does not dispute MSPB jurisdiction, the agency must thereafter dismiss any complaint on the same claim, regardless of whether the claims of discrimination are raised in the appeal to the MSPB.[(3)]

(2) The agency or the EEOC Administrative Judge must advise the complainant that s/he must bring the claims of discrimination contained in the dismissed complaint to the attention of the MSPB, pursuant to 5 C.F.R. § 1201.151, et seq.

(3) Where an agency has not accepted a complaint for processing, i.e., has disposed of the complaint on procedural grounds, the resulting final agency decision is appealable to the Commission. § 1614.302(d)(1); Abegglen v. Department of Energy, EEOC Appeal No. 01966055 (October 9, 1998).

b. Where the agency or the MSPB Administrative Judge questions MSPB jurisdiction

The agency shall hold the mixed case complaint in abeyance until the MSPB Administrative Judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him/her to bring the discrimination claim to the attention of MSPB. During this period, all time limitations for processing or filing the complaint will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB Administrative Judge finds that MSPB has jurisdiction over the claim, the agency shall dismiss the mixed case complaint and advise the complainant of the right to petition EEOC to review MSPB's final decision on the discrimination issue. If the MSPB administrative judge finds that MSPB does not have jurisdiction over the claim, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

c. Where a complainant files with the agency first

If an employee first files a mixed case complaint at the agency and then files a mixed case appeal with the MSPB, the agency should advise MSPB of the prior agency filing and request that the MSPB dismiss the appeal without prejudice.

5. Processing Where MSPB Dismisses a Mixed Case Appeal Because it Finds No Jurisdiction (That Is, the Case Is Not Mixed)

   a. If an individual files a mixed case appeal with MSPB instead of a mixed case complaint, and MSPB subsequently dismisses the appeal as non-jurisdictional, the agency must inform the individual that s/he may contact a Counselor **within forty-five (45) days** to raise the discrimination claim(s) and that the filing date of the mixed case appeal will be deemed to be the date the individual initially contacted the Counselor.

   b. If the individual filed the appeal after the agency issued an agency final decision on the mixed case complaint or after the agency failed to issue a final decision on the mixed case complaint **within 120 days**, the agency must provide the complainant with a thirty (30) day notice of right to a hearing and decision from an EEOC Administrative Judge or an immediate final decision by the agency pursuant to § 1614.108(f) and thereafter proceed as in a non-mixed case.

6. Processing Mixed Case Complaints Filed at the Agency

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

   a. Within **forty-five (45) days** following completion of the investigation, the agency must issue a final decision without a hearing before an EEOC Administrative Judge.

   b. Upon the filing of a complaint, the agency must advise the complainant that if a final decision is not issued within **120 days** of the date of filing the mixed case complaint, the complainant may appeal the claim to the MSPB at any time thereafter, as specified in 5 C.F.R. § 1201.154(a), or may file a civil action as specified in § 1614.310(g), but not both.

   c. Also upon the filing of a complaint, the agency must notify the complainant that if s/he is dissatisfied with the agency's final decision on the mixed case complaint, s/he may appeal the claim to the MSPB (not the EEOC) within **thirty (30) days** of receipt of the agency's final decision.

   d. Upon completion of the investigation, the agency must notify the complainant that a final decision will be issued within forty-five (45) days without a hearing before an EEOC Administrative Judge.

   e. Upon issuance of the agency's final decision on a mixed case complaint, the agency must advise the complainant of the right to appeal the claim to the MSPB (not EEOC) within **30 days** of receipt of the notice and of the right to file a civil action as provided in § 1614.310(a).

III. **NEGOTIATED GRIEVANCE PROCEDURES**

A. **Where Agency is Covered by 5 U.S.C. § 7121(d)**

1. When an aggrieved employee is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, the employee must elect to file an EEO complaint or a grievance. The underlying principle is that an aggrieved employee who has a choice of forums in which to proceed cannot go forward in more than one forum (unless the employing agency is exempt from coverage of 5 U.S.C. § 7121(d)). This is true "irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination." § 1614.301(a).

2. If an employee first files a grievance and thereafter files a complaint of discrimination on the same claim, the complaint must be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure, including the right to appeal to the Commission from a final decision as provided in subpart D of Part 1614 (Appeals and Civil Actions). The dismissal of the complaint must advise the complainant of the obligation to raise discrimination claims in the grievance process and of the right to appeal the final grievance decision to the Commission. § 1614.301(a).

B. **Where Agency is not Covered by 5 U.S.C. § 7121(d)**

1. The U.S. Postal Service and the Tennessee Valley Authority are two of the agencies not covered by § 7121(d). In such agencies, an aggrieved individual may file a complaint pursuant to Part 1614 and also a grievance pursuant to a collective bargaining agreement involving the same claim.

2. In such agencies, complaints filed pursuant to Part 1614 may be held in abeyance where a grievance is filed on the same claim, if written notice of the abeyance is provided.

3. Complaints may be held in abeyance until a final decision is issued on the grievance.

IV. AGE DISCRIMINATION COMPLAINTS

It is incumbent upon federal agency personnel responsible for processing discrimination complaints to inform complainants or potential complainants of the following procedures available to them in pursuing an age discrimination complaint.

A. **Election of Administrative Process**

An aggrieved person may file an administrative age discrimination complaint with the agency pursuant to 29 C.F.R. Part 1614. If the aggrieved person elects to file an administrative complaint, s/he must exhaust administrative remedies before s/he may file a civil action in U.S. District Court. Exhaustion of administrative remedies occurs when the agency takes final action or 180 days after filing the complaint if no final action is taken. See § 1614.201; see also Chapter 9, Sections II and III, of this Management Directive.

B. **Aggrieved May Bypass Administrative Process**

An aggrieved person may bypass the administrative complaint process and file a civil action directly in U.S. District Court provided that the aggrieved person first provides the Commission with a written notice of intent to sue under the ADEA. The notice to the Commission must be filed within **180 days** of the date of the alleged discriminatory action. Once a timely notice of intent to sue is filed with the Commission, the aggrieved person must wait at least **thirty (30) days** before filing a civil action.

C. **Responsibilities Regarding Notices of Intent to Sue**

The following is a statement of the procedures and a delineation of the responsibilities on the part of the aggrieved person, the Commission, and the agency with respect to the filing and processing of notices of intent to sue under the ADEA.

D. The Aggrieved Person

It is the responsibility of the aggrieved person to provide the Commission with a written notice of intent to sue within **180 days** of the date of the alleged discriminatory action.

a. Notices of intent to sue must be delivered to the Commission at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

or mailed to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
P.O. Box 77960
Washington, DC 20013

or faxed (if no more than ten pages) to:

(202) 663-7022.

b. The notice of intent to sue should be dated and must contain the following information:

(1) statement of intent to file a civil action under Section 15(d) of the Age Discrimination in Employment Act of 1967, as amended;

(2) name, address, and telephone number of the employee or applicant;

(3) name, address, and telephone number of the complainant's designated representative, if any;

(4) name and location of the federal agency or installation where the alleged discriminatory action occurred;

(5) date on which the alleged discriminatory action occurred;

(6) statement of the nature of the alleged discriminatory action(s); and

(7) signature of the complainant or the complainant's representative.

The Commission

a. Upon receipt of a notice of intent to sue, the Commission will promptly notify the concerned agency (and all persons named in the notice as prospective defendants in the action, if any), in writing, of its receipt of the notice of intent to sue and will provide the agency with a copy of the notice. Commission contact with the concerned agency will normally be through the agency headquarters level Office of Equal Employment Opportunity or similarly designated office, as the case may be. A copy of the Commission's notification will be provided to the aggrieved person and/or his/her representative, if any. Additionally, the Commission will take any appropriate action to ensure the elimination of any unlawful practice.

b. Where an aggrieved person files a civil action before the agency has completed its inquiry, or before the Commission has reviewed the agency's disposition, the Commission will terminate the inquiry and will take no further action on the notice of intent to sue.

The Agency

Upon receipt of a notice of intent to sue, an agency must review the claim(s) of age discrimination and conduct an inquiry sufficient to determine whether there is evidence that unlawful age discrimination has occurred. Agencies may determine their method of review/inquiry and the method may vary depending on the scope and complexity of the claims. Agencies are encouraged to make good faith efforts to resolve disputes.

EQUAL PAY ACT COMPLAINTS

An aggrieved individual does not have to file an administrative complaint before filing a lawsuit under the Equal Pay Act (EPA). If an aggrieved individual nonetheless wants to file an administrative complaint, it will be processed like Title VII complaints under Part 1614. Complainants in EPA cases should be notified of the statute of limitations (two years or, if a willful violation is alleged, three years), which applies even if the individual files an administrative complaint, and of the right to file directly in a court of competent jurisdiction without first providing notice to the Commission or exhausting administrative remedies.

1. These are not all-inclusive lists of employees who have or lack standing to appeal to the MSPB and these lists may change over time. Questions concerning whether an employee may appeal an action to the MSPB should be referred to the personnel office at the agency or to the MSPB.

2. For example, pursuant to 5 U.S.C. § 2105(c), the MSPB lacks jurisdiction to hear appeals filed by employees of the Army and Air Force Exchange. Perez v. Army and Air Force Exchange Service, 680 F.2d 779 (D.C. Cir. 1982).

3. An EEOC Administrative Judge may dismiss the mixed case complaint pursuant to § 1614.109(b).

CHAPTER 5

AGENCY PROCESSING OF FORMAL COMPLAINTS

I. AGENCY SHALL ACKNOWLEDGE FORMAL COMPLAINT

Immediately upon receipt of a formal complaint of discrimination, the agency shall acknowledge receipt of the complaint in writing. The acknowledgment letter shall inform the complainant of the date on which the complaint was filed. If the complaint is mailed, the date of filing is the postmark date, not the date the agency received the complaint.

Commission regulations require that an EEO Counselor provide **both** the agency and the complainant with a written report within fifteen (15) days of being advised that the complainant has filed a formal EEO complaint. 29 C.F.R. § 1614.105(c). Agencies thus should immediately notify the EEO Counselor that a complainant has filed a complaint so as to expedite the preparation and delivery of the written report.

Within a reasonable time after receipt of the written report, the agency should send the complainant a second letter (commonly referred to as an "acceptance" letter), stating the claim(s) asserted and to be investigated. If the second letter's statement of the claim(s) asserted and claim(s) to be investigated differs, the letter further shall explain the reasons for the difference, including whether the agency is dismissing a portion of the complaint. The agency shall advise the complainant that s/he may submit a statement to the agency concerning the agency's articulation of the claim, which shall become a part of the complaint file. (Dismissals are governed by 29 C.F.R. § 1614.107(a). Additional dismissal guidance is provided in Section III of this Chapter of the Management Directive.) The agency shall notify the complainant of a partial dismissal by letter and further inform the complainant that there is no immediate right to appeal the partial dismissal. The agency should advise the complainant that the partial dismissal shall be reviewed either by an EEOC Administrative Judge, if the complainant requests a hearing before an Administrative Judge, or by the Commission, if the complainant files an appeal of a final agency action or final agency decision. (See Section IV.C below for further discussion on the requirements of a partial dismissal).

Unless the complainant states otherwise, copies of the acknowledgment and all subsequent actions on the complaint should be mailed or delivered to the complainant's representative with a copy to the complainant.

II. THE AGENCY SHALL ALSO PROVIDE OTHER INFORMATION AND NOTICE OF RIGHTS

A. Agency Shall Inform the Complainant of the Agency's Obligations

1. To Investigate in a Timely Manner

The agency is required to investigate the complaint in a timely manner. The investigation must be appropriate, impartial, and completed within **180 days** of filing the complaint; within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107(a), unless the EEO Officer or designee and the complainant agree in writing, consistent with § 1614.108(e), to an extension of not more than **ninety (90) days**; or within the period of time set forth in §§ 1614.108(e)(2) or 1614.606 if the complainant has amended the complaint or filed multiple complaints.

An investigation is deemed completed when the report of the investigation is served on the complainant in conjunction with the notice of the right to elect

either a hearing before an EEOC Administrative Judge or a final decision from the agency pursuant to § 1614.108(f).

2. To Process Mixed Cases Timely

With regard to mixed case complaints, if a final decision is not issued on a mixed case complaint within **120 days** of the date of filing, the complainant may appeal to the Merit Systems Protection Board (MSPB) at any time thereafter pursuant to 5 C.F.R. § 1201.154(a) or may file a civil action as provided in 29 C.F.R. § 1614.310(g), but not both. See § 1614.302(d)(1). The complainant is not entitled to a hearing before the EEOC on a mixed case.

3. Unilateral Extension for Sanitizing Classified Information

The agency may, after providing notice to the complainant, unilaterally extend the time period or any period of extension for no more than thirty (30) days where it must sanitize a complaint file that may contain information classified pursuant to Executive Order 12356 or successor orders as secret in the interest of national defense or foreign policy.

B. **Agency Shall Inform Complainant of His/Her Rights**

The agency shall ensure that all rights and responsibilities enumerated in Chapters 2, 3, and 4 of this Management Directive are provided to every complainant in writing. This includes:

1. The Right to Hearing

Except in mixed cases, the complainant has the right to request a hearing before an EEOC Administrative Judge after **180 calendar days** from the filing of a formal complaint or after completion of the investigation, which ever comes first. Complainants must request a hearing directly from the EEOC field office that has jurisdiction over the geographic area in which the complaint arose, as set forth in Appendix J of this Management Directive. See § 1614.108(g). In an agency's written acknowledgment of receipt of a complaint or an amendment to a complaint, the agency shall advise the complainant of the EEOC office and address where a hearing request is to be sent as well as the agency office to which the copy of the request should be sent. The complainant shall certify to the Administrative Judge that s/he sent a copy of the request to the agency EEO office to the attention of the individual and at the address that the agency previously informed the complainant.

2. The Right to Appeal

The complainant has the right to appeal a dismissal, final action or a decision. Partial dismissals are not immediately appealable. See §§ 1614.107(b) and 1614.401, and, Section IV.C of this Chapter, for further guidance.

a. Agencies shall inform the complainant that s/he may appeal within **thirty (30) days** of receipt of the dismissal, final action or decision. Appeals may be mailed to:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington D. C. 20013

or hand delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
Appellate Review Programs
131 M Street N.E.
Washington, D.C. 20507

or sent by fax to:

(202) 663-7022.

b. Agencies shall provide the information at § 1614.403 (a)-(f) (use of appeal form EEOC Form 573, Notice of Appeal/Petition (a copy of which is appended hereto as Appendix K); content of petition; service of copies on agency EEO director; certification of delivery; and opposition brief schedule).

c. With regard to a mixed case, if the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB, not the EEOC, within 30 days of receipt of the agency's final decision.

3. The Right to File a Civil Action

The complainant has the right to file a civil action in federal district court on claims raised in the administrative process:

a. Within **ninety (90) days** of receipt of a final action on an individual or class complaint if no appeal has been filed;

b. After **180 days** from the date of filing an individual or class complaint if an appeal has not been filed and a final action has not been taken;

c. Within **90 days** of receipt of the Commission's final decision on appeal; or

d. After **180 days** from the date of the filing of an appeal with the Commission if there has been no final decision by the Commission.

4. See Appendix B of this Management Directive, which sets forth a detailed list of a complainant's rights about which the agency must advise the complainant.

III. AGENCIES MUST AVOID FRAGMENTING EEO COMPLAINTS

The fragmentation, or breaking up, of a complainant's legal claim during EEO complaint processing has been a significant problem in the federal sector. For complainants, fragmented processing can compromise their ability to present an integrated and coherent claim of an unlawful employment practice for which there is a remedy under the federal equal employment statutes. For agencies and the Commission, fragmented processing substantially increases case inventories and workloads when it results in the processing of related matters as separate complaints.[(1)]

The fragmentation of EEO claims must be prevented at all levels of the complaint process, including pre-complaint EEO counseling. This section is designed to promote understanding of the concept of fragmentation and to provide guidance on avoiding fragmented complaint processing.

A. Identifying and Defining the Claim in an EEO Complaint

1. Fragmentation often occurs at the point where the agency identifies and defines the complainant's claim, most commonly during the counseling and investigative stages. A claim refers to an assertion of an unlawful employment practice or policy for which, if proven, there is a remedy under the federal equal employment statutes. Fragmentation often results from a failure to distinguish between the **claim** the complainant is raising and the **evidence** (factual information) s/he is offering in support of that claim.

   Example 1

   An African-American employee complains to the EEO Counselor that his supervisor is more strict about his time and attendance than with the unit's Caucasian employees. This is a legal claim of race-based disparate treatment in the terms and conditions of the complainant's employment with regard to time and attendance. In support of this claim, the complainant tells the counselor about a number of different occasions when the supervisor denied his request for annual leave or required him to use leave because he was tardy, while treating similarly situated Caucasian employees more favorably. These specific incidents should be considered the evidence supporting the complainant's claim that the supervisor is treating him differently because of his race with regard to his time and attendance. Fragmentation would occur if each of these incidents were considered a separate claim and processed as a separate complaint.

   Example 2

   A female employee complains to the EEO Counselor that she is being subjected to a hostile work environment due to the ongoing sexual harassment by her male coworkers. This is the complainant's legal claim. In support of this claim, the complainant tells the counselor of specific incidents of a sexual advance, a sexual joke and a comment of a sexual nature. These individual incidents are evidence in support of the complainant's claim and should not be considered as separate claims in and of themselves.

2. Often, when an agency identifies each piece of factual evidence (usually comprising a single incident) offered by the complainant as a separate and distinct legal claim, it ignores the complainant's real underlying claim of a pattern of ongoing discrimination.[(2)] In contrast, fragmentation rarely occurs when the complainant presents a legal claim based on a single incident (such as a particular selection decision or a termination decision) rather than a series of events.

   In defining a legal claim, the agency must exercise care where a series of incidents offered by a complainant initially seem different from one another.

   Example 3

   A complainant tells the counselor that she believes that the agency discriminated against her when she was not selected for a GS-14 Engineer position, when she was not detailed to serve in a similar position, and when she was denied access to a particular training program. All of these seemingly different incidents are part of the same claim of a discriminatory nonselection, as the complainant has alleged that the detail and the training would have enhanced her qualifications for the GS-14 Engineer position and, therefore, are relevant to the agency's failure to select her for that position.

   Practice Tip: When defining a claim, two components must be identified. First, the claim must contain a factual statement of the employment practice or policy being challenged. As already discussed, it is critical that EEO Counselors, investigators, and other EEO staff members ensure that they understand the exact nature of the complainant's concerns so that the employment practice is defined broadly enough to reflect any allegation of a pattern of ongoing discrimination. Particular attention should be given to claims involving terms and conditions of employment. In Example 1 above, the employment practice being challenged is: disparate treatment in terms and conditions of employment with regard to time and attendance polices. In Example 2 above, the employment practice is: the creation of a hostile work environment because of sexual harassment. In Example 3 above, the employment practice might be defined as: management's failure to advance the complainant's career to a GS-14 position. The second component of a legal claim is the identification of the basis (because of race, color, national origin, sex, religion, reprisal, age or disability) for a violation of an equal employment statute.

3. **Timeliness Issues**: One of the reasons the distinction between legal claims and supporting evidence is important is because complainants frequently raise factual incidents that occur outside of the 45-day time period for contacting an EEO Counselor. In general, for a legal claim to be timely raised, at least one of the incidents the complainant cites as evidence in support of his/her claim must have occurred within the 45-day time period for contacting an EEO Counselor. (The usual exceptions should still be made. See Section IV of this Chapter on dismissals.) If the claim itself is timely raised, the question remains as to how the agency is to treat those factual incidents that the complainant cited as evidence in support of his/her claim that occurred outside the 45-day time limit.

The answer is that an agency must consider, at least as background, all relevant evidence offered in support of a timely raised legal claim, even if the evidence involves incidents that occurred outside the 45-day time limit. This is true of supporting evidence that the complainant offered during EEO counseling as well as later in the investigative stage. During the investigation, the degree to which a certain piece of proffered evidence is relevant to the legal claim will determine what sort of investigation is necessary of that particular piece of evidence. For example, in a nonselection case, a selection decision made long before the one at issue, involving different agency officials, may have little relevance to the current claim. On the other hand, if the selecting official in the most recent nonselection also failed to select the complainant for a similar position six months before, that piece of evidence may be very relevant to the complainant's claim. Investigators should not simply disregard relevant information the complainant provided in support of his/her claim as untimely raised; nor should they send the complainant back to counseling as if the supporting evidence was a new claim to be processed as a separate complaint.

Beyond consideration as background evidence, incidents that occurred outside the 45-day time limit should be investigated and remedied to the extent that they are sufficiently interrelated to a timely raised incident such that a continuing violation has been established. A continuing violation is a series of related acts, one or more of which falls within the limitations period, that are tied together with a common theme uniting the alleged discriminatory acts into a continuous pattern. When determining if a continuing violation exists, the following information is relevant to, but not necessarily dispositive of, the issue: whether the same officials were involved in the incidents, whether the incidents were similar in nature, and whether they recurred or were of a more isolated nature. If discrimination is found in a continuing violation claim, relief may be granted for each incident making up that claim, as appropriate.

Practice Tip: It is critical that agencies document their actions and the reasons for those actions in the record for Administrative Judge and Commission consideration later in the process. For example, if the agency's investigator decides that a certain factual incident raised by the complainant is of little relevance to his/her claim and, therefore, decides that an "appropriate" investigation of that incident is very minimal, the investigator should document that decision and the reasons for it in the investigative report.

B. A Complainant May Amend A Pending Complaint

At any time prior to the agency's mailing of the notice required by § 1614.108(f) at the conclusion of the investigation, § 1614.106(d) permits a complainant to amend a pending EEO complaint to add claims that are like or related to those claim(s) raised in the pending complaint.[(3)] There is no requirement that the complainant seek counseling on these new claims. After the complainant has requested a hearing, s/he may file a motion with the Administrative Judge to amend the complaint to include claims that are like or related to those raised in the pending complaint.

This situation most frequently occurs when an alleged discriminatory incident occurs after the filing of an EEO complaint. In the past, agencies usually made these subsequent incidents the basis of a separate EEO complaint. A separate EEO complaint is not appropriate, however, if the new incident of discrimination raises a claim that is like or related to the original complaint. Rather, the original complaint should be amended to include the new incident of discrimination.

When a complainant raises a new incident of alleged discrimination during the processing of an EEO complaint, it must be determined whether this new incident:

1. provides additional evidence offered to support the existing claim, but does not raise a new claim in and of itself;

2. raises a new claim that is like or related to the claim(s) raised in the pending complaint; or

3. raises a new claim that is **not** like or related to the claim(s) raised in the pending complaint.

In order to facilitate such a determination, the complainant shall be instructed by the investigator (or any other EEO staff person with whom complainant raises the new incident) to submit a letter to the agency's EEO Director or Complaints Manager (or a designee) describing the new incident(s) and stating that s/he wishes to amend his/her complaint to include the new incident(s). The EEO Director or Complaints Manager shall review this request and determine the correct handling of the amendment in an expeditious manner.

4. <u>New Incident That Is Part of the Existing Claim</u>

   If the EEO Director or Complaints Manager concludes that the new incident(s) provides additional evidence offered in support of the claim raised in the pending complaint, but does not raise a new claim in and of itself, then the EEO Director or Complaints Manager should instruct the investigator to include the new incident in the investigation. A copy of this letter should be sent to the complainant.

   Example 4

   During EEO counseling and in her formal complaint, an agency employee has alleged that her co-workers were harassing her because of her gender, and she cites five examples of harassment. During the investigation, she provides an initial affidavit detailing these incidents. Shortly thereafter, the employee contacts the investigator and tells him of several new incidents of gender-based harassment by these same coworkers. In this case, these new incidents are additional evidence offered by complainant in support of her pending claim of discriminatory harassment and the investigator should be instructed to incorporate these new facts into his investigation of the pending claim. In this instance, the investigative period is not extended beyond 180 days, except with the consent of the complainant pursuant to § 1614.108(e).

5. New Incident That Raises a New Claim Like or Related to the Pending Claim

While a complaint is pending, a complainant may raise a new incident of alleged discrimination that is not part of the existing claim, but may be part of a new claim that is like or related to the pending claim. In deciding if a subsequent claim is "like or related" to the original claim, a determination must be made as to whether the later incident adds to or clarifies the original claim, and/or could have reasonably been expected to grow out of the investigation of the original claim. See Scher v. U.S. Postal Service, EEOC Request No. 05940702 (May 30, 1995); Calhoun v. U.S. Postal Service, EEOC Request No. 05891068 (March 8, 1990); Webber v. Department of Health and Human Services, EEOC Appeal No. 01900902 (February 28, 1990).

If the EEO Director or Complaints Manager concludes that the new incident(s) raises a new claim, but that this new claim is like or related to the claim(s) raised in the pending complaint, the agency must amend the pending complaint to include the new claim. Accordingly, and pursuant to § 1614.106(e), the agency shall acknowledge receipt of an amendment to a complaint in writing and inform the complainant of the date on which the amendment was filed. The EEO Director or Complaints Manager should also send a copy of the letter to the EEO investigator who is investigating the complainant's prior complaint with instructions to include the new incident(s) in the investigation.

Example 5

An agency employee files a race discrimination complaint alleging he was not selected for a particular supervisory position, despite his belief that he was the best qualified candidate for the job. During the investigation into his complaint, the complainant is not selected for another supervisory position by the same selecting official. Complainant again asserts he was not selected because of his race. This new claim of a discriminatory nonselection is sufficiently like or related to the original nonselection claim that the agency should amend the original complaint to include the subsequent nonselection.

Example 6

During the investigation into her claim that the agency is discriminating against her in the terms and conditions of her employment because her supervisor denied her developmental assignments that could lead to upward mobility in the agency, the complainant informs the investigator that her supervisor just issued her a letter of warning for attendance problems. The complainant asserts that the supervisor took this action in retaliation for her complaint about the denial of development assignments. This new claim of retaliation is related to the pending claim because it grew out of the investigation into that claim. The agency should amend the original complaint to include this subsequent, but related, claim.

Example 7

An agency employee files a complaint of discrimination when his request for a hardship transfer is denied. During the investigation into his complaint, the complainant sends a letter to the EEO office stating that he has decided to resign from the agency because of the agency's failure to transfer him and the resulting stress. He further states that he is no longer seeking the transfer as a remedy to his complaint, but asserts he is entitled to a compensatory damages award instead. The EEO office should amend the original complaint to include the complainant's new like or related claim of constructive discharge.

Pursuant to § 1614.106(e)(2), the agency is required to complete its investigation of an EEO complaint within 180 days of the filing of a complaint unless the parties agree in writing to extend the time period. If a complaint is amended, however, this deadline is adjusted so that the agency must 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.

A complainant retains the right to request a hearing, even in the case of an amended complaint, after 180 days have passed since the filing of the original complaint, even if the agency's investigation has not been completed. In such a case, an Administrative Judge may develop the record through discovery and the hearing process, or utilize other means within his/her discretion to ensure that the amended complaint is properly addressed.

6. New Incident Raises Claim That Is Not Like or Related to Pending Claim

In cases where subsequent acts of alleged discrimination do not add to or clarify the original claim, and/or could not have been reasonably expected to grow out of the investigation of the original claim, the later incident should be the subject of a separate EEO complaint. In such cases, fragmented processing of an EEO complaint is not at issue because there are two distinct and unrelated legal claims being alleged.

If the EEO Director or Complaints Manager concludes that the new claim raised by the complainant is **not** like or related to the claim(s) raised in the pending complaint, then the complainant must be advised in writing that s/he should seek EEO counseling on the new claim. The postmark date of the letter (from complainant requesting an amendment) to the EEO Director or Complaints Manager would be the date for time computation purposes used to determine if initial counselor contact was timely under § 1614.105(b).

Example 8

An agency employee sought EEO counseling and filed a formal complaint concerning his allegation that the agency discriminated against him in the terms and conditions of his employment by requiring that he adhere to a specific work schedule while not imposing a similar requirement on a comparative employee. During the investigation into this complaint, the complainant tells the investigator that he was recently not selected for a position in another facility and believes this occurred as a result of discrimination. In this case, the discriminatory nonselection

claim is not like or related to the adherence to the work schedule claim as it is factually distinct and cannot reasonably be said to add to or clarify the original claim.

C. Consolidation of Complaints

As noted above, a new claim that is not like or related to a previously filed complaint provides the basis for a new , and separate, complaint. The complainant must present the new, unrelated claim to an EEO Counselor and the new claim is subject to all of the regulatory case processing requirements. In order to address a different fragmentation concern, § 1614.606 requires agencies to consolidate for joint processing two or more complaints of discrimination filed by the same complainant, after appropriate notification is provided to the parties.[(4)] While it is anticipated that most consolidated complaints will be investigated together, in certain circumstances, such as significant geographic distance between the sites of two complaints, consolidation does not preclude an agency from investigating each complaint separately. In all instances, however, where an individual requests a hearing, the consolidated complaints should be heard by a single Administrative Judge; or where the complainant requests a final agency decision, the agency should issue a single decision. An agency must consolidate complaints filed by the same complainant before the agency issues the notice required by § 1614.108(f) at the conclusion of the investigation.

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. A complainant has the right to request a hearing, even in the case of consolidated complaints, after 180 days have passed since the filing of the original complaint, even if the agency's investigation has not been completed. If not already consolidated, an Administrative Judge or the Commission may, in their discretion, consolidate two or more complaints of discrimination filed by the same complainant.

Section 1614.606 permits, but does not require, the consolidation of complaints filed by different complainants that consist of substantially similar allegations or allegations related to the same matter.

D. Partial Dismissals

Another method of addressing the fragmentation problem is § 1614.107(b), which provides for no immediate right to appeal a partial dismissal of a complaint. See Section IV.C of this Chapter for a more detailed discussion of partial dismissals. Partial dismissals will be preserved and decided within the context of the rest of the complaint.

E. No More Remands By Administrative Judges

To further avoid the fragmenting of EEO claims, Administrative Judges will no longer remand issues to agencies for counseling or other processing. Once a case is before an Administrative Judge, that Administrative Judge is fully responsible for processing it. This provision is discussed more fully in Chapter 8 on Hearings.

F. **"Spin-off" Complaints**

Section 1614.107(a)(8) provides for the dismissal of spin-off complaints, which are complaints about the processing of existing complaints. It provides instead that complaints about the processing of existing complaints should be referred to the agency official responsible for complaint processing, and/or processed as part of the original complaint, as set forth in Section IV.D of this Chapter.

G. **Training**

As already emphasized, the EEO Counselor and investigator have critical roles in identifying, defining and clarifying an aggrieved employee's legal claims. Therefore, agencies must provide all counselors and investigators with mandatory training in this area. See Chapter 2, Section II (EEO Counselor training) and Chapter 7, Section II (investigator training) of this Management Directive.

IV. AGENCY DISMISSAL PROCESS

Section 1614.107(a) sets out the circumstances under which an agency may dismiss a complaint. An agency's authority to dismiss a complaint ends when a complainant requests a hearing. An agency should process dismissals expeditiously.

A. Bases for Dismissals that May Exist As of the Filing of the Complaint or Develop Thereafter

1. Untimely Counseling Contact-**§ 1614.107(a)(2)**

   a. A claim that has not been brought to the attention of an EEO Counselor in a timely manner.

   b. The complainant did not contact an EEO Counselor within **forty-five (45) days** of the discriminatory event or within **45 days** of the effective date of the personnel action, § 1614.105(a)(1), and the complainant did not show that the 45-day contact period should be extended pursuant to § 1614.105(a)(2). See, e.g., Ball v. U.S. Postal Service, EEOC Request No. 05880247 (July 6, 1988) (reasonable suspicion standard used to determine when the 45-day limitation period begins; time limit is not triggered until the complainant reasonably suspects discrimination, but before all of the facts that support the charge of discrimination have become apparent). An agency may be barred from dismissing a complaint on timeliness grounds where:

   (1) The agency could not establish that the complainant was not notified of the time limits and was not otherwise aware of them, or did not know and reasonably should not have known that the discriminatory practice or personnel action occurred or that despite due diligence was prevented by circumstances beyond his/her control from contacting an EEO Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission; or

(2) the complainant contends that the claim is a part of a continuing violation or establishes that there are other equitable circumstances that mitigate untimely contact. Time limits are subject to waiver, estoppel and equitable tolling under § 1614.604(c).

2. Untimely Filing of the Formal Complaint-**§ 1614.107(a) (2)**

The complainant failed to file a formal complaint within **fifteen (15) days** of his/her receipt of the Counselor's notice of right to file a formal complaint ("Notice of Final Interview") in an individual complaint, § 1614.105(d), or in a class complaint, § 1614.204(c). The agency has the burden of proving that the complainant received the notice and that the notice clearly informed the aggrieved person of the 15-day filing time frame. See, e.g., Paoletti v. U.S. Postal Service, EEOC Request No. 05950259 (August 17, 1995). This time limit is also subject to waiver, estoppel and equitable tolling under § 1614.604(c).

3. Failure to State a Claim-**§ 1614.107(a)(1)**

The complainant failed to state a claim under § 1614.103. This may include a claim that does not allege discrimination on a basis encompassed in one of the statutes applicable to federal sector employees. In determining whether a complaint states a claim, the proper inquiry is whether the conduct if true would constitute an unlawful employment practice under the EEO statutes. Cobb v Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997) (a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle the complainant to relief; the trier of fact must consider all of the alleged harassing incidents and remarks, and considering them together in the light most favorable to the complainant, determine whether they are sufficient to state a claim). See also Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268-69 (1998) (referencing cases in which courts of appeals considered whether various employment actions were sufficient to state a claim under the civil rights laws). Dismissal for failure to state a claim also may be appropriate where the complainant named the improper agency. See § 1614.106(a).

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that s/he has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. The Commission has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994); see also Wildberger v. Small Business Administration, EEOC Request No. 05960761 (October 8, 1998). An agency is required to address EEO complaints only when filed by an individual who has suffered direct, personal deprivation at the hands of the employer; the agency's act must have caused some concrete effect on the aggrieved person's employment status. Quinones v. Department of Defense, EEOC Request No. 05920051 (March 12, 1992).

4. Abuse of Process-**§ 1614.107(a)(9)**

Section 1614.l07(a)(9) is the appropriate provision under which an agency may dismiss a complaint on the extraordinary grounds of abuse of process.

(a) Abuse of process is defined as a **clear pattern of misuse of the process for ends other than that which it was designed to accomplish**. See Buren v. U.S. Postal Service, EEOC Request No. 05850299 (1985); Kleinman v. U.S. Postal Service, EEOC Appeal No. 01943637 (1994); Sessoms v. U.S. Postal Service, EEOC Appeal No. 01973440 (1998). The Commission has a strong policy in favor of preserving a complainant's EEO rights whenever possible. The occasions in which application of the standards are appropriate must be rare, because of the strong policy in favor of preserving a complainant's EEO rights whenever possible. See generally Love v. Pullman, 404 U.S. 522 (1972); Wrenn v. Equal Employment Opportunity Commission, EEOC Appeal No. 01932105 (1993). Therefore, such dismissals must be taken only in cases where there is a clear misuse or abuse of the administrative process.

(b) In order to determine whether a complaint, or a number of consolidated complaints, should be dismissed for this reason under § 1614.107(a)(9), the agency or Administrative Judge must strictly apply the criteria established by the Commission on this issue.[(5)] This requires an analysis of whether the complainant evidences an ulterior purpose to abuse or misuse the EEO process. Agencies are cautioned that numerous complaint filings alone is not a sufficient basis for determining that there has been an abuse of the process. However, multiple filings on the same issues, lack of specificity in the allegations, and the filing of complaints on allegations previously raised, may be considered in deciding whether a complainant has engaged in a pattern of abuse of the EEO process. All pending complaints from a complainant which satisfy these criteria should be consolidated for dismissal under this section.

(c) Cases in which the Commission has found an abuse of the EEO process include those where, upon review of the complainant's record, including the number and types of complaints filed, the Commission has concluded that the complainant has pursued a scheme involving the misuse and misapplication of the EEO process for an end other than that which it was designed to accomplish.

(1) For example, in reviewing a complainant's prior complaints, the Commission has found abuse of process where the complainant presented similar or identical allegations, evidencing a pattern of initiating the complaint process whenever the agency did anything that dissatisfied the complainant. Hooks v. U.S. Postal Service, EEOC Appeal No. 01953852 (1995).

(2) The Commission has also found abuse of process when the complainant presented similar or identical allegations related to the complainant's dissatisfaction with the EEO process itself. Goatcher v. U.S. Postal Service, EEOC Request No. 05950557 (1996). The complainant in Goatcher filed numerous complaints concerning the agency's purported denial of access to sufficient equipment and storage for EEO claims, denial of official time for such

claims, inadequate EEO counseling, agency monitoring of time spent in the EEO process, and failure to maintain her anonymity during EEO counseling.

(3) In Sessoms v. U.S. Postal Service, EEOC Appeal No. 01973440 (1998), the Commission noted that the appellant was experienced in the EEO process, but that he pursued a clear pattern of abuse of the EEO process by filing numerous frivolous complaints. The Commission noted, "A definite pattern of initiating the complaint machinery with respect to any matter with which appellant was dissatisfied has developed, . . . clearly has amounted to an abuse of process." See also Kessinger v. U.S. Postal Service, EEOC Appeal No. 0197639 (June 8, 1999) (clear pattern of abuse from multiple filings, totaling over 160 complaints and 150 appeals, many of which were duplicate complaints of earlier, dismissed filings; Commission found the complainant's actions an intentional effort to clog the agency's in-house administrative machinery).

(d) The Commission has stressed in such cases that a party cannot be permitted to utilize the EEO process to circumvent other administrative processes; nor can individuals be permitted to overburden the EEO system, which is designed to protect individuals from discriminatory practices.

Example 1

The complainant originally filed a complaint of discrimination in non-selection for promotion. Subsequently, he repeatedly files complaints of reprisal, alleging that the agency was denying him official time to prepare EEO complaints, denying him the use of facilities and storage space for his EEO materials, providing improper EEO counseling, and unfairly keeping tabs on the amount of official time he is spending on his EEO complaints. Many of the allegations in these complaints are vague, and raise allegations previously raised in earlier complaints. In fact, he had on several occasions copied a previous complaint on which he would write a new date in order to file new complaint. Over the course of several months, he filed a total of 25 complaints in this manner. The agency could consolidate the subsequent complaints and dismiss them under § 1614.107(a) for abuse of process. The complainant had demonstrated a pattern of abuse of the process, involving multiple complaints containing identical or similar allegations. (See, e.g., Kessinger v. U.S. Postal Service, EEOC Appeal No. 0197639 (June 8, 1999); Story v. U.S. Postal Service, EEOC Request No. 05970083 (May 22, 1998)).

Example 2

The complainant originally filed a complaint of discrimination in non-selection for promotion. Subsequently she filed a total of 15 complaints, many alleging specific and distinct acts of reprisal for her prior EEO activity. Based on the number of complaints alone, the agency attempted to dismiss them all for abuse of process.

There was insufficient evidence to dismiss the complaints for abuse of process. Evidence of numerous complaint filings, in and of itself, is not a sufficient basis

for determining that there has been an abuse of the process. In this case, there was no evidence that the complainant's ulterior purpose is to abuse the EEO process, or that she was misusing the process for ends other than that which it was designed to accomplish. It may be appropriate, however, for the agency to consolidate the individual complaints for processing. (See, e.g., Manley v. Department of the Air Force, EEOC Appeal No. 01975901 (May 29, 1998); and Donnelly v. Department of Energy, EEOC Appeal No. 01972171 (November 17, 1997) for decisions rejecting agency contentions of abuse of process).

5. States the Same Claim-**§1614.107(a)(1)**

The complaint states the same claim that is pending before or had been decided by the agency or Commission except in those cases where a class action complaint is pending.[(6)] The Commission has interpreted this regulation to require that the complaint must set forth the "identical matters" raised in a previous complaint filed by the same complainant, in order for the subsequent complaint to be rejected. Terhune v. U.S. Postal Service, EEOC Request No. 05950907 (July 18, 1997); Russell v. Department of the Army, EEOC Request No. 05910613 (August 1, 1991) (interpreting 29 C.F.R. § 1613.215(a)(1), the predecessor of 29 C.F.R. § 1614.107(a)(1)).

6. Complainant Files a Civil Action-**§ 1614.107(a)(3)**

The complainant files a civil action concerning the same allegation, at least **one hundred eighty (180) days** after s/he filed his/her administrative complaint. The requirement in § 1614.410 that the civil action shall be dismissed only if it was filed pursuant to § 1614.408 evidences the intent of the Commission to restrict the dismissals of EEO complaints for filing a civil action to those civil actions which were brought under the statutes enforced by the Commission. Where a complainant has not filed a civil action pursuant to the specific statutes listed in § 1614.408, the complaint may not be dismissed pursuant to § 1614.107(a)(3). See Krumholz v. Department of Veterans Affairs, EEOC Appeal No. 01934799 (December 15, 1993), aff'd, EEOC Request No. 05940346 (October 21, 1994).

7. Issue Has Been Decided-**§ 1614.107(a)(3)**

The same issue has been decided by a court of competent jurisdiction and the complainant was a party to the lawsuit. Commission regulations mandate dismissal of the EEO complaint under these circumstances so as to prevent a complainant from simultaneously pursuing both administrative and judicial remedies on the same matters, wasting resources, and creating the potential for inconsistent or conflicting decisions. Stromgren v. Department of Veterans Affairs, EEOC Request No. 05891079 (May 7, 1990); Sandy v. Department of Justice, EEOC Appeal No. 01893513 (October 19, 1989). The proper inquiry to determine whether dismissal is warranted is whether the issues in the EEO complaint and the civil action are the same, that is, whether the acts of alleged discrimination are identical. Bellow v. U.S. Postal Service, EEOC Request No. 05890913 (November 27, 1989). The factual allegations and not the bases or the precise relief requested should be the crux of the legal analysis.

8. Allegation Raised in Negotiated Grievance Proceeding-**§ 1614.107(a)(4)**

The complainant has raised the allegation in a negotiated grievance procedure that permits allegations of discrimination, indicating an election to pursue a non-EEO process. Section 1614.301(a) provides that "a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both." This subsection also provides that an election to proceed under 1614 is indicated by the "filing of a written complaint," while an election to proceed under a negotiated grievance procedure is indicated by the "filing of a timely written grievance." See Casey v. Department of Veterans Affairs, EEOC Appeal No. 01944605 (August 9, 1995). The withdrawal of a grievance does not abrogate its effect for purposes of an election. Bracket v. Department of the Air Force, EEOC Request No. 05910383 (August 8, 1991).

9. Appeal Made to MSPB-**§ 1614.107(a)(4)**

The complainant has elected to appeal the claim to the Merit Systems Protection Board, rather than file a mixed case complaint under § 1614.302.

10. Complaint Alleges a Preliminary Step-**§ 1614.107(a)(5)**

The complaint alleges that a proposal to take or a preliminary step in taking a personnel action is discriminatory. This provision requires the dismissal of complaints that allege discrimination "in any preliminary steps that do not, without further action, affect the person: for example, progress reviews or improvement periods that are not a part of any official file on the employee." 57 Fed. Reg. 12,643 (April 10, 1992); see, e.g., McAlhaney v. U.S. Postal Service, EEOC Request No. 05940949 (July 7, 1995). If the individual alleges, however, that the preliminary step was part of a pattern of harassing the individual for a prohibited reason, the complaint cannot be dismissed under this section because the preliminary step has already affected the employee. See, e.g., Noone v. Central Intelligence Agency, EEOC Request No. 05940422 (January 23, 1995).

11. Complaint is Moot-**§ 1614.107(a)(5)**

A complaint may be dismissed as moot where there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See Wildberger v. Small Business Administration, EEOC Request No. 05960761 (October 8, 1998), citing County of Los Angeles v. Davis, 440 U.S. 625 (1979). When such circumstances exist, no relief is available, and there is no need for a determination of the rights of the parties. The Commission has also held, however, that where a complainant has made a timely request for compensatory damages, an agency must address the issue of compensatory damages before it can dismiss a complaint for mootness. See, e.g., Salazar v. Department of Justice, EEOC Request No. 05930316 (February 9, 1994).[(7)]

12. Dissatisfaction with the Processing of a Complaint-**1614.107(a)(8)**

The complaint alleges dissatisfaction with the processing of a previously filed complaint. See discussion in Section IV.D of this Chapter of the Management Directive.

B. **Dismissals that Generally Occur After the Agency Accepts the Complaint Based on Complainant's Actions or Inactions**

1. The Complainant Cannot Be Located-**§ 1614.107(a)(6)**

The regulations permit dismissal where the complainant cannot be located. The provision requires that the agency make reasonable efforts to locate the complainant and inform the complainant that s/he must respond to the agency's notice of proposed dismissal within **fifteen (15) days** sent to his/her last known address. A matter may not be "dismissed" under this section until after the complaint has been filed. See Clairborne v. Department of the Air Force, EEOC Appeal No. 01972713 (March 19, 1998).

2. The Complainant Failed to Respond or Proceed in a Timely Fashion-**§ 1614.107(a)(7)**

The regulations permit dismissal where the complainant has failed to respond to a written "request to provide relevant information or to otherwise proceed" within **15 days** of receipt, provided that the request contained notice of the proposed dismissal and further provided that there is otherwise insufficient available information to adjudicate the claim. The regulation further states that an agency may not dismiss on this basis where the record includes sufficient information to issue a decision. The Commission also has held that the regulation is applicable only in cases where there is a clear record of delay or contumacious conduct by the complainant. See, e.g., Anderson v. U.S. Postal Service, EEOC Request No. 05940850 (February 24, 1995).

C. **Processing of Partially Dismissed Complaints**

There is no immediate right to appeal a partial dismissal of a complaint. Where an agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in § 1614.107(a), the agency must notify the complainant in writing of its determination, set forth its rationale for that determination, and notify the complainant that the allegations will not be investigated. The agency must place a copy of the notice in the investigative file. The agency should advise the complainant that an Administrative Judge shall review its dismissal determination if s/he requests a hearing on the remainder of the complaint, but the complainant may not appeal the dismissal until a final action is taken by the agency on the remainder of the complaint. See § 1614.107(b).

1. Where a Hearing is Requested

If the complainant requests a hearing from an Administrative Judge, the Administrative Judge will evaluate the agency's reasons for believing that a portion of the complaint met the standards for dismissal before holding the hearing. If the Administrative Judge believes that all or a part of 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. The parties may conduct discovery to develop the record for all portions of the complaint continuing in the hearing process. The Administrative Judge's decision on the partial dismissal will become part of the Administrative Judge's final decision on the complaint and may be appealed by either party after final action is taken on the complaint.

2. Where a Final Decision By the Agency Is Requested

Where a complainant requests a final decision by 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 decision, including any partial dismissals, to the Commission.

Agency decisions shall include the following:

(a) findings of fact and conclusions of law on the merits of each issue in the complaint;

(b) appropriate remedies and relief in accordance with subpart E of part 1614 when discrimination is found;

(c) notice of right to appeal to the Commission (EEOC Form 573, Notice of Appeal/Petition, to be attached), unless the complaint involves a mixed case, where the agency should provide notice of right to appeal to the MSPB (not the EEOC) within thirty (30) days of receipt of the agency final decision;

(d) notice of right to file a civil action in federal district court;

(e) the name of the proper defendant in any such lawsuit; and

(f) the applicable time limits for appeals and lawsuits.

D. **Allegations of Dissatisfaction Regarding Processing of Pending Complaints**

1. If a complainant is dissatisfied with the processing of his/her pending complaint, whether or not it alleges prohibited discrimination as a basis for dissatisfaction, s/he should be referred to the agency official responsible for the quality of complaints processing. Agency officials should earnestly attempt to resolve dissatisfaction with the complaints process as early and expeditiously as possible.

2. The agency official responsible for the quality of complaints processing must add a record of the complainant's concerns and any actions the agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. If no action was taken, the file must contain an explanation of the agency's reason(s) for not taking any action.

3. A complainant must always raise his/her concerns first with the agency, in the above manner. However, in cases where the complainant's concerns have not been resolved informally with the agency, the complainant may present those concerns to the EEOC at either of the following stages of processing:

   a. Where the complainant has requested a hearing, to the EEOC Administrative Judge when the complaint is under the jurisdiction of the Administrative Judge; or

   b. Where the complainant has not requested a hearing, to the EEOC Office of Federal Operations (OFO) on appeal.

   A complainant must raise any dissatisfaction with the processing of his/her complaint before the Administrative Judge issues a decision on that complaint, the agency takes final action on the complaint, or either the Administrative Judge or the agency dismiss the complaint. The complainant has the burden of showing improper processing. No concerns regarding improper processing raised after a decision will be accepted by the agency, the Administrative Judge, or OFO.

   Where the Administrative Judge or OFO finds that an agency has improperly processed the original complaint and that such improper processing has had a material effect on the processing of the original complaint, the Administrative Judge or OFO may impose sanctions on the agency as s/he/it deems appropriate. For example, where the complainant asserts that the agency's investigation of the complaint was improper, the Administrative Judge may determine whether the complainant has properly characterized the investigation and whether the agency's failure properly to investigate the complaint had a material effect on the processing of the complaint. If the Administrative Judge finds that the processing of the complainant's complaint was materially effected by the agency's actions, the Administrative Judge shall issue an appropriate order addressing the deficiencies in the investigation. If the Administrative Judge finds that although the agency's actions were inconsistent with its requirements under the 29 C.F.R. Part 1614 regulations, but had no material effect on the processing of the complaint, the Administrative Judge, in the exercise of his/her discretion, may suggest that the complainant submit a letter to the following EEOC office for consideration regarding the agency's conduct:

   Equal Employment Opportunity Commission
   Federal Sector Programs
   P.O. Box 77960
   Washington, DC 20013

   If the letter is ten (10) pages or less, it may be faxed to:

   202-663-7022.

   Where the complainant contends that an agency improperly denied him/her official time and the Administrative Judge or OFO finds in the complainant's

favor, the Administrative Judge or OFO may order the agency to restore such personal leave as the complainant may have used in lieu of official time.

V. CONDUCTING THE INVESTIGATION

A. Agency Retains Responsibility

Agencies are responsible for conducting an appropriate investigation of complaints filed against them. An agency may contract out an investigation or may arrange for another agency to conduct the investigation, but the agency remains responsible for the content and timeliness of the investigation.

B. Investigations Must be Finished Timely

Investigations must be finished within **180 days**[(8)] of filing a complaint or within the time period contained in an order from the Office of Federal Operations to investigate a complaint following an appeal from a dismissal, unless the EEO Officer or designee and the complainant agree in writing to an extension of not more than an additional **ninety (90) days.** Where a complaint has been amended or consolidated with another complaint, the investigation must be completed within the earlier of 180 days after the filing of the last complaint or 360 days after the filing of the original complaint. A complainant has the right to request a hearing, even in the case of consolidated complaints, after 180 days have passed since the filing of the original complaint, even if the agency's investigation has not been completed.

C. What Must be Done for an Investigation to be Considered Appropriate

A timely completed investigation means that within the applicable time period the agency must complete several actions.

1. The complaint must be appropriately investigated in a manner consistent with Chapter 6 of this Management Directive. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.

2. Copies of the investigative file, including a summary of the investigation must be provided to the complainant(s)[(9)]; and

3. Within **thirty (30) days**, notice must be given to the complainant informing him of his/her right to request a hearing, if it is not a mixed case, or of the right to request a final action by the agency pursuant to § 1614.110.

VI. FINAL ACTIONS

There are two types of final actions by agencies. One is a final action by an agency following a decision by an Administrative Judge. The other is a final action in all other circumstances.

A. Final Action By Agency Following An Administrative Judge's Decision

When an Administrative Judge issues a decision under § 1614.109 (b), (g), or (i), the agency shall take final action on the complaint by issuing an order **within forty (40) days** of the date of its receipt of the Administrative Judge's decision. The agency's final action shall inform the complainant as to whether the agency will fully implement that decision. The term "fully implement" means that the agency adopts without modification the decision of the Administrative Judge. The agency's final action further shall inform the complainant of his/her right to file an appeal with the Commission, the right to file a civil action in federal district court, the name of the proper defendant in such appeal or civil action, and the applicable time limits for such appeals or civil actions. If the agency's final action does not fully implement the decision of the Administrative Judge, the agency shall file an appeal with the Commission in accordance with § 1614.403, appending a copy of its appeal to the final order, simultaneously with its issuance of a decision to the complainant. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the final action.

B. **Final Actions in All Other Circumstances**

When an agency dismisses an entire complaint under § 1614.107(a), receives a request for an immediate final decision, or does not receive a reply to the notice issued under § 1614.108(f), the agency will take final action by issuing a final decision. The final decision consists of findings by the agency on the merits of each claim in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of Part 1614. The agency will issue the final decision within sixty (60) days of receiving notification that a complainant has requested an immediate final decision from the agency, or within 60 days of the end of the thirty (30)-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested a hearing or a decision. The final action shall contain notice of the right to appeal the final action to the EEOC, 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, Notice of Appeal/Petition, shall be attached to the final action.

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1. See Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997); Toole v. Equal Employment Opportunity Commission, EEOC Appeal No. 01964702 (May 22, 1997).

2. See, e.g., Reid v. Department of Commerce, EEOC Request No. 05970705 (April 22, 1999); Ferguson v. Department of Justice, EEOC Request No. 05970792 (March 30, 1999); Manalo v. Department of the Navy, EEOC Appeal Nos. 01960764 and 01963676 (November 5, 1996), request for reconsideration denied, EEOC Request No. 05970254 (May 29, 1998).

3. It should be noted that technical amendments to a complaint, such as changing the name of the agency head, should be handled quickly and without adding additional case processing time.

4. Through mandatory consolidation, the Commission seeks to address the situation where a single complainant has multiple complaints pending against an agency. Even if the complaints are unrelated, their resolution in a single proceeding will make better use of agency and Commission resources.

5. The Commission retains the authority on appeal to protect its administrative processes from abuse by either party.

6. In that case, an individual complaint will be subsumed under the class complaint.

7. A different situation is presented where an agency unilaterally and unconditionally promises in writing to provide the full and complete remedy as defined by the Administrative Judge. Although the complaint is "moot" in the sense that the guarantee of complete relief completely and irrevocably eradicates the effects of the alleged violation, the Administrative Judge will not dismiss the complaint as moot, but will issue an order determining the appropriate remedy. The purpose of this requirement is to ensure that the complainant will be able to seek enforcement of the agency's agreement to provide full relief should the agency fail to do so. See Chapter 7, Section III.D.15 of this Management Directive.

8. If the complaint is a mixed case, the investigation must be finished within 120 days. 5. C.F.R. § 1201.154(a).

9. See Chapter 6 of this Management Directive for the nature and content of an investigative summary.

CHAPTER 6

DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS

I. INTRODUCTION

Section 1614.108(b), of Title 29 C.F.R., requires that "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. Pursuant to that regulation, this Chapter

prescribes the Equal Employment Opportunity Commission's standards for impartiality and appropriateness in factual findings on formal complaints of discrimination. Further, because continuing education and training for employees working in federal EEO is vitally important, this Chapter also establishes a mandatory minimum training requirement for all investigators, including contract and collateral duty investigators.

This Chapter is intended to ensure that federal agencies consistently develop sound factual bases for findings on claims raised in equal employment opportunity complaints while retaining the maximum flexibility in the use of fact-finding techniques and in the use of established dispute resolution plans. This Management Directive is not intended as an exhaustive guide for conducting investigations, but represents the standard that the Commission expects in an investigation.

II. MINIMUM TRAINING REQUIREMENTS FOR ALL INVESTIGATORS

All new EEO investigators, including contract and collateral duty investigators, must have completed at least thirty-two (32) hours of investigator training before conducting investigations. Individuals serving as EEO investigators as of the date of this publication may also benefit from such training. Agencies have, however, the discretion to decide whether to make this training available to current investigatory staff. In addition to the training requirement for new investigators, all investigators are required to receive at least eight hours of continuing investigator training every year. The Commission has developed training courses to satisfy this requirement and offers them to agencies through its Revolving Fund Program on a fee-for-service basis. Agencies may also develop their own courses to satisfy this requirement or contract with others to provide training, as long as the training meets the standards provided below.

A. New Investigator Training Requirement

The agency should provide training on the following:

1. An overview of the entire EEO process pursuant to 29 C.F.R. Part 1614. This segment must emphasize important time frames in the EEO process, including relevant time frames for investigation.

2. The role and responsibility of an EEO Investigator, as described in this Management Directive.

3. A thorough presentation of the relevant statutes including Title VII of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, as amended, the Americans with Disabilities Act, the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended. This module must explain the theories of discrimination relevant to these statutes, including disparate treatment, adverse impact, and reasonable accommodation theories. This module must provide detailed instruction concerning issues attendant to fragmentation. See Chapter 5, Section III, of this Management Directive.

4. Case management issues, including information on practical techniques concerning the timely investigation of complaints.

5. Remedies, including compensatory damages, attorney's fees, and costs. This module must provide investigators with practical information on how to gather relevant information in cases where remedies, attorney's fees, and costs are at issue.

6. Investigative techniques, such as the gathering and analysis of evidence. Participants should be provided with an opportunity to get practical, hands-on experience during this module on topics such as interviewing witnesses, making credibility determinations, and the gathering and reviewing of documentary evidence. Participants should be provided with case studies to work with so that investigative skills can be effectively developed.

B. **Continuing Investigator Training**

The continuing eight hours of investigator training every year is intended to keep EEO investigators informed of developments in EEO practice, law, and guidance, as well as to enhance and develop investigatory skills. Agencies are encouraged to conduct a needs assessment to determine specific investigative staff training needs. The Commission anticipates that this eight hours of continuing investigator training will include segments on legal and policy updates, regulatory and statutory changes, and investigative skills development.

III. CONTENTS OF A COMPLAINT FILE

The complaint file will include the various documents and information acquired during fact-finding under this Directive, indexed and tabbed in accordance with the instructions contained in this Chapter, with pages numbered sequentially. The file will include:

1. The notice of the EEO Counselor to the complainant pursuant to 29 C.F.R. § 1614.105(d).

2. The written report of the EEO counseling efforts pursuant to § 1614.105(c), and any attached documents.

3. A copy of the complaint.

4. Acknowledgment of filing of complaint. If the agency did not accept all of the claims set forth in the complaint, the complaint file should include the agency's partial dismissal determination and the agency's rationale for its action.

5. If the complaint is withdrawn in whole or in part, or otherwise amended or changed, the withdrawal or changes must be in writing and signed by the complainant. A copy of the signed withdrawal or change must be made a part of the complaint file.

6. If resolution of the complaint is reached, the terms of the resolution must be reduced to writing and included in the complaint file.

7. A statement of claim(s) to be investigated.

8. A record of any activity before the EEOC, Office of Federal Operations.

9. Evidence collected by the investigator.

10. A summary of the investigation.

The file should **not** include:

- documentation concerning the substance of attempts to resolve the complaint during informal counseling or during any alternative dispute resolution procedure.

RESPONSIBILITIES

. **Director of Equal Employment Opportunity**

The Director of Equal Employment Opportunity shall ensure that 1) all new investigators receive at least thirty-two (32) hours of introductory investigator training before conducting investigations and that all investigators receive at least eight hours of continuing investigator training every year, 2) the claim(s) in a complaint are thoroughly investigated, 3) all employees of the agency cooperate in the investigation, and 4) witness testimony is given under oath or affirmation and without a promise that the agency will keep the testimony or information provided confidential.

The Director will also ensure that individual complaints are properly and thoroughly investigated and that final actions and final decisions are issued in a timely manner in accordance with 29 C.F.R. § 1614.110.

The Director also must ensure that there is no conflict or appearance of conflict of interest in the investigation of complaints.

A. **Equal Employment Opportunity Investigator**

The Equal Employment Opportunity Investigator is a person officially designated and authorized to conduct inquiries into claims raised in EEO complaints. The authorization includes the authority to administer oaths and to require employees to furnish testimony under oath or affirmation without a promise of confidentiality. The investigator does not make or recommend a finding of discrimination.

A new investigator must have received, at a minimum, thirty-two (32) hours of investigator training before s/he conducts an investigation; experienced investigators must receive eight hours of training every year.

B. **Complainant**

The complainant must cooperate in the investigation and keep the agency informed of his/her current address. If an agency is unable to locate the complainant, the agency may dismiss the complaint, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within fifteen (15) days of the notice of proposed dismissal. § 1614.107(a)(6).

Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, coupled with a 15-day notice of proposed dismissal, a failure to respond could result in dismissal of the complaint. See § 1614.107(a)(7); Chapter 5, Section IV.B.1, of this Management Directive.

INVESTIGATION

An investigation of a formal complaint of discrimination is an official review or inquiry, by persons authorized to conduct such review or inquiry, into claims raised in an EEO complaint.

The investigative process is non-adversarial. That means that the investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence.

A copy of the complaint shall be provided to the investigator prior to the commencement of the investigation. .

Models for the analysis of common types of discrimination cases appear at Appendix L to this Management Directive.

. Methods of Investigation

Investigative inquiries may be made using a variety of fact-finding models, such as the interview or the fact-finding conference, and a variety of devices, such as requests for information, position statements, exchange of letters or memoranda, interrogatories, and affidavits. The inquiry/review process may also incorporate some of the features of a dispute resolution plan.

A. Purpose of the Investigation

The purpose of the investigation is 1) to gather facts upon which a reasonable fact finder may draw conclusions as to whether an agency subject to coverage under the statutes that the Commission enforces in the federal sector has violated a provision of any of those statutes and 2) if a violation is found, to have a sufficient factual basis from which to fashion an appropriate remedy.[(1)]

B. General Investigative Requirements

The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the complainant's group as compared with the treatment of other similarly situated employees, if any[(2)]; and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.

THE ROLE OF THE INVESTIGATOR

. Collecting and Discovering Factual Information

The role of the investigator is to collect and to discover factual information concerning the claim(s) in the complaint under investigation and to prepare an investigative summary.

A. Variety of Methods Available

The investigator may accomplish his/her mission in a variety of ways. The investigator may function as:

1. a presiding official at a fact-finding conference,

2. an examiner responsible for developing material evidence,

3. an issuer of requests for information in the form of requests for the production of documents, interrogatories, and affidavits, and/or,

4. a face-to-face interviewer in on-site visits.

B. Investigator Must Be Unbiased and Objective

In whatever the mix of fact-finding activity selected for a particular case, the investigator must be and must maintain the appearance of being unbiased, objective, and thorough. S/he must be neutral in his/her approach to factual development. The investigator is not an advocate for any of the parties or interests and should refrain from developing allegiances to them. In addition, the following rules must be observed:

1. The person assigned to investigate shall not occupy a position in the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose.

2. The investigator, if a contract investigator, shall not have been hired by or be obligated to the person(s) involved in the claims giving rise to the complaint. For example, where the contract monitor of EEO investigation contracts is alleged to have been involved in discriminatory activity, the use of the usual contract investigator would create an apparent bias because there is at best the appearance that the contract investigator could not be impartial.

3. An agency is prohibited, in some situations, from using its own immediate investigative resources, even though the investigation of discrimination complaints in the federal service is primarily an agency function and responsibility. In such cases the agency shall use alternatives, such as contract investigators or other outside sources. Such situations include, but are not limited to:

    a. Particularly sensitive cases involving high-level officials (e.g., complainant is an immediate subordinate of the head of the agency and the head of the agency is alleged to have taken discriminatory action).

b. Potential conflict of interest (e.g., complainant is an employee in the EEO office and names the EEO director as the person taking the wrongful action).

c. A small agency unable to carry out an unexpected EEO workload (e.g., an agency with fewer than 450 employees, has a staff of part-time or ad hoc EEO investigators, and is unable to absorb an additional investigative caseload).

C. **Investigator Must Be Thorough**

This means identifying and obtaining all relevant evidence from all sources regardless of how it may affect the outcome. Investigators need not expend the same amount of investigatory effort on each case, however. The proper scope of an investigation is dictated by the facts at issue. Investigators should not take a cookie-cutter, one-size-fits-all approach, as that wastes resources and delays resolution of the complaint. The investigation and the amount of effort expended should be appropriate to determine the claims raised by the complaint. An appropriate investigation is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.

The investigator need not concern him/herself with balancing the amount of evidence supporting the complainant as compared with the amount of evidence supporting the agency. To ensure a balanced record, it is necessary only to exhaust those sources likely to support the complainant and the respondent. An investigation conducted in this manner might reveal that there is ample evidence to support the complainant's claims and no evidence to support the agency's version of the facts, or vice versa. Nevertheless, this investigation would be thorough.

EVIDENCE

. **Quality of Evidence**

Evidence will be gathered from the complainant, witnesses, and other sources. In order to support findings and, ultimately, decisions, this evidence should be material to the complaint, relevant to the issue(s) raised in the complaint, and as reliable as possible.

1. Material Evidence

Evidence is material when it relates to one or more of the issues raised in the complaint or raised by the agency's answer to it. To determine whether evidence is material, one must look to the claims of discriminatory conduct and resultant harm contained in the complaint and the agency's answers to the claims. If the evidence relates to one or more of those claims, then it relates to the issues presented in the complaint, and it is material.

2. Relevant Evidence

Evidence is relevant if it tends to prove or disprove a material issue raised by a complaint. Relevancy and materiality are often used interchangeably. Generally,

relevance is the more important concept in an investigation. If evidence is not relevant, whether it is material is of little consequence. A test of relevance is to ask, "What does this evidence tend to prove?" If the answer is that it tends to prove or disprove a proposition that is related to the complaint, then the evidence is relevant.

3. Reliable Evidence

Evidence is reliable if it is dependable or trustworthy. Evidence should not be ignored because it is of questionable reliability. Such evidence may lead to evidence that is reliable.

Some factors to consider in determining whether testimony is reliable are: whether the witness's testimony is based on his/her own experience and personal knowledge, or based on rumor, hearsay, or innuendo; whether the testimony is a statement of fact or is merely a conclusion; and whether witnesses have an interest in the outcome of the complaint, or are otherwise biased.

Some factors to consider in determining whether documents are reliable are: whether they were prepared in response to the investigation or whether they are maintained in the ordinary course of business; whether they are obtained from the custodian of records or the author of the document; and whether they are copies or original documents and whether the documents are signed and/or dated.

The rules of evidence were designed to set limits on the reliability of documents and testimony entered in evidence in court. Such formal rules will not be strictly applied in the collection of evidence for the investigation of federal equal employment opportunity complaints. Such rules may be used, however, as a guide in assessing the evidentiary weight to be given particular items of evidence.

A. **Types of Evidence**

There are many types of evidence which can be obtained on the issues raised in an equal employment complaint. The three basic types of evidence are circumstantial evidence (e.g. comparative evidence or other evidence giving rise to an inference of discrimination), direct evidence, and statistical evidence.

1. Comparative Evidence

Comparative evidence must be sought in every case alleging disparity in treatment on a basis protected by a law enforced by the EEOC. One of the challenges of developing comparative evidence is gathering sufficient evidence to determine whether the comparators are similarly situated with respect to the complainant. In general, similarly situated means that the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment as the complainant in the context of a particular employment decision. It is important to remember that individuals may be similarly situated for one employment decision, but not for another. For example, a female GS-4 clerk-typist may be similarly situated to a male GS-7 paralegal in a discrimination

case involving the approval of annual leave where the same rules are applied to both by the same supervisor or where both are in the same unit or subject to the same chain of command. The investigator would be obligated to find out whether there were persons, not named by the complainant but similarly situated, whose treatment could be compared to the complainant's treatment.[(3)]

2. Direct Evidence

Direct evidence of discrimination consists of facts revealing that intentional discrimination caused an adverse action. Direct evidence of discrimination means that one need not resort to inference or circumstantial evidence.

Direct evidence is relevant in cases involving disparate treatment where the question is whether the employer intentionally treated employees differently because of a protected factor. It is also relevant in cases involving the effect of policies where the question is whether the policy disparately treats all employees in the protected class.

Direct evidence is rare. The statement, "I would never hire you for that job because you are a woman," is direct evidence of discrimination on the basis of sex in hiring but would not be direct evidence if the issue involved a performance appraisal, for example. Care must be taken to distinguish between direct evidence of bias and direct evidence of discrimination. Direct evidence of bias may be strong but circumstantial evidence of discrimination in a particular case. For example, the statement, "I would never hire a woman for that job," is direct evidence of bias, as not directed towards any specific person. See Heim v. Utah, 8 F.3d 1541, 1546 (10th Cir. 1993). A statement to a complainant that you "may be getting too old to understand the store's new computer programs" was deemed direct evidence of age discrimination in Wright v. Southland Corp., 1999 WL 688051 at *16 (11th Cir. 1999).

3. Statistical Evidence

Statistical evidence or a survey of the general environment may be conducted as appropriate. For example, this evidence may be probative when claims involve the comparative treatment of groups, as in a claim of a pattern or practice of discrimination, or the adverse effect of an agency policy or practice.

B. **Sources of Evidence**

1. The Complainant

The complaint will generally provide the initial information concerning the bases, issues, and incidents that gave rise to the complaint of discrimination. The complaint may also indicate the reason, if any was given, for any adverse employment decision. Additional background and detailed information must be obtained from the complainant and recorded through written questions and answers (interrogatories), recorded interviews (using handwritten notes or verbatim transcription), an exchange of letters or memoranda, or a fact-finding

conference. This information should include medical documentation, where necessary. Witness testimony intended to be made a part of the complaint file should be made under oath or affirmation or penalty of perjury.

Volume II of the EEOC Compliance Manual will assist in developing inquiries. That volume contains substantive topics arranged in sections. Most sections contain advice on what questions to ask when certain issues are raised. The Commission's Compliance Manual is published commercially and is available at many libraries and at the Commission's district, area, and field offices. In addition, newly issued sections of the Compliance Manual and Commission policy guidance on issues such as reprisal, definition of disability, reasonable accommodation and sexual harassment are available on the Commission's web site, www.eeoc.gov., or from the EEOC information line at 1-800-USA-EEOC.

2. The Agency

Information from the agency may be obtained initially through a request for information. Consult the agency Director of EEO or EEO officer for instructions concerning to whom to direct the request. The EEOC Compliance Manual, Volume I, Section 26.3, provides some guidance on developing requests for information.

Follow-up information should be obtained in a variety of ways, including further requests, affidavits, interrogatories, or a fact-finding conference.

In most instances, the individual who initiated or enforced the decision or engaged in the action about which the complaint was filed should be interviewed early in the investigation. His/her reasons for the action will often open other avenues to explore.

3. Witnesses

Witnesses can be identified by asking the complainant, the official involved in the alleged discriminatory action, or other obvious witnesses if they are aware of other persons who might have information related to the complaint. Witnesses need not be employees at the respondent agency.

a. The EEO staff may be of some assistance in discovering other witnesses, but they should rarely be witnesses themselves. Their information will usually be hearsay and their participation as witnesses would compromise their objectivity. Information should be obtained from its primary source.

b. Witness bias should be noted when it is discovered. The following should be noted: 1) favorable feelings toward a party based on a mutual alliance, family ties, or close friendship; 2) hostility to a party, because of a past disagreement; and 3) self-interest in the outcome of the complaint are some indicators of potential bias. The indicators should be made a part of the record, and efforts should be made to corroborate the testimony. The weight accorded the evidence adduced from such witnesses will be

governed by the degree to which it can be determined that the bias colored the testimony.

4. Documentary Evidence

All relevant documents should be obtained. The complainant, the supervisor, the manager who took the personnel action, or the personnel office of the agency may be sources to help identify relevant documents.

Statistical evidence usually can be obtained through the EEO Office or the personnel office of the agency.

C. **Evidence on the Question of Remedies**

Evidence should be gathered from which an appropriate remedy can be fashioned. This essentially means that a determination of the parameters of relief should be made and the appropriate inquiries developed. Agencies should be aware that, during the investigative process, they need to address evidence that may be used in connection with framing remedies. Evidence on the question of remedies may include evidence of a complainant's interim earnings or subsequent promotions (in a discharge or non-promotion case), compensatory damages, or other mitigating factors. (For a source of information concerning compensatory damages, see Enforcement Guidance, Compensatory & Punitive Damages Available under § 102 of the Civil Rights Act of 1991, N-915.002 (July 14, 1992).[(4)]

WITNESSES AND REPRESENTATIVES IN THE FEDERAL EEO PROCESS

The procedures outlined here relate specifically to the processing of individual complaints of discrimination under § 1614.108. The principles reflected in these procedures, however, should also guide the processing of class complaints of discrimination under § 1614.204.

. **Disclosure of Investigative Material to Witnesses**

1. To the complainant

The complainant must receive a copy of the complaint file and a transcript of the hearing, if a hearing is held.

2. To other witnesses

Agencies may disclose information and documents to a witness who is a federal employee where the investigator determines that the disclosure of the information or documents is necessary to obtain information from the witness, e.g., to explain the claims in a complaint or to explain a manager's articulated reason for an action in order to develop evidence bearing on that reason.

A. **Travel Expenses**

1. Witness Employed by the Federal Government

Section 1614.605(f) requires that a witness be in an official duty status when his/her presence is required or authorized by agency or Commission officials in connection with a complaint. A witness is entitled to travel expenses. If a witness is employed at an agency other than the one against which the complaint is brought and must travel to provide the attestation or testimony, the witness is entitled to reimbursement for travel expenses. The current employing agency of a federal employee must initially authorize and pay the employee's travel expenses and is entitled to reimbursement from the responding agency, which is ultimately responsible for the cost of the employee's travel. Decision of the Comptroller General, Matter of John Booth - Travel Expenses of Witness - Agency Responsible, File: B-235845, 69 Comp. Gen. 310 (1990). An agency would not be responsible for paying the travel expenses of non-federal witnesses.

2. Outside Complainant or Applicant Not Employed by Federal Government

The agency is not responsible, however, for paying the travel expenses of an "outside" complainant or applicant. Although the complainant who, for purposes of his/her complaint is a witness, may once have been employed by the agency against whom s/he complains, the termination of the employment status with the federal government also terminates any federal obligation to pay travel expenses associated with prosecution of the complaint. Decision of the Comptroller General, Matter of: Expenses of Outside Applicant Complainant to Travel to Agency EEO Hearing, File: B-202845, 61 Comp. Gen. 654 (1982).

B. **Official Time**

Section 1614.605 provides that complainants are entitled to a representative of their choice during pre-complaint counseling and at all stages of the complaint process. Both the complainant and the representative, if they are employees of the agency where the complaint arose and was filed, are entitled to a reasonable amount of official time to present the complaint and to respond to agency requests for information, if otherwise on duty. § 1614.605(b). Former employees of an agency who initiate the EEO process concerning an adverse action relating to their prior employment with the agency are employees within the meaning of § 1614.605, and their representatives, if they are current employees of the agency, are entitled to official time. Witnesses who are federal employees, regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with the complaint.

1. Reasonable Amount of Official Time

"Reasonable" is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information. The actual number of hours to which complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis. The complainant and the agency should arrive at a mutual

understanding as to the amount of official time to be used prior to the complainant's use of such time. Time spent commuting to and from home should not be included in official time computations because all employees are required to commute to and from their federal employment on their own time.

2. Meeting and Hearing Time

Most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with EEOC Administrative Judges. Whatever time is spent in such meetings and hearings is automatically deemed reasonable. Both the complainant and the representative are to be granted official time for the duration of such meetings or hearings and are in a duty status regardless of their tour of duty. If a complainant or representative has already worked a full week and must attend a hearing or meeting on an off day, that complainant or representative is entitled to official time, which may require that the agency pay overtime.

3. Preparation Time

Since presentation of a complaint involves preparation for meetings and hearings, as well as attendance at such meetings, conferences, and hearings, complainants and their representatives are also afforded a reasonable amount of official time, as defined above, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time to prepare the formal complaint and any appeals that may be filed with the Commission, even though no meetings or hearings are involved. However, because investigations are conducted by agency or Commission personnel, the regulation does not envision large amounts of official time for preparation purposes. Consequently, "reasonable," with respect to preparation time (as opposed to time actually spent in meetings and hearings), is generally defined in terms of hours, not in terms of days, weeks, or months. Again, what is reasonable depends on the individual circumstances of each complaint.

4. Aggregate Time Spent on EEO Matters

The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, an agency may restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative's duty hours in any given month, quarter, or year. Such overall restrictions would depend on the nature of the position occupied by the representative, the relationship of that position to the mission of the agency, and the degree of hardship imposed on the mission of the agency by the representative's absence from his/her normal duties. The amount of official time to be afforded to an employee for representational activities will vary with the circumstances.

Moreover, § 1614.605(c) provides that in cases where the representation of a complainant or agency would conflict with the official or collateral duties of the

representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative. At all times, the complainant is responsible for proceeding with the complaint, regardless of whether s/he has a designated representative.

The Commission does not require agencies to provide official time to employee representatives who are representing complainants in cases against other federal agencies. However, the Commission encourages agencies to provide such official time.

5. Requesting Official Time

The agency must establish a process for deciding how much official time it will provide a complainant. Agencies further must inform complainants, their representatives, and others who may need official time, such as witnesses, of the process and how to claim or request official time.

6. Denial of Official Time

If the agency denies a request for official time, either in whole or in part, the agency must include a written statement in the complaint file noting the reasons for the denial. If the agency's denial of official time is made before the complaint is filed, the agency shall provide the complainant with a written explanation for the denial, which it will include in the complaint file if the complainant's subsequently files a complaint.

C. **Duty Status/Tour of Duty**

For purposes of these regulations, "duty status" means the complainant's or representative's normal hours of work.

It is expected that the agency will, to the extent practical, schedule meetings during the complainant's normal working hours and that agency officials shall provide official time for complainants and representatives to attend such meetings and hearings.

If meetings, conferences, and hearings are scheduled outside of the complainant's or the representative's normal work hours, agencies should adjust or rearrange the complainant's or representative's work schedule to coincide with such meetings or hearings, or grant compensatory time or official time to allow an approximately equivalent time off during normal hours of work. The selection of the appropriate method for making the complainant or representative available in any individual circumstance shall be within the discretion of the agency.

Any reasons for an agency's denial of official time should be fully documented and made a part of the complaint file.

Witnesses who are federal employees, regardless of their tour of duty and whether they are employed by the respondent agency or another federal agency, must be in a duty

status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

D. **Use of Government Property**

The complainant's or complainant's non-attorney representative's use of government property (copiers, telephones, word processors) must be authorized by the agency and must not cause undue disruption of agency operations.

COMPLAINT FILE

. **Contents of the Complaint File**

The complaint file will be assembled in a suitable binder, have a title page (see Appendix M of this Management Directive), and contain all documents pertinent to the complaint, including the following:

1. The notice of the EEO Counselor to the complainant pursuant to 29 C.F.R. § 1614.105(d).

2. The written report of the EEO counseling efforts pursuant to § 1614.105(c), and any attached documents.

3. A copy of the complaint.

4. Acknowledgment of filing of complaint. If the agency did not accept all of the claims set forth in the complaint, the complaint file should include the agency's partial dismissal determination and the agency's rationale for its action.

5. If the complaint is withdrawn in whole or in part, or otherwise amended or changed, the withdrawal or changes must be in writing and signed by the complainant. A copy of the signed withdrawal or change must be made a part of the complaint file.

6. If resolution of the complaint is reached, the terms of the resolution must be reduced to writing and included in the complaint file.

7. A statement of claim(s) to be investigated.

8. A record of any activity before the EEOC, Office of Federal Operations.

9. Evidence collected by the investigator.

10. A summary of the investigation.

A. **Features of the Complaint File**

The completed complaint file shall have the following features:

1. Case index to documents and exhibits.

2. Tabbed sections for documents, exhibits, and explanatory material.

3. A typed summary of the investigation signed and dated by the investigator and containing a discussion and analysis of the evidence. See Section VIII of this Chapter and Volume 2, EEOC's Compliance Manual for further guidance.

B. **Format for the Complaint File**

The following is a suggested format for complaint files.

Binder	Heavy-duty cover or binder.
Title Page	See Appendix M.
Summary	Summary of investigation/summary analysis of the facts. The summary should cite to exhibits and evidence.
Case Index	The index to the file should list the contents of the file by tab and sequential page number.
Tab A	Tab A should contain the formal complaint and documents submitted by the complainant. (Individual documents under each tab should be consecutively numbered in addition to being identified as part of the tab. Example A-1, A-2, A-3, etc.).
Tab B	Tab B should contain the EEO Counselor's report and all documents generated in the informal process. Included here should be the notice of right to file a complaint.
Tab C	Tab C should contain the agency's notice of claims to be investigated pursuant to Section IV.A.1 of this Chapter. Copies of any other documents bearing on delineation of the claims to be investigated should also be included. Documents pertaining to the partial dismissal of claim(s) should be included in this tab.
Tab D	Tab D should document attempts at informal resolution; however, documentation should not include the substance of such attempts.
Tab E	Tab E should contain any documentation of appellate activity and any decisions affecting the processing of the complaint.
Tab F	Tab F should contain the evidence and documents in a logical order, with documents further separated by numerical tabs as necessary.
Tab G	Tab G should contain any miscellaneous material.

C. **Availability of Complaint Files**

The complainant and his/her representative shall be entitled to one copy each of the complaint file and investigative summary either at the time that the investigation is completed or when the agency send the complainant the notice required by § 1614.108(f), whichever is earlier.

D. **Disposition of Complaint Files**

1. Effective December 8, 1998, the National Archives and Records Administration (NARA) revised General Records Schedule (GRS) 1, Item 25, titled Equal Employment Opportunity Records, provides:

   Equal Employment Opportunity Records.

   a. a. Official Discrimination Complaint Files.

      Originating Agency's file containing complaints with related correspondence, reports, exhibits, withdrawal notices, copies of decisions, records of hearings and meetings, and other records as described in 29 C.F.R. Part 1614.[(5)]

   Authorized Disposition

   Destroy four years after resolution of case.

2. The agency originating the equal employment opportunity case will retain the original ("official") file during the appeals process and send only duplicate copies of documents to EEOC for use in the appeal. The agency sending the duplicates will certify that the file contains everything that is in the original.

3. EEOC will create documents relating to the appeal, but will file such documents apart from the materials sent by the originating agency. After resolution of the appeal, the Commission will destroy all duplicate materials, but will retain the appeals documentation for four years. The originating agency will retain the original file for four years after resolution of the case. EEOC will retain the appeals documentation and will answer Freedom of Information Act requests on the appeals file. The EEOC will maintain the security of documents as required by Federal Statutes and Executive Orders.

4. The originating agency will be responsible for retiring the original case file to the Federal Records Center, and answering Freedom of Information Act requests on the original file. Requests for disclosure, which the EEOC determines are requests for the agency's complaint file, will be forwarded to the agency for a response.

5. Further information concerning the disposition of records under this section may be obtained by reviewing NARA GRS 1, Transmittal 8, which is available on the NARA web site at www.nara.gov[(6)] or by contacting:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

Telephone : (202) 663-4599

TDD : (202) 663-4593

THE INVESTIGATIVE SUMMARY

The investigative summary is a narrative document that succinctly states the issues and delineates the evidence addressing both sides of each issue in the case. The summary should state facts (supported in the complaint file) sufficient to sustain a conclusion(s). The summary should cite to evidence and the exhibits collected.

COMPLAINANTS' OPPORTUNITY TO REVIEW THE INVESTIGATIVE FILE

Within the appropriate time frame for finishing an investigation under § 1614.108(e), and prior to issuance of the notice required by § 1614.108(f), agencies are encouraged to allow complainants and their designated representatives an opportunity to examine the investigative file and to notify the agency, in writing, of any perceived deficiencies in the investigation prior to transferring the case to the EEOC for a hearing or prior to issuing a final decision without a hearing. A copy of the complainant's notification to the agency of perceived deficiencies must be included in the investigative file together with a written description by the agency of the corrective action taken.

If the agency agrees with alleged deficiencies in the investigation as identified by the complainant, the agency must immediately correct them. If the investigation period has ended or is about to end, the agency should request agreement from the complainant to extend the investigation period for pursuant to § 1614.108(e). If the agency does not agree with the complainant's claimed deficiencies in the investigative file, the agency will prepare a statement explaining the rationale for the disagreement and include it in the investigative file along with the complainant's notice of claimed deficiencies.

SANCTIONS FOR FAILURE TO COOPERATE DURING THE INVESTIGATION

Section 1614.108(b) requires that an agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the written complaint. EEOC Administrative Judges and the Office of Federal Operations have the authority to issue sanctions against an agency for its failure to develop an impartial and appropriate factual record in appropriate circumstances. Moreover, agencies and complainants each have a duty to cooperate with the investigator during the investigation. In § 1614.108(c)(3), a party-the complainant as well as the agency- may be subject to sanction where it fails to comply with a request of the investigator for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses. The investigator shall make a note in the investigative file concerning the party's failure without good cause shown to comply and the decisionmaker (Administrative Judge during the hearing process or the agency where the complainant requests a final agency decision) or the Commission on appeal may, in appropriate circumstances:

0. draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

1. consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

2. exclude other evidence offered by the party failing to produce the requested information or witness;

3. issue a decision fully or partially in favor of the opposing party; or

4. take such other actions as it deems appropriate.

An investigator should inform the party from which it seeks documents, records, comparative data, statistics, affidavits, or the attendance of witnesses that a failure to comply with the request may lead to the imposition of sanctions from the decisionmaker or the Commission on appeal. An investigator may, in an initial request for documents (etc.), advise the party that, absent good cause shown, the party has a duty to respond fully and in a timely fashion to the investigator's request and that a failure to do so may result in sanctions set forth at § 1614.108(c)(3). Where the investigator does not so inform the party upon making the request, s/he may advise the party upon the party's failure to comply with the request. If the investigator properly advised the party that a failure to comply with the request may result in the sanctions set forth at § 1614.108(c)(3), the decisionmaker or Commission on appeal may impose such sanctions upon receipt and review of the complaint/appeal file.

SANCTIONS FOR FAILURE TO DEVELOP AN IMPARTIAL AND APPROPRIATE FACTUAL RECORD

Where it is clear that the agency failed to develop an impartial and appropriate factual record, an Administrative Judge may exercise his/her discretion to issue sanctions In such circumstances, the sanctions listed in § § 1614.109(f)(3) are available. See McDuffie v. Department of the Navy, EEOC Request No. 05880134 (1988) (adverse inference can be drawn from agency's failure to include relevant statistical information in the file); Wasser v. Department of Labor, EEOC Request No. 05940058 (1995) (Administrative Judge appropriately imposed an adverse inference where the agency failed to provide requested documents); Stull v. Department of Justice, EEOC Appeal No. 01941582 (1995) (a complainant may be awarded interim attorney's fees as a sanction for failure to produce records requested during discovery even where s/he is unsuccessful on the ultimate issue of discrimination)[(7)]; and Comer v. FDIC, EEOC Request No. 05940649 (May 31, 1996) (Administrative Judge has the authority to order the agency to reimburse appellant for costs resulting from the agency's bad faith conduct in failing to appear for properly scheduled depositions).

Before an Administrative Judge may sanction an agency for failing to develop an impartial and appropriate factual record, the Administrative Judge must issue an order to the agency or request the documents, records, comparative data, statistics, or affidavits. § 1614.109(f)(3). Such order or request shall include a notice to show cause to the agency and, in appropriate circumstances, may provide the agency with an opportunity to take such action as the Administrative Judge deems necessary to correct the deficiencies in the record. The Administrative Judge also shall provide the agency with a reasonable period of time within which to take the action that the

Administrative Judge has deemed necessary. The order or request further must identify the sanction(s) that the Administrative Judge may impose if the agency fails to comply with it. Only on the failure of the agency to comply with the Administrative Judge's order or request and the notice to show cause may the Administrative Judge impose a sanction or the sanctions identified in the order or request.[(8)]

OFFER OF RESOLUTION

The Commission encourages the resolution of complaints at all times in the complaint process through a variety of settlement mechanisms. Section 1614.109(c) provides for one of these mechanisms by permitting agencies to make an "offer of resolution" to complainants. The Commission believes that this provision will provide incentive for agencies and complainants to resolve complaints and that it will conserve agency resources where settlement reasonably should occur. If a complainant does not accept an offer of resolution made in accordance with the requirements of § 1614.109(c) and subsequently obtains less relief than had been offered, the complainant's attorney's fees will be limited, as described below. It should be emphasized that the offer of resolution is only one mechanism by which complaints may be settled.

. **Elements of the Offer**

An offer of resolution made pursuant to § 1614.109(c) can be made to a complainant who is represented by an attorney at any time after the filing of a formal complaint until thirty (30) days before a hearing. If, however, the complainant is not represented by an attorney, an offer of resolution cannot be made before the case is assigned to an Administrative Judge for a hearing. (These time and representation provisions apply only to offers of resolution and do not restrict the parties from discussing settlement or engaging in an alternate dispute resolution process in an effort to resolve an EEO complaint.)

Complainants have 30 days from receipt of an offer of resolution to consider the offer and decide whether to accept it. Offers of resolution must be in writing and must explain to the complainant the possible consequences of failing to accept the offer. The agency's offer, to be acceptable, must include attorney's fees and costs, and must specify any non-monetary relief. The agency may offer a lump sum payment that includes all forms of monetary liability, including attorney's fees and costs, or the payment may itemize the amounts and types of monetary relief being offered. Complainant's acceptance of the offer must also be in writing. Upon acceptance, the complaint is settled in full and processing ceases.

If a complainant decides not to accept the offer, the agency takes no immediate action, and the complaint continues to be processed normally. After the hearing is completed, if the Administrative Judge (or the Commission on appeal) concludes that discrimination has occurred, but provides for less relief than the amount offered by the agency earlier in its offer of resolution, then the agency may use complainant's decision not to accept its offer of resolution to argue for a reduction in its obligation to pay complainant's attorney's fees. In general, if a complainant fails to accept a properly made offer, and the relief ordered on the complaint is not more favorable than the offer, then the complainant will not receive payment from the agency for attorney's fees or costs incurred after the expiration of the 30-day acceptance period.

It should be noted, however, that an exception to this general rule exists where the interests of justice would not be served. An example of an appropriate use of the interest of justice exception is 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). If the complainant did not accept the offer for that reason, and then obtained less relief than was obtained in the offer, it would be unjust to deny attorney's fees and costs.

A complainant's failure to accept an offer of resolution does not preclude the agency from making other offers of resolution or either party from seeking to negotiate a settlement of the complaint at any time.

When comparing the relief offered in an offer of resolution with that actually obtained, the Commission intends that non-monetary as well as monetary relief 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. Attorney's fees and costs incurred after the offer of resolution may not be included in the amount actually obtained for comparison purposes. For guidance, parties may wish to refer to court cases deciding issues involving an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure. See, for example, Marek v. Chesny, 473 U.S. 1 (1985). While not identical, the EEOC's offer of resolution provision was modeled on the Rule 68 offer of judgment process.

A. **Model Language for the Offer**

The preamble to the Commission's regulations noted that this Management Directive would include model language for agency use in extending offers of resolutions:

This offer of resolution is made in full satisfaction of the claims of employment discrimination that you have made against [name of agency] in [identify the complaint by number or other clear and unambiguous designation]. This offer includes all of the monetary and/or non-monetary relief to which you are entitled, including attorney's fees and costs.

[For complainants who are not represented by counsel, include this paragraph:]

Your acceptance of this offer must be made in writing and postmarked or received in this office **within thirty (30) days** of your receipt of the offer. If you accept this offer, please indicate your acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your acceptance on the line appearing adjacent to your name. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[For complainants represented by counsel, substitute the following paragraph:]

The complainant's acceptance of this offer must be made in writing and postmarked or received in this office **within thirty (30) days** of **your** receipt of the offer. If the complainant accepts this offer, please indicate **your** acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your

acceptance on the line appearing adjacent to your name. Please also obtain the signature of the complainant, which should be placed on the line appearing above [his/her] name and include the date of [his/her] acceptance on the line appearing adjacent to [his/her] name. This offer will not be deemed to have been accepted without the signature of both you and the complainant. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[The following paragraphs must be included in offers sent ALL to complainants:]

If you do not accept this offer of resolution and the relief that you are eventually awarded by the Administrative Judge, or the Equal Employment Opportunity Commission on appeal, is less than the amount offered, you will not receive payment for the attorney's fees or costs that you incur after the expiration of the 30-day acceptance period for this offer. The only exception to this rule is where the Administrative Judge or Commission rules that the interests of justice require that you receive your full attorney's fees and costs.

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1. The Commission enforces: (1) Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; (2) Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791 and 794a; (3) Section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; and (4) the Equal Pay Act, Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 296(d).

2. Investigators are reminded that even where the complainant is unable to provide comparative data and the investigator similarly cannot obtain any such information, the investigator still must determine whether there is other evidence that may establish unlawful discrimination. In O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996), the Supreme Court ruled that comparative evidence is not an essential element of a prima facie case of discrimination, but the complainant must come forward with sufficient evidence to create an inference of discrimination; that is, enough evidence that, if unrebutted, would support an inference that the agency's actions resulted from discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). The EEOC has issued enforcement guidance on O'Connor, entitled "EEOC Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp.," (September 18, 1996), which is available on the EEOC web site at www.eeoc.gov, in the "Enforcement Guidances and related Documents" section or by calling the EEOC information line at 1-800-USA-EEOC.

3. As discussed in note 2, while comparative evidence is important, it is not always available and an investigator may be able to obtain other evidence of discrimination. So while the investigator should make an effort to obtain comparative evidence, s/he also should make an effort to determine whether there may be other evidence equally probative of discrimination.

4. The Commission prepared this Enforcement Guidance for use in both public and private EEO litigation. The discussion in the Enforcement Guidance concerning punitive damages does not apply to federal sector EEO.

5. See Section II of this Chapter for a description of the documents contained in the complaint file. There is no difference intended with respect to the items that may be destroyed after 4 years.

6. The web site for the General Records Schedule is "http://ardor.nara.gov/grs/index.html."

7. In Stull, the Commission has held that where an adverse inference has been awarded for discovery abuse, appellant is entitled to reasonable attorneys fees "incurred in connection with the attempt to have an adverse inference drawn."

8. Where an agency did not complete an investigation of late-filed amendments to complaints or late-consolidated complaints because the complainant either requested a hearing before the full investigatory period ended or the amendments and consolidation occurred late in the process, sanctions for inadequate records would be inappropriate. Sanctions only would be appropriate where a party subsequently fails to comply with an order or request of the Administrative Judge that puts the party on notice of the type of sanction that may be imposed for noncompliance.

CHAPTER 7

HEARINGS

I. INTRODUCTION

The hearing is an adjudicatory proceeding that completes the process of developing a full and appropriate record. A hearing provides the parties with a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses. Hearings are governed by § 1614.109. An Administrative Judge from the EEOC

adjudicates claims of discrimination and issues decisions. Administrative Judge decisions, in non-class action cases, become the final action of the agency if the agency does not issue a final order within forty (40) days of receipt of the Administrative Judge's decision in accordance with § 1614.110(a). A complainant may appeal an agency's final action or dismissal of a complaint. An agency may appeal as provided in § 1614.110(a). 29 C.F.R. § 1614.401(a) & (b).

Section 1614.108(f) generally provides, among other things, that within 180 days from the complainant's filing of his/her complaint, an agency shall provide the complainant with a copy of the investigative file and shall notify the complainant that within thirty (30) days of the complainant's receipt of the investigative file that the complainant has the right to request a hearing and decision from an Administrative Judge or a final agency decision from the agency.[(1)] The agency's duty to send this notice and the complainant's right to receive it are not dependant on the agency's completion of the investigation.

A complainant must submit the hearing request directly to the EEOC district or field office having jurisdiction over the geographic area in which the complaint arose, as set forth in Appendix J of this Management Directive, and provide a copy of the request to the agency. See § 1614.108(g). (The Commission has prepared a hearing request form that agencies may provide to complainants for their use in requesting a hearing, which advises complainants that they are to send a copy of the request to the agency. See Appendix N.) Upon receipt of the request for a hearing, the EEOC district or field office will send a docketing letter to the complainant and the agency, in which it will provide the parties with an EEOC Hearings Unit No., and will request that the agency forward a copy of the complaint file within the earlier of fifteen (15) days of its receipt of the complainant's request for a hearing or receipt of the docketing letter.

In an agency's written acknowledgment of receipt of a complaint or an amendment to a complaint, the agency shall advise the complainant of the EEOC office and address where a hearing request is to be sent as well as the agency office to which the copy of the request should be sent. In the absence of the required notice from the agency, the complainant may request a hearing at any time after 180 days have elapsed from the filing of the complaint by submitting his/her written hearing request directly to the appropriate EEOC district or field office indicated in the agency's acknowledgment letter. § 1614.108(g). In the case of accepted class complaints, an EEOC Administrative Judge will, pursuant to § 1614.204(h), conduct a hearing on the complaint in accordance with § 1614.109(a) through (f).

Generally, an Administrative Judge will conduct a hearing on the merits of a complaint unless: 1) the parties mutually resolve the complaint and the hearing request is withdrawn; 2) the hearing request is otherwise voluntarily withdrawn; 3) the Administrative Judge dismisses the complaint; or 4) the Administrative Judge determines that material facts are not in genuine dispute and issues an order limiting the scope of the hearing or issues a decision without a hearing pursuant to § 1614.109(g). The Administrative Judge will issue a decision on a complaint and shall order appropriate remedies and relief when discrimination has been found within 180 days of his/her receipt of the complaint file from the agency, unless the Administrative Judge makes a written determination that, in his/her discretion, good cause exists for extending the time for issuing a decision. § 1614.109(i).[(2)]

II. THE ROLE OF THE AGENCY AT THE HEARING STAGE

A. Forward Complaint File to EEOC

Within fifteen (15) days of its receipt of a copy of the complainant's request for a hearing sent to an EEOC district or field office or the docketing letter from the district or field office, whichever is earlier, the agency shall send a copy of the complaint file, including the investigative file, to the district or field office. The agency also shall send a copy of the complaint and investigative file(s) to the complainant, if it has not previously done so.

B. **Hearing Room and Production of Witnesses**

The agency is responsible for arranging for an appropriate size room in which to hold the hearing and must ensure that all approved witnesses who are federal employees are notified of the date and time of the hearing and the approximate time that their presence will be required. The agency is responsible for ensuring the appearance and travel arrangements to the hearing site of approved witnesses who are federal employees.

C. **Hearings are Closed to the Public**

Access to the hearing room and the record of the hearing shall be restricted in accordance with the Commission's regulation. See § 1614.109(e).

D. **Verbatim Hearing Transcripts and Court Reporters**

The agency shall arrange and pay for a verbatim transcript (printed or typewritten) of the hearing proceedings pursuant to § 1614.109(h). All exhibits submitted to the Administrative Judge and admitted into evidence shall become a part of the record and at the discretion of the Administrative Judge may be referred to the court reporter to be appended to the transcript. Agencies should instruct reporters with whom they contract to submit bills to the agency. The Administrative Judge may require the court reporter to submit the original and all copies (usually two) of the transcript to the Administrative Judge, who can provide verification of transcript receipt and the number of pages in the transcript. Contracts with court reporting firms must require delivery of the transcript to the Administrative Judge within ten (10) calendar days or less after the close of the hearing. If the Administrative Judge identifies a problem with timely delivery of the transcript or any other difficulty, s/he should contact the agency directly to resolve the dispute. The agency shall take any steps necessary to ensure that the transcript is provided as expeditiously as possible. Absent a specific memorandum of understanding with the EEOC, the agency may not use employees of that agency to transcribe the proceedings.

As a matter of information, the General Services Administration maintains a list of court reporters available to agencies in the Federal Supply Schedule.

E. **The Site of the Hearing**

Appendix J of the Management Directive is a list of the addresses of the EEOC district and field offices and their geographic jurisdictions. Hearing requests are sent to the district office having jurisdiction of the agency facility where the complaint arose. In an agency's written acknowledgment of a complaint or an amendment to a complaint, the agency must advise the complainant of the EEOC office and its address where a request for a hearing shall be sent. Where two or more complaints have been consolidated and the

EEOC district or field offices identified in the agency's complaint acknowledgment letter differ, the office identified in the last filed complaint will govern the location of the office to which the hearing request shall be made. Should the agency's organizational component where the complaint arose not fall within one of the geographical jurisdictions shown in Appendix J, the agency should contact the following office for guidance:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, D.C.20013

Telephone: (202) 663-4599

TDD: (202) 663-4593

Upon receipt of a hearing request, the Administrative Judge assigned to hear the complaint will determine the site of the hearing. Within his/her discretion, the Administrative Judge is authorized to conduct the hearing in the EEOC district or field office, in an EEOC area or local office, at the agency's organizational component where the complaint arose or at such other location as he/she may determine appropriate. In determining the hearing site, the Administrative Judge may consider factors such as the location of the parties; the location of EEOC district, area, and local offices; the number and location of witnesses; the location of records; travel distances for the Administrative Judge, the parties, and witnesses; travel costs; the availability of sources of transportation; and other factors as may be appropriate.

If the Administrative Judge sets a hearing site that is outside the local commuting area of the agency's organizational component where the complaint arose, the agency must bear all reasonable travel expenses of complainants, their authorized representatives, agency representatives, and all witnesses approved by the Administrative Judge, except that an agency does not have the authority to pay the travel expenses of the complainant or the complainant's witnesses or representatives if they are not federal employees.

F. **Request for Change in Venue**

Should either party desire that a hearing be held within the jurisdictional area of another EEOC district office, it must submit a request, in writing, to the Administrative Judge assigned to the case in the appropriate EEOC district or field office having jurisdiction over the agency's organizational component where the complaint arose. In its request, the party must set out, in detail, its reasons and justification for the requested change. The Administrative Judge will rule on the request only after the directors of the concerned EEOC district offices, or their designees, have conferred on the matter.

G. **Agency Costs**

The agency's obligation is limited to those costs that are legally payable in advance by the agency. See Decisions of the Comptroller General, Matter of: Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing, File: B-202845, 61 Comp.

Gen. 654 (1982). See also Matter of: John Booth--Travel Expenses of Witness -- Agency Responsible, File: B-235845, 69 Comp. Gen. 310 (1990).

III. THE ROLE OF THE ADMINISTRATIVE JUDGE

Once an Administrative Judge is appointed, the Administrative Judge has full responsibility for the adjudication of the complaint. § 1614.109(a). The agency cannot dismiss a case that has been referred to the EEOC for a hearing. § 1614.107(a).

A. Administrative Judge's Review

An Administrative Judge shall determine whether additional documentation is necessary and may request of the appropriate party the production of any additional documentation.

If after reviewing the file, the Administrative Judge determines that the investigation is inadequate due to the agency's failure to complete the investigation within the time limits set forth in § 1614.108(e), or the agency has not cooperated in the discovery process as required by § 1614.109(f)(3), the Administrative Judge may take the following actions:

1. Subject the agency to adverse inference findings in favor of the complainant;

2. Consider the issues to which the requested information or testimony pertains to be favorable to the complainant;

3. Exclude other evidence offered by the agency;

4. Permit the complainant to obtain a summary disposition in his/her favor on some or all of the issues without a hearing; or

5. Take other action deemed appropriate, including, but not limited to, requiring the agency to pay any costs incurred by the complainant in taking depositions or in conducting any other form of discovery.

Before an Administrative Judge may sanction an agency for failing to develop an impartial and appropriate factual record, the Administrative Judge must issue an order to the agency or request the documents, records, comparative data, statistics, or affidavits. § 1614.109(f)(3). Such order or request shall include a notice to show cause to the agency and, in appropriate circumstances, may provide the agency with an opportunity to take such action as the Administrative Judge deems necessary to correct the deficiencies in the record. The Administrative Judge also shall provide the agency with a reasonable period of time within which to take the action that the Administrative Judge has deemed necessary. The order or request further must identify the sanction(s) that the Administrative Judge may impose if the agency fails to comply with it. Only on the failure of the agency to comply with the Administrative Judge's order or request and the notice to show cause may the Administrative Judge impose a sanction or the sanctions identified in the order or request.

B. Developing the Record in Complaints with Inadequate Records

Section 1614.108(g) authorizes a complainant to request a hearing before an Administrative Judge where the respondent agency has not completed the investigation within the required time limit and where the complainant has not agreed in writing with the agency to extend the time for completing the investigation.[(3)] This provision reflects the Commission's intent that complainants be permitted to move their cases forward in the complaint process where an agency has not complied with the regulation by completing a timely investigation. Further, it is the Commission's intent that where a hearing is properly requested and where there has been no investigation or there is an incomplete or inadequate investigation, the record in the case shall be developed under the supervision of the Administrative Judge assigned to the case. The record can be developed through the parties' use of discovery and/or through the Administrative Judge's orders for the production of documents and witnesses.

Section 1614.109(a) 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. 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. An Administrative Judge may issue an order, however, directing the agency to complete its investigation within a period of time set forth in the order.

Where an agency has not completed a timely investigation or has prepared an inadequate investigation, the Administrative Judge may issue an order sua sponteor upon request by either party requiring a party to produce documents, records, comparative data, statistics or the attendance of witnesses. Where a party fails without good cause shown to respond fully and in a timely fashion to the Administrative Judge's order and/or the party has not otherwise cooperated in the discovery process, the Administrative Judge may impose sanctions pursuant to § 1614.109(f)(3).[(4)] Additionally, the Administrative Judge may, as a result of a discovery order issued pursuant to § 1614.109(f)(3)(v), require the agency to bear the costs for the complainant to obtain depositions or any other discovery because the agency has failed to complete its investigation timely as required by § 1614.108(e) or has failed to investigate the allegations adequately pursuant to Chapter 6 of this Management Directive. See also Section IV.F of this Chapter.

If either party is requested by the Administrative Judge to produce additional documents, that party shall furnish a copy of those documents to the opposing party at the time they are submitted to the Administrative Judge.

C. **Dismissal of Complaint by Administrative Judge**

The Administrative Judge may dismiss complaints within his/her jurisdiction pursuant to § 1614.107(a) on his/her own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint. (See § 1614.109(b) and Chapter 5, Section IV, of this Management Directive.) Before dismissing a complaint, the Administrative Judge must ensure that the claim has not been fragmented inappropriately into more than one complaint. 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. See Chapter 5, Section III of this Management Directive for an extended discussion on fragmentation.

D. **Administrative Judge's Authority**

The Administrative Judge has full responsibility for the adjudication of the complaint, which includes, but is not limited to the following:

1. Issue decisions on complaints.

2. Administer oaths.

3. Regulate the conduct of hearings.

4. Limit the number of witnesses so as to exclude irrelevant and repetitious evidence.

5. Order discovery or the production of documents and witnesses by serving orders on both parties.

   The Administrative Judge has independent authority under § 1614.109(f) to request the production of information, documents, records, comparative data, statistics, affidavits, or the attendance of witnesses.

6. Issue protective orders not to disclose information.

7. Exclude any person who is disruptive from the hearing or who is a witness so that s/he cannot hear the testimony of other witnesses.[(5)]

8. Issue decisions without a hearing if there are no material facts in issue.

9. Limit the hearing to the issues in dispute.

10. Impose appropriate sanctions on parties who fail to comply with orders or requests.

    The Administrative Judge has the authority to impose sanctions on a party if s/he fails to comply without good cause with orders or requests. In addition, the Administrative Judge may impose sanctions where a party fails to appear or be prepared for a conference (e.g., for status or settlement discussions) or hearing pursuant to an order of the Administrative Judge. Sanctions may be imposed on the agency for failure to produce an approved witness who is a federal employee. Sanctions may be imposed for failure to comply with orders to compel, requests for information, documents, or admissions where the information is solely in the control of that party. Similarly, if a party fails to provide an adequate explanation for the failure to respond fully and in a timely manner to a request and the information is solely in the control of that party, the Administrative Judge may impose sanctions. Sanctions for failing to comply with the orders or requests discussed above include, but are not limited to, the authority to:

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

(b) consider the issues to which the requested information pertains to be established in favor of the opposing party;

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

(d) enter a decision fully or partially in favor of the opposing party; and,

(e) take such other actions as appropriate.[(6)]

11. Calculate compensatory damage awards.

Before holding a hearing, the Administrative Judge may require the complainant, after receipt of an agency motion or otherwise, to declare whether or not s/he is seeking compensatory damages as relief for the discrimination or retaliation alleged in the complaint, and to proffer or produce evidence demonstrating entitlement to compensatory damages. If a complainant fails to proffer or produce such evidence, the Administrative Judge may, in his/her discretion, deem the claim for damages to be waived.

Where the complainant has claimed compensatory damages and where the Administrative Judge determines, on the merits of the complaint, entitlement to compensatory damages because of intentional discrimination or retaliation, the Administrative Judge will calculate the amount of compensatory damages to be awarded by the respondent agency. In complaints where compensatory damages have been claimed and a hearing is held, the Administrative Judge may, in his/her discretion, develop the record on the compensatory damages claim during the hearing on the merits on the complaint or may bifurcate the proceeding and develop the record on the compensatory damage claim after a finding of discrimination.

12. Order a medical examination.

Administrative Judges have the authority to order, in very limited circumstances, as detailed below, that a complainant undergo a medical examination on motion of the agency. A request by the agency that a complainant undergo a medical examination must notify the complainant, the complainant's representative, and the Administrative Judge, of the proposed time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. All such requests must be approved by the Administrative Judge.

In making a determination of whether to order a medical examination, an Administrative Judge may be guided by the principles and cases arising under Rule 35 of the Federal Rules of Civil Procedure governing the physical and mental examinations of persons. The burden of proof in supporting a request for such an examination requires an affirmative showing that each condition as to

which examination is sought is genuinely in controversy and that good cause exists for ordering each particular examination. Such requests must be narrowly tailored to elicit only the evidence necessary to develop the record with regard to the specific issue.

The agency requesting the examination has the burden of proving that the examination is reasonably necessary. For example, merely showing that the complainant has made a claim for compensatory damages is not sufficient to meet the agency's burden of proof. In determining whether such a request is reasonable, the Administrative Judge will consider: whether the complainant has asserted a claim for compensatory damages sufficient to place his/her mental or physical condition in controversy; and whether the request is made for good cause shown; that is, that the examination is reasonably necessary to determine the existence and extent of an asserted injury. The Commission has held that evidence from a health care professional is not a mandatory prerequisite to establishing entitlement to compensatory damages. Sinnott v. Department of Defense, EEOC Appeal No. 01952872 (1996); Lawrence v. U.S. Postal Service, EEOC Appeal No. 01952288 (1996); Carpenter v. Department of Agriculture, EEOC Appeal No. 01945652 (1995). A complainant's own testimony, along with the circumstances of a particular case, may suffice to sustain the complainant's burden in this regard. Therefore, independent medical examinations will not be appropriate in every case in which a claim for compensatory damages is made.

Some factors to be considered in determining whether an agency has shown that a complainant has asserted a claim for damages sufficient to place his/her mental or physical condition in controversy include: 1) the type and extent of mental or physical harm claimed; 2) whether the harm alleged is ongoing or is merely a past harm with no current effects on the complainant; 3) whether the complainant has offered expert testimony concerning the nature and/or extent of the alleged harm, or intends to offer such testimony; and 4) whether the complainant has sufficiently asserted a connection between the asserted harm and the alleged discrimination sufficient to establish a causal relationship between the harm and the alleged discrimination.

Some factors to be considered in determining whether an agency requesting a mental or physical examination has shown good cause for such examination include: 1) the nature and severity of the alleged harm, and the likelihood that the requested examination will elicit relevant evidence as to the existence and/or extent of the alleged harm; 2) whether there is already sufficient evidence in the record as to the nature and extent of the asserted harm; and 3) whether the information sought could be obtained through other less intrusive discovery techniques, such as interrogatories, depositions, or requests for the production of witnesses or documents.

Even where the above criteria may have been satisfied by the agency requesting the examination, the decision to order such examination at the hearing stage is solely within the discretion of the Administrative Judge.

Upon receipt of a request from the agency for a medical examination, the complainant may file a motion for a protective order, stating objections to the request or order. See Section IV.B.3.b of this Chapter. The decision to order such examination at the hearing stage remains solely within the discretion of the Administrative Judge.

13. Calculate and award the amount of attorney's fees or costs.

Where a party is represented by an attorney, an Administrative Judge is authorized to award a complainant reasonable attorney's fees and costs (including expert witness fees) incurred in the processing of a complaint where the Administrative Judge issues a decision finding discrimination in violation of Title VII and/or the Rehabilitation Act, issues an order sanctioning the agency, or where the award of attorney's fees or costs may otherwise be appropriate and authorized. Any award of attorney's fees or costs shall be paid by the respondent agency. Where the Administrative Judge determines that a complainant is entitled to an award of attorney's fees or costs, the Administrative Judge will calculate the amount of such award in accordance with § 1614.501(e)(2)(ii)(B) and Chapter 11 of this Management Directive.

When the Administrative Judge determines an entitlement to attorney's fees or costs, the complainant's attorney must submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the Administrative Judge within thirty (30) days of receipt of the decision, unless otherwise directed, and must submit a copy of the statement to the agency. A statement of attorney's fees and costs must 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 thirty (30) days of its receipt. The verified statement, accompanying affidavit and any agency response shall be made a part of the complaint file. The Administrative Judge will issue a decision determining the amount of attorney's fees and costs due within sixty (60) days of receipt of the statement and affidavit.

14. Engage the parties or encourage the parties to engage in settlement discussions.

The Administrative Judge may engage the parties in discussion aimed at reaching a settlement agreement or may allow the parties such time as they may need to discuss settlement. The Administrative Judge further may hold a hearing in abeyance to allow the parties to engage in alternate forms of dispute resolution. (For a more detailed discussion of alternative dispute resolution, see Chapter 3 of this Management Directive.)

15. Issue an order determining full relief.

Administrative Judges shall issue an order awarding full relief where the agency unilaterally and unconditionally promises in writing to provide the full and complete remedy as defined by the Administrative Judge. To permit him/her to determine the appropriate remedy for the complaint, the Administrative Judge may require the parties to submit statements of full relief, may receive evidence

including testimony, and/or require oral argument. After issuing the order and a determination of the appropriate remedy, the Administrative Judge shall return the hearing file to the agency, which shall have forty (40) days to take final action. § 1614.110(a). Once the agency takes final action, the complainant will have thirty days within which to file an appeal. § 1614.402(a). If the agency fails to provide the full and complete remedy as promised, the complainant may seek compliance from the agency and, failing that, file an appeal with the Commission. See § 1614.504(a); see also Miller v. Department of the Treasury, EEOC Request No. 05980345 (July 20, 1998); Perlingiero v. Department of the Navy, EEOC Appeal No. 01941176 (Feb. 24, 1995); Poirrier v. Department of Veterans Affairs, EEOC Appeal No. 01933308 (May 5, 1994).

16. Hold a hearing in abeyance

An Administrative Judge may hold a hearing in abeyance in the event that a party is unable to proceed with the hearing for reasons such as illness, military assignment, or for other good cause shown.

E. **Decisions Without a Hearing**

1. On Motion of a Party

A party who believes that some or all material facts are not in genuine dispute may file a motion in support of this contention with the Administrative Judge at least fifteen (15) days prior to the hearing, or at such earlier time as required by the Administrative Judge. This is similar to summary judgment in court. The Administrative Judge may, in the acknowledgment order, specify a date for filing such a motion and provide for extending that time in certain circumstances. A copy of any such motion shall be served on the opposing party.

The opposing party will have 15 days from the receipt of the statement in which to file any opposition to the statement.

After considering the request and the opposing submission, if any, the Administrative Judge may deny the request, order that discovery be permitted on the facts involved, limit the hearing to the issues remaining in dispute (if any), issue a decision without a hearing, or make such other rulings as are appropriate.

2. On Administrative Judge's Determination

If the Administrative Judge determines that some or all of the material facts are not in genuine dispute, s/he may, after giving notice to the parties and providing them an opportunity to respond within 15 days of receipt of the notice, issue an order limiting the scope of the hearing or issue a decision without conducting a hearing.

3. Oral Argument or Testimony on Summary Judgment Motion

At his/her discretion, the Administrative Judge may provide notice requiring the parties to appear and present oral argument or testimony on a motion for summary judgment.

4. Legal Standard for the Use of Summary Judgment

Summary judgment is proper when "material facts are not in genuine dispute." § 1614.109(g). 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 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 or 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 C.F.R. § 1614.109(e)(2); Anderson, 477 U.S. at 322-24; Patton v. U.S. Postal Service, EEOC Request No. 05930055 (July 1, 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).

F. **Transmittal of the Decision and Hearing Record**

At the conclusion of the hearing stage the Administrative Judge shall send to the parties copies of the record produced at the hearing stage of the process, including the transcript of the hearing, if any, as well as the decision.

The Administrative Judge may, when necessary, release the transcript prior to the issuance of the decision, e.g., when the transcript is needed to prepare a post-hearing brief or to prepare for a hearing on relief.

The Administrative Judge may issue a decision from the bench after the conclusion of the hearing, in lieu of issuing a written decision.

IV. DISCOVERY

A. Introduction

1. General

The purpose of discovery is to enable a party to obtain relevant information for preparation of the party's case. Both parties are entitled to reasonable

development of evidence on issues relevant to the issues raised in the complaint, but the Administrative Judge may limit the quantity and timing of discovery.

A reasonable amount of official time shall be allowed to prepare requests for discovery and to respond to discovery requests. (See Chapter 6, Section VIII.C, of this Management Directive.)

2. Avoidance of Delay

The discovery instructions that follow are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. The parties are expected to initiate and complete needed discovery with a minimum of intervention by the Commission's Administrative Judge. The parties are further expected to use discovery judiciously for its intended purpose only.

B. **Right to Seek Discovery**

1. Notice of Right to Seek Discovery

The Administrative Judge shall send the parties an acknowledgment order advising the parties that they may commence discovery. It is the Commission's policy that the parties are entitled, pursuant to § 1614.109(b), to the reasonable development of evidence on the issues raised in the complaint.

2. Discovery is Designed to Supplement the Record

It is anticipated that discovery will ordinarily involve supplementing the existing record. There may be situations in which the record does not have to be supplemented.

3. Discovery Time Frames Will Be Strictly Regarded

Discovery must be completed by such time ordered by the Administrative Judge. Parties may request to extend the time for discovery beyond the time limit set. The Administrative Judge may modify the time frame for completing discovery either by extending it or by curtailing it as the Administrative Judge may determine. Any request for extension must be made by motion and accompanied with a proposed order and shall state whether the opposing party agrees or objects to the motion or order.

C. **Methods of Discovery**

1. Evidence may be developed using a variety of methods including:

a. Interrogatories

Absent specific authorization from the Administrative Judge, a party may propound no more than one set of interrogatories and a set of

interrogatories shall not exceed thirty (30) in number including all discrete subparts.

b. Depositions

Generally the party requesting depositions will pay for them. A failure to appear at a properly scheduled deposition may result in the non-appearing party bearing the cost of the missed session. Agencies must make federal employees available for depositions and such depositions shall be taken on official time. The agency may be liable for costs incurred if such persons are not made available on the clock for depositions or other discovery or if such persons fail to appear.

c. Stipulations

Stipulations are strongly encouraged.

d. Requests for Admissions

Absent specific authorization from the Administrative Judge, a request for admissions shall not exceed 30 in number including all discrete subparts. This limit does not apply, however, to admissions relating to the authenticity or genuiness of documents.

e. Requests for the Production of Documents

Absent specific authorization from the Administrative Judge, requests must be specific, identifying the document or types of documents requested. A set of document requests shall not exceed 30 in number including all discrete subparts.

2. Where possible, more informal methods of discovery should be employed.

In many instances, discovery should proceed on an informal basis, including unrecorded meetings and conference calls designed to exchange information. For example, if a primary purpose of discovery is to determine the scope and content of a material witness's testimony, it may be sufficient that there be a meeting scheduled with the witness and that the discovery be conducted on an informal basis. If that method proves unsatisfactory, a more formal method of discovery may be used.

When information gathering and hearing preparation takes place outside the scope of formal discovery, agencies may not restrict access to nonmanagement employees who voluntarily cooperate with informal discovery.

a. The parties may agree that a witness be made available for questioning without the production of a transcript or tape recording where the purpose is to discover the availability of other evidence, either documentary or testimonial.

b. The parties may agree to the questioning of witnesses using a tape recording device, provided that any such tape will not be accepted in evidence without authentication. Such authentication can be presumed where the opposing party is provided a copy of the tape at the close of the discovery session and it is identical to the tape proffered in evidence.

D. **Discovery Procedures**

1. Commencing Discovery

a. Requests for authorization to commence

Unless the Administrative Judge requires that a party request authorization to commence discovery, parties may begin discovery upon receipt of the Administrative Judge's acknowledgment order.

If the Administrative Judge requires that a party request authorization to commence discovery, the request must state the method(s) and scope of discovery requested and its relevance to the issue(s) in the complaint.

b. Exchange of requests

Upon receipt of the Administrative Judge's authorization to begin discovery or acknowledgment order that does not require the parties to seek authorization, the parties must, within twenty (20) calendar days or such period of time ordered by the Administrative Judge, exchange requests for discovery. If a party does not submit a discovery request to opposing party within that period, the Administrative Judge may determine that the party has waived its right to pursue discovery.

The parties must cooperate with each other in honoring requests for relevant, non-repetitive documentary and testimonial evidence. The parties shall not use any form of discovery or discovery scheduling for harassment, unjustified delay, to increase litigation expenses, or any improper purpose. Discovery disputes will be resolved by the Administrative Judge only after the parties have made a good faith effort to resolve the dispute.

(1) Where to address discovery

Requests for discovery should be addressed to the agency representative, complainant or complainant's representative of record, and not to the Administrative Judge, unless requested by the Administrative Judge. Where a party addressed a request for discovery to the Administrative Judge, the Administrative Judge may, at his/her discretion, return the request to the party submitting the discovery request with instructions to serve it on the appropriate party or may forward the request to the appropriate party. Where a party inappropriately submits a discovery request to the Administrative Judge, the required time frame for

submitting the request to the appropriate party will not stop running unless the Administrative Judge rules otherwise.

(2) Criteria for requests

The request should be: 1) as specific as possible, 2) reasonably calculated to discover non-repetitive, material evidence and, 3) if not self-evident, the request must indicate the materiality of the documentary or testimonial evidence sought and the manner in which the information sought will elucidate the accepted issues.

2. Response to Discovery Request

Unless otherwise ordered, the opposing party/representative must serve his/her response to the request for discovery within thirty (30) calendar days from the date of service of the request. If service of the request was by mail, the opposing party/representative may add three days to the date that the response is due. A response means:

a. Compliance with the request;

Voluntary cooperation with discovery requests is encouraged;

b. Written opposition to the request/motion for a protective order;

Such opposition shall set forth a basis for finding that the request is irrelevant, overburdening, repetitious, or privileged;

c. Written agreement or stipulation obviating the request;

Stipulations of fact are favored as a means of resolving discovery issues;

d. Request for extension of time;

Request for extension of time to comply or to produce a written agreement shall not exceed 15 calendar days.

3. Failure to Respond to Request for Discovery

a. Failure to fully respond to a request for discovery within 30 calendar days of receipt of the request, or as otherwise ordered by the Administrative Judge, shall form the basis for a motion to compel discovery, provided the parties have made a good faith effort to resolve the dispute.

b. A motion to compel must be filed within ten (10) calendar days after the expiration date for responding to a request for discovery, or as otherwise ordered by the Administrative Judge. When filing a motion, the moving party must certify that s/he conferred with the opposing party, or made a good faith effort to do so, to attempt to resolve the discovery dispute. See

Fed. R. Civ. P. 37(a)(2)(B); Apex Oil Co. v. Belcher Co., 855 F.2d 1009, 1020 (2d Cir. 1988) (failure to confer in good faith over discovery disputes multiplied the proceedings and justified sanctions); Prescient Partners v. Fieldcrest Cannon, 1998 WL 67672 (S.D.N.Y. 1998) (parties required to discuss discovery disputes); Charles Alan Wright & Arthur R. Miller, 8A Fed. Prac. & Proc. Civ.2d § 2285 (Supp. 1999) (n. 18.1).

c. A motion to compel compliance with a request for discovery must be addressed to the Administrative Judge and the moving party must certify that a copy was served on the opposing party.

d. Any statement in opposition to the motion must be filed within ten (10) calendar days of service of the motion and the responding party must certify that a copy was served on the moving party.

4. The Administrative Judges Will Rule Expeditiously on Discovery Issues

Following the filing of an opposition, if any, to the motion to compel discovery, the Administrative Judge will rule expeditiously on the request for discovery. In the alternative, the Administrative Judge may, in the interest of expediting the hearing, order that the document(s), witness(es), or other evidence at issue be produced at the hearing. Where the Administrative Judge finds that the request for discovery that is the subject of the motion to compel is irrelevant, overburdening, repetitious, or privileged, the Administrative Judge will deny the motion to compel and may, upon the request of the party opposing the motion to compel, or upon the Administrative Judge's own initiative, issue such protective orders as the Administrative Judge determines appropriate.

5. Administrative Judge's Orders to Comply

a. In considering a motion to compel compliance, the Administrative Judge will consider whether the following factors apply:

(1) the discovery is calculated to produce or lead to the production of material evidence that is not repetitious of facts or documents already in the complaint file,

(2) the discovery does not concern privileged or restricted information, and

(3) the discovery is not overly burdensome.

b. Where a motion to compel discovery is approved, in whole or in part, the Administrative Judge shall issue a written order to comply with the request. The parties shall have 15 calendar days or such other time period ordered by the Administrative Judge to comply with a discovery order.

6. Failure to Respond or Comply With Administrative Judge's Order May Result in Sanctions

A failure to respond or follow an order to comply with a request for discovery may result in sanctions. See Section III.D, of this Chapter.

E. Failure to Request Discovery Implies Waiver of Subsequent Requests for Documents

It is the intention of the Commission that the parties utilize the informal or formal discovery procedures provided for in this Chapter to develop the record in the complaint or that the record be developed to the extent necessary through the Administrative Judge's orders for documents, information and witnesses. Under previous Commission guidance, the failure to request discovery did not imply a waiver of the opportunity of the parties to make requests for documents and witnesses at the hearing. Allowing parties this opportunity at the time of the hearing, regardless of whether the discovery process was invoked, is not consistent with sound administrative economy and with the expeditious processing of complaints. Accordingly, where a party has not timely requested discovery or has not otherwise timely requested that the Administrative Judge order the opposing party to produce documents, the party's request for documents for the first time at the time of the hearing, or at a pre-hearing conference held just prior to the hearing, will be disallowed unless the Administrative Judge, in his/her discretion, rules otherwise.

F. Cost of Discovery

The parties shall initially bear their own costs with regard to discovery, unless the Administrative Judge requires the agency to bear the costs for the complainant to obtain depositions or any other discovery because the agency has failed to complete its investigation timely as required by § 1614.108(e) or has failed to investigate the allegations adequately pursuant to Chapter 6 of this Management Directive.

V. EXCLUSION AND DISQUALIFICATION

All participants in the EEO hearing process have a duty to maintain the decorum required for a fair and orderly proceeding and to obey orders of the Administrative Judge. Any person who engages in improper behavior or contumacious conduct at any time subsequent to the docketing of a complaint for a hearing is subject to sanction. Section 1614.109(e) provides that persons may be excluded from the hearing for contumacious conduct or misbehavior that obstructs the hearing. It further provides that if the complainant's or agency's representative engages in misconduct or refuses to obey an order of the Administrative Judge, the Commission may suspend or disqualify the representative from future hearings, refer the matter to an appropriate licensing authority, or both.

A. Exclusion from a Hearing

An Administrative Judge has the power to regulate the conduct of a hearing and to exclude any person from a hearing for contumacious conduct or misbehavior that obstructs the hearing. § 1614.109(e). The Administrative Judge may exclude any disruptive person, including the complainant, an agency official, or a representative, including agency or complainant counsel. This sanction generally applies to conduct occurring in the Administrative Judge's presence at any point during the hearing process, including prehearing proceedings and teleconferences as well as the hearing itself. It also

applies to a representative's refusal to obey orders of the Administrative Judge. The exclusion bars the individual, for the duration of the hearing process, from further participation in the case in which the misconduct occurs. (In contrast, a disqualification of a representative applies to future hearings. The procedure for disqualification is in Section V.A.5 below.)

The authority of an Administrative Judge to impose an exclusion under § 1614.109(e) derives from the judicial doctrine of the "inherent powers" of the forum. For example, courts have certain implied powers that are necessary to the exercise of all others. Chambers v. NASCO, Inc., 501 U.S. 32 (1991). "'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.'" Id. at 43 (quoting Anderson v. Dunn, 6 Wheat. 204, 227 (1821)). "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" Id. (quoting Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962)).

Inherent powers must be exercised with restraint and discretion. Id. In considering the imposition of sanctions, Administrative Judges must take steps to ensure fairness to the parties and the effectiveness of the sanction in furthering the orderly conclusion of the hearing process. Sanctions should be proportional to the nature and degree of the improper conduct. Administrative Judges may look to rules of ethics, common law, statutes, and case law to determine the propriety and nature of a sanction. With respect to sanctions against a representative, the Administrative Judge should be mindful that a party to the EEO process is entitled to be represented by an individual of that party's choice, and the representative is expected to be an advocate for the party's interests. Nonetheless, by virtue of their position, all representatives also have a particular responsibility to respect the order and authority of the EEO process. See subsection 4 below.

1. Relationship to other sanctions

   In addition to exclusion under § 1614.109(e) for misconduct, other sanctions may be imposed for failure to obey orders of an Administrative Judge. Section 1614.109(f)(3) provides that when the complainant, the agency, 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 witnesses, the Administrative Judge shall impose sanctions in appropriate circumstances.

   Sanctions under § 1614.109(f) may be evidentiary, monetary, or both. The failure of a party to produce evidence or obey an order may support the drawing of an adverse inference about a matter in dispute, the exclusion of other evidence offered by that party, or a decision on the merits in favor of the other party. Monetary sanctions include attorneys fees and the costs of discovery. See § 1614.109(f)(3).

2. Preventive measures

To lessen the need for resort to exclusion or other sanctions, Administrative Judges may instruct the parties in the initial order and/or at the outset of the hearing to maintain professional conduct and speech. The parties should be informed that engaging in improper conduct or failing to comply with orders of the Administrative Judge or Commission regulations may result in sanctions under § 1614.109. Giving such a warning is within the Administrative Judge's discretion, however. Any asserted failure to advise the parties of the potential for sanctions does not limit the Administrative Judge's authority to impose a sanction.

3. General standard for exclusion

A person's conduct is contumacious when it is "willfully stubborn and disobedient." Black's Law Dictionary 330 (6th ed. 1990). Contumacious behavior or disruptive conduct may include any unprofessional or disrespectful behavior; degrading, insulting or threatening verbal remarks or conduct; the use of profanity; or conduct engaged in for the purpose of improperly delaying the hearing.[(7)] A finding of contumacious conduct or disruptive behavior may be based on a series of disruptive incidents, a pattern of acts, or a single sufficiently obstructive episode.[(8)] Normally, any pattern should be manifest within a single case. However, the Administrative Judge may take into consideration other improper conduct engaged in by the individual on any previous occasion before that judge, if the Administrative Judge had clearly described the misconduct for the record in the earlier proceeding or the misconduct is otherwise clearly apparent from the record.

In addition, there may be situations in which a decision to exclude a person may take into consideration prior misconduct before a different Administrative Judge or the Commission. For example, in the first instance of misconduct, the Administrative Judge, in his/her discretion and as part of the sanction, may publicize the sanction to other Administrative Judges or require the sanctioned individual to disclose the sanction to other Administrative Judges. This should be done in appropriate circumstances, taking into account the nature and degree of the misconduct. If the sanctioned individual engages in further improper conduct in a subsequent hearing before the same or a different Administrative Judge, the prior sanction should be considered in determining whether to exclude the individual from the subsequent hearing. To that end, the Administrative Judge also may ask an individual, on the record, to disclose whether or not s/he ever had previously been sanctioned in any way before the EEOC.

4. Standard for exclusion of representative

Representatives may also be excluded for refusal to follow the orders of an Administrative Judge or other improper conduct, in addition to "contumacious conduct or misbehavior that obstructs the hearing." Representatives have a special duty to maintain the dignity of the EEO process and to preserve the order and authority of the EEO forum and must act accordingly.

If a party's representative engages in repetitive misconduct or conduct justifying exclusion, the Commission also will consider imposing a suspension or

disqualification through the procedure described in Section B below. If the representative is an attorney, s/he also may be referred to the appropriate bar association for disciplinary action as provided in section C below.

5. Procedure for exclusion

Unless the improper conduct is so egregious as to compromise the order required for a fair and orderly proceeding, the Administrative Judge normally should first warn the offending person to stop the conduct. The warning should give notice that if the conduct continues, the person will be excluded from the hearing.

When imposing the sanction, the Administrative Judge must ensure that the record includes a clear and specific description of the nature of the misconduct. The record must include the particular details of what the person said or did, rather than a conclusory characterization.[(9)] The Administrative Judge may place the information on the record through a statement at the hearing or, if the misconduct occurred in a teleconference or other proceeding without a court reporter, by inclusion in a prehearing conference memorandum or order or through a written statement provided to the individual. Any gestures or actions that would not be apparent from the hearing transcript should be clearly described for the record. If the person used profanity or other improper or threatening language before the Administrative Judge while off the record or at a proceeding that is not being transcribed, the Administrative Judge should relate the particular language used in a statement on the record or other written statement made a part of the record.

An Administrative Judge's decision to exclude a person from a hearing is final.[(10)] There is no right to appeal an exclusion decision, because that decision applies only to the particular hearing in which the misconduct occurred.

If the complainant engages in obstructive misconduct or contumacious conduct, the Administrative Judge should warn the complainant as described above and consider recessing the hearing for a short time to restore order. If the complainant's misconduct is extreme or persistent, the Administrative Judge may, pursuant to § 1614.107(g), dismiss the case for failure to cooperate or issue a decision if the record is sufficient to permit adjudication.

If the complainant's representative is excluded, the complainant should be given the option of proceeding without his/her representative. If the agency's representative is excluded, the Administrative Judge must notify the agency of the exclusion. In either case, the Administrative Judge may, in his/her discretion, continue the hearing to allow time for the designation of a new representative or, in appropriate circumstances, terminate the hearing and decide the case based on the record if the record is sufficient to permit adjudication.

The Administrative Judge also may impose an evidentiary sanction against either party as provided in § 1614.109(f)(3). For example, when misconduct has prevented or hindered the development of evidence, the Administrative Judge may draw an adverse inference; consider the matter to be established in favor of

the opposing party; exclude other evidence; or issue a decision fully or partially in favor of the opposing party. See § 1614.109(f)(3). The standard for imposing such a sanction must be the same for both complainants and agencies. A sanction should be proportional to the level of the misconduct and reflect the degree to which the misconduct has impeded a full and fair hearing.

B. **Disqualification of a Representative from Future Hearings**

1. Standard for suspension and disqualification[(11)]

In the case of repeated or flagrant improper conduct by a representative, the Administrative Judge or the Commission may take further action. Section 1614.109(e) provides that the Commission, after notice and an opportunity to be heard, may suspend or disqualify from representing complainants or agencies in future EEOC hearings any representative who refuses to follow the Administrative Judge's orders or otherwise engages in improper conduct. These provisions apply not only to conduct at the hearing stage of the case but also to all other actions taken by a representative in the course of an EEO proceeding, including the appeal. A disqualification applies to future representation of a party before the EEOC, at both the hearing and appellate stages.

2. Procedure for suspension and disqualification

Before suspension or disqualification from future hearings, the representative must be given:

a. notice of the specific conduct that is the basis for the proposed disqualification;

b. notice of the proposed sanction; and

c. the opportunity to be heard.

This is accomplished through a show cause order. The show cause order must describe in detail the incident(s) constituting the grounds for suspension or disqualification,[(12)] describe the proposed sanction, and give the representative a period of time in which to explain in writing why s/he should not be suspended or disqualified.

For improper conduct or a refusal to follow orders at the hearing stage, the Administrative Judge will issue the show cause order and certify the matter to the Director, Office of Federal Operations, for a determination. In addition, the Administrative Judge may, separately or simultaneously, issue an order excluding the representative from the hearing process in the case at bar, in accordance with the provisions discussed above. If the representative is an attorney, referral to the appropriate bar association normally should be considered as well, pursuant to section C below.

For improper conduct during the appeal, the Office of Federal Operations will issue the show cause order. In all cases, the representative must submit his/her response to the Director of the Office of Federal Operations. The Director or his/her designee will issue a final order, which is not appealable.

An order suspending or disqualifying a representative from future hearings must specify the time period the penalty will be in effect, which must be commensurate with the severity of the conduct.

When the Administrative Judge or the Commission proposes to suspend or disqualify the agency's representative, a copy of the show cause order and subsequent decision must be provided to the agency's EEO director.

C. **Referral of Attorney Representatives to Bar Association**

Section 1614.109(e) provides that the Administrative Judge or the Commission may refer to the disciplinary committee of the appropriate bar association any attorney who refuses to follow the orders of an Administrative Judge or who otherwise engages in improper conduct. This may be done independently of, or in conjunction with, any proposed or final exclusion, suspension, or disqualification.

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1. Section 1614.108(f) specifically provides that the agency has a duty to send the notice within 180 days of the filing of the complaint or, where a complaint has been amended, the earlier of 180 days from the date of the last amendment or 360 days from the filing of the first complaint, whichever is earlier; within a time period set forth in an order from the Commission; or within any period of extension provided under § 1614.108(e).

2. A decision issued within 180 days may include a finding of discrimination and order that the agency provide relief and pay the complainant's attorney's fees. The Administrative Judge then would issue a second decision subsequent to the end of this 180-day period concerning the quantum of relief and attorney's fees. In this situation, the agency's 40-day period for taking final action on the Administrative Judge's decision and determining whether it will implement the decision begins on its receipt of the second decision and the hearing file. § 1614.110(a).

3. Where an agency did not complete an investigation of late-filed amendments to complaints or late-consolidated complaints because the complainant either requested a hearing before the full investigatory period ended or the amendments and consolidation occurred late in the process, sanctions for inadequate records would be inappropriate. Sanctions only would be appropriate where a party subsequently fails to comply with an order or request of the Administrative Judge that puts the party on notice of the type of sanction that may be imposed for noncompliance.

4. The Administrative Judge's order or request to the parties should make clear what sanction(s) or other actions may be imposed for a failure to comply with the order within the time set forth therein. Where an order or request did not put a party on notice that it could be sanctioned for noncompliance or did not put the party on notice of the type of sanction that the Administrative Judge now seeks to impose, the Administrative Judge must issue a notice to show cause to the party for an explanation why the sanction should not be imposed and provide an opportunity to cure the noncompliance before imposing the

sanction. This rule applies in all instances where the Administrative Judge intends to impose a sanction on a party for a failure to comply with an order or request that does not make clear what sanction(s) may be imposed for noncompliance.

5. The Administrative Judge may apply Rule 615 of the Federal Rules of Evidence to the exclusion of witnesses:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

6. See note 4, supra, for a discussion of placing a party on notice that sanctions may be imposed before ordering their imposition.

7. In Bradley v. U.S. Postal Service, EEOC Appeal Nos. 01952244, 01963827 (1996), the Commission rejected the appellant's contention that he was denied a fair hearing because the Administrative Judge had appellant and his representative escorted from the hearing room under guard and terminated the hearing. The Commission found that appellant's representative "engaged in contumacious conduct of the worst kind: asking questions which the witnesses could not comprehend, then berating the witnesses for failing to answer; repeatedly testifying rather than asking questions; vociferously arguing on the record with the agency representative and the Administrative Judge; defying the authority of the Administrative Judge with regard to evidentiary rulings and the conduct of the hearing; and threatening the Administrative Judge over an evidentiary ruling." Misconduct does not have to rise to this level to be subject to sanction. Any one of the types of misconduct noted in Bradley would alone be sufficient.

8. See In re Chaplain, 621 F.2d 1272, 1276 (4th Cir. 1980) (contempt of court may be found based on the cumulative impact of a series of actions, no one of which standing alone would be sufficient: "It is only necessary that a contumacious act be 'a volitional [one] done by one who knows or should reasonably be aware that his conduct is wrongful.'") (citations omitted).

9. For example, the description might state that the party's representative, despite a warning to remain at his seat, "repeatedly rose out of his chair, walked around the hearing room, and pointed his finger close to the witness's face while berating the witness in a loud voice and cutting short the witness's answers, making the following statements to the witness: . . . ."

10. An appellant may, however, raise the issue as part of any appeal of the final order on the case. The exclusion may be included as an issue on appeal when the party asserts it has been deprived the opportunity for a fair hearing.

11. In addition to disqualification under § 1614.109(e) for misconduct, the term "disqualification" is also used when the representation of a complainant or agency would conflict with the official or collateral duties of the representative. Under § 1614.605(c), in that circumstance, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative. In contrast to disqualification for misconduct, a disqualification for conflict of interest under § 1614.605(c) applies only to the particular case. Parties shall disclose and reasonably attempt to avoid all conflicts of interest.

12. The conduct must be described with specificity and detail, as explained in section A. 5 above with respect to exclusion.

CHAPTER 8

COMPLAINTS OF CLASS DISCRIMINATION IN THE FEDERAL GOVERNMENT

I. **INTRODUCTION**

Section 1614.204 of Title 29 C.F.R. provides for processing class complaints of discrimination. A class is defined as a group of employees, former employees, or applicants who are alleged to have been adversely affected by an agency personnel policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, or disability. A class complaint is a written complaint of discrimination filed on behalf of the class by the agent of the class, alleging that the class is so numerous that a consolidated complaint by the members of the class is impractical, that there are questions of fact common to the class, that the claims of the agent of the class are typical of the claims of the class, and that the agent of the class and, if represented, the representative, will fairly and adequately protect the interests of the class.

The regulatory requirements for class complaints at § 1614.204 provide a structure different from that for individual complaints. For class complaints, there is a four-stage process. The first stage is the establishment of a class complaint. At this stage, the class agent is required to seek counseling from an agency EEO Counselor. The second stage is a determination from a Commission Administrative Judge, subject to agency final action, as to whether to certify the complaint as a class action. The third stage, assuming that the complaint has been certified as a class action, involves a recommended decision from an Administrative Judge on the merits of the class complaint, subject to final agency action in the form of a final decision. The fourth stage, where there has been a finding of class-based discrimination, is the determination of the claims for relief of the individual class members.

II. PRE-CERTIFICATION PROCEDURES

A. Pre-Complaint Processing

Section 1614.204(b) provides that, as with an individual complainant, an employee who seeks to represent a class of employees must seek counseling and undergo pre-complaint processing in accordance with § 1614.105 and Chapter 2 of this Management Directive, with one exception, discussed below. Section 1614.105 requires that an employee must seek counseling within forty-five (45) days of the discriminatory event. The agency shall extend the 45-day time limit when the individual shows that s/he was not notified of the time limits and was not aware of them, that s/he did not know and reasonably should not have known that the discriminatory practice or personnel action occurred, that despite due diligence s/he was prevented by circumstances beyond his/her control from contacting the EEO Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. See § 1614.105(a)(2). The time period may be waived by the agency and is subject to estoppel and equitable tolling. See § 1614.604(c). If the complaint is not resolved on the thirtieth (30^{th}) day following initial EEO counseling, the EEO Counselor must give the agent written notice that s/he has **fifteen (15) days** from receipt of the notice to file a formal complaint. § 1614.204(c)(2).

The counseling period may be extended up to an additional **sixty (60) days** if, prior to the expiration of the 30-day period, the aggrieved person agrees with the agency in writing to postpone the final interview.

The one exception to the mandatory counseling prerequisite allows a complainant to 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. §

1614.204(b).[(1)] The Commission intends that "reasonable point in the process" be interpreted to allow a complainant to seek class certification when s/he knows or suspects that the complaint has class implications, i.e., the complaint potentially involves questions of law or fact common to a class and the complainant's claim is typical of that of the class. Undue delay will lead to dismissal of the class complaint. (See Section III.A.4 below.) If a complainant moves for class certification after completing the pre-complaint process contained in § 1614.105, no additional counseling is required. Instead, the agency or the Administrative Judge, as appropriate, must advise the complainant of his/her rights and responsibilities as the class agent.

B. **Filing and Presentation of the Class Complaint**

As with an individual complaint, a class complaint must be filed with the agency that allegedly discriminated against the putative class. § 1614.106. A class complaint must be signed by the class agent (the complainant) or a class representative and must identify the policy or practice adversely affecting the class as well as the specific action or policy affecting the class agent. § 1614.204(c)(1).

Within thirty (30) days of an agency's receipt of a class complaint, including the agency's receipt of the class complaint during its investigation of the aggrieved person's individual complaint, an agency must designate an agency representative and forward the complaint, along with a copy of the EEO Counselor's report and any other relevant information about the complaint, to the Commission. § 1614.204(d)(1). When **any** complaint is filed, an agency must take care to preserve any and all evidence with potential relevance to the class complaint. This is a continuing obligation that begins as soon as the complaint is filed, even before the class has been certified, and continues throughout the processing of the complaint.

The agency must forward the class complaint to the EEOC district office having jurisdiction of the agency facility where the complaint arose. Appendix J to this Management Directive is a list of the addresses of the EEOC district and field offices and their geographic jurisdictions.

Should the agency's organizational component where the complaint arose not fall within one of the geographical jurisdictions shown, the agency should contact the following office for guidance:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
Complaint Adjudication Division
P.O. Box 77960
Washington, D.C.20013

Telephone: (202) 663-4519

TDD: (202) 663-4593

III. CERTIFICATION OR DISMISSAL - § 1614.204(d)

The Commission will assign an Administrative Judge (or in some limited circumstances involving national security, a complaints examiner from another agency) to issue a decision on certification of the complaint. § 1614.204(d).

A. **Class Complaint Criteria**

A class complaint will be dismissed if:

1. The complaint does not meet all of the prerequisites of a class complaint under § 1614.204(a)(2) (i.e., numerosity, commonality, typicality, and adequacy of representation);

2. The claims lack specificity and detail pursuant to § 1614.204(d)(4);

3. The complaint meets any of the criteria for dismissal pursuant to § 1614.107(a) "Dismissals of Complaints"; or

4. The complainant unduly delayed in moving for class certification. See § 1614.204(b).

B. **Developing the Evidence for Purpose of Certification Determination**

The Administrative Judge may direct the complainant or agency to submit additional information relevant to the issue of certification. See § 1614.204(d)(1).

C. **Individual Complaints Filed on Bases and Issues Identical to Class Complaints**

An individual complaint that is filed before or after the class complaint is filed and that comes within the definition of the class claim(s), will not be dismissed but will be subsumed within the class complaint. If the class complaint is dismissed at the certification stage, the individual complaint may still proceed, unless the same or another basis for dismissal applies. If the class proceeds to a hearing, the individual claim may be presented by the class representative at the liability stage of the process, or it may be presented at the remedy stage by the complainant. If the class complaint is dismissed at the certification stage, the class members may not proceed unless they have timely filed individual complaints.

The agency shall, **within thirty (30) days** of receipt of a decision dismissing a class complaint for failure to meet the criteria of a class complaint, issue the acknowledgment of receipt of an individual complaint as required by § 1614.106(d) and process in accordance with subpart A, each individual complaint that was subsumed into the class complaint.

IV. CERTIFICATION DECISION - § 1614.204(d)(7)

A. **Administrative Judge Issues Decision on Certification**

The Administrative Judge shall issue a decision on whether to certify or dismiss a class complaint. When appropriate, the Administrative Judge may decide to certify a class conditionally, for a reasonable period of time, until a complainant finds representation.

For example, if the record on a class complaint satisfies the numerosity, typicality, and commonality requirements for class certification, the Administrative Judge may "conditionally" certify the class for a reasonable period of time so that the class agent may secure adequate representation. Administrative Judges should refer complainants to any attorney referral systems that may be operating in EEOC district offices or other attorney referral services for assistance in obtaining adequate legal representation.

Even after a class is certified, the Administrative Judge remains free to modify the certification order or dismiss the class complaint in light of subsequent developments. See General Telephone Co. v. Falcon, 457 U.S. 147, 160 (1982). The Administrative Judge has the authority, in response to a party's motion or on his/her own motion, to redefine a class, subdivide it, or dismiss it if the Administrative Judge determines that there is no longer a basis for the complaint to proceed as a class complaint. Hines v. Department of the Air Force, EEOC Request No. 05940917 (January 29, 1996).

B. **Transmittal of Decision**

The Administrative Judge shall transmit his/her decision to accept or dismiss a class complaint to the agency and the agent. The agency shall take final action by issuing a final order within forty (40) days of receipt of the Administrative Judge's decision. The final order shall notify the agent whether the agency will implement the decision of the Administrative Judge. If the final order does not fully implement the decision of the Administrative Judge, the agency shall simultaneously appeal the Administrative Judge's decision in accordance with § 1614.403 and append a copy of the appeal to the final order. The Commission has prepared a separate form that agencies may use to file appeals with the Commission. A copy of that form is attached as Appendix O.

If the decision is to accept (certify) the class complaint, Commission regulations require the agency to notify all class members. 29 C.F.R. § 1614.204(e)(1). The agency must use all reasonable means to notify all class members of the acceptance of the complaint within 15 days of receipt of the Administrative Judge's decision or within a reasonable time frame specified by the Administrative Judge. (See Section V, below.)

An Administrative Judge's decision to dismiss the class complaint at the certification stage will inform the agent that the complaint is being filed on that date as an individual complaint and will be processed under subpart A, that the complaint is also dismissed as an individual complaint in accordance with § 1614.107(a), or, in the case of a complaint forwarded to the Administrative Judge during the agency's investigation of the complaint, that the complaint is being returned to the agency and will continue from the point that the agency's investigation ended with the referral of the complaint to the Administrative Judge.

C. **Right to Appeal the Administrative Judge's Decision**

The Administrative Judge's decision whether to accept or dismiss the class complaint is subject to final agency action. The Administrative Judge shall transit his/her decision to the agency, with a copy to the complainant and the complainant's representative, if any. The agency has forty (40) days from receipt of the Administrative Judge's decision to take final action by issuing a final order informing the complainant as to whether the

agency will fully implement the decision. If the agency informs the complainant that it does not intend to fully implement the decision, the agency must simultaneously file an appeal with the Commission and append a copy of the appeal to the final order served on the complainant. The agency may use the form appended hereto as Appendix O to file its appeal with the Commission. The complainant will have thirty (30) days from receipt of the final order to file an appeal and the agency shall provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K).

V. NOTIFICATION - § 1614.204(e)

A. Timing and Method of the Notice

Within **fifteen (15) calendar days** of the agency's receipt of the Administrative Judge's decision certifying a class complaint or such time frame specified by the Administrative Judge, the agency shall use reasonable means, such as hand delivery, mailing to the last known address, or distribution (such as through inter-office mail or e-mail) to notify all class members of the certification of the class complaint. An agency may file a motion with the Administrative Judge seeking a stay in the distribution of the notice for the purpose of determining whether it will file an appeal of the Administrative Judge's order.

The "reasonable means" used by agencies for notification should be those most likely to provide an opportunity for class members to know about the complaint. Conspicuous posting on bulletin boards to which all potential class members have easy access may constitute adequate notice in some situations.

B. Content of the Notice

The notice must contain:

1. the name of the agency or organizational segment, its location, and the date of acceptance of the complaint;
2. the definition of the class and a description of the issues accepted;
3. 3. an explanation of the binding nature of the decision or resolution of the complaint on class members;
4. 4. the name, address, and telephone number of the class representative; and
5. 5. a copy of the Administrative Judge's decision certifying the class.

C. Individuals May Not Opt Out

The class members may not "opt out" of the defined class; however, they do not have to participate in the class or file a claim for individual relief. All class members will have the opportunity to object to any proposed settlement and to file claims for individual relief if discrimination is found.

D. Settlement Notice

All class members must receive notice of any settlement or decision on the class complaint whether or not they participated in the action. See Section VII of this Chapter.

VI. DEVELOPING THE EVIDENCE - § 1614.204(f)

A. The Process of Developing the Evidence

The Administrative Judge will advise both parties that they will have at least sixty (60) days to develop evidence. § 1614.204(f)(1). They can do this in the same manner as in individual cases, i.e., through interrogatories, depositions, requests for admissions, stipulations, or production of documents. The parties may object to production on the grounds that the information sought is irrelevant, overly burdensome, repetitious, or privileged. The Administrative Judge has the authority to impose sanctions on a party if that party fails to comply without good cause with rulings on requests for information, documents, or admissions. An adverse inference may be appropriate where the information is solely in the control of that party. Similarly, if a party fails to provide an adequate explanation for the failure to respond fully and in a timely manner to a request, the Administrative Judge may impose sanctions. Adverse inferences are appropriate when the information is solely in the control of that party. These sanctions include, but are not limited to, the authority to:

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 issues to which the requested information pertains to be established in favor of the opposing party;

3. exclude other evidence offered by the party failing to produce the requested information, and/or;

4. recommend that a decision be entered in favor of the opposing party.[(2)]

B. Use of Agency Facilities by Class Agent

The class agent and his/her non-attorney representative should be permitted reasonable access to and/or use of agency facilities (copiers, telephones, word processors) for preparation of the case as long as there is no undue disruption of agency operations. The class agent and/or non-attorney representative may not use agency resources and facilities in the preparation of the class case without obtaining the prior approval of the designated agency official.

VII. RESOLUTION - § 1614.204(g)

A. Resolution by the Parties

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 § 1614.204(g)(4).

B. Notice of Proposed Resolution

If a resolution is proposed, notice must be given to all class members in the same manner as the notification of certification of the class was given. The notice must include a copy of the proposed resolution, set out the relief, if any, that the agency will grant**,** and inform the class members that the resolution will bind all members of the class. The notice must also inform class members of the right to submit objections to the settlement. The notice further must inform the parties of the name and address of the Administrative Judge assigned to the complaint.

The agency shall provide the Administrative Judge with a copy of the proposed resolution and the notice sent to the parties.

C. **Administrative Judge Shall Review Resolution**

1. The Administrative Judge shall review and issue a decision concerning the fairness, adequacy, and reasonableness of the proposed resolution. Within**thirty (30) days** of the date of a class member's receipt of the notice of proposed resolution, the class member may file a petition with the Administrative Judge noting objections to the settlement if the petitioner (class member) believes that the settlement benefits only the class agent or is otherwise not fair, adequate, and reasonable to the class as a whole. The Administrative Judge will review the proposed resolution after the expiration of the 30-day period allowed for petitions and consider any petitions received. If the judge determines that the resolution is not fair, adequate, and reasonable, s/he will vacate the proposed resolution and may replace the class agent with the petitioner or other class member who is eligible to serve as class agent.

2. An Administrative Judge's decision that a resolution is not fair, adequate, and reasonable vacates the agreement between the class agent and the agency. The decision must inform the class agent, the petitioner, class members, and the agency, of the right to appeal the decision to the Commission. The decision must include a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K). The agency may use the separate form at Appendix O for filing its appeal with the Commission.

3. An Administrative Judge's decision that a resolution is fair, adequate, and reasonable binds all members of the class. The decision must inform the petitioner of the right to appeal the decision to the Commission. The decision must include a copy of EEOC Form 573, Notice of Appeal/Petition.

VIII. **HEARING - §§ 1614.204(h) and (i)**

A. **Hearing Procedures**

Hearing procedures in class complaints are the same as those applied to hearings in individual complaints of discrimination and are set out at § 1614.109.

B. **Site of the Class Hearing**

The Administrative Judge assigned to hear the complaint will, upon expiration of the period allowed for preparation of the class case, set a date for a hearing and determine the

site of the hearing. Within his/her discretion, the Administrative Judge is authorized to conduct the hearing in the EEOC district office, in an EEOC area or local office, at the agency's organizational component where the complaint arose, or at such other location as s/he may determine appropriate. In determining the hearing site, the Administrative Judge may consider factors such as the location of the parties; the location of EEOC district, area, and local offices; the number and location of witnesses; the location of records; travel distances for the Administrative Judge, the parties, and witnesses; travel costs; the availability of sources of transportation; and other factors as may be appropriate.

Should an agency desire that a hearing be held at a location within the jurisdictional area of another EEOC district office, it must submit a request, in writing, to the EEOC office that determined the class certification issue. In its request, the agency must identify the location of the desired place of hearing and must set out, in detail, its reasons and justification for the requested change. The Administrative Judge will rule on the request only after the directors of the concerned EEOC district offices have conferred on the matter.

C. **Travel Expenses**

If the Administrative Judge sets a hearing site that is outside the local commuting area of the agency's organizational component where the complaint arose, the agency must bear all reasonable travel and per diem expenses of complainants, their authorized representatives, agency representatives, and all witnesses approved by the Administrative Judge, except that an agency does not have the authority to pay the travel expenses of complainant's witnesses who are not federal employees.

The agency's obligation is limited to those costs which are legally payable in advance by the agency. See Decision of the Comptroller General, Matter of: Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing, File: B-202845, 61 Comp. Gen. 654 (1982); see also Decision of the Comptroller General, Matter of: John Booth - Travel Expenses of Witness - Agency Responsible, File: B-235845, 66 Comp. Gen. 310 (1990).

D. **Official Time for Agency Employees**

Any employee testifying at a hearing is entitled to official time for the time s/he spends testifying as well as a reasonable amount of time for travel to and from the hearing. The class agent and agent's representative, if employees of the agency where the complaint arose and was filed, are entitled to official time for actual time spent at the hearing and for a reasonable amount of time spent preparing for the hearing.

An agency may permit its employees to use official time in preparing and presenting a class complaint which arose in another agency.

IX. ADMINISTRATIVE JUDGE'S RECOMMENDED DECISION

The Administrative Judge shall transmit to the agency a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class, and any

individual relief, where appropriate, with regard to the personnel action or policy that gave rise to the complaint. The report of findings and recommendations shall be sent to the agency together with the entire record, including the transcript. The Administrative Judge shall also notify the class agent, in a separate communication, of the date on which the report of findings and recommendations was forwarded to the agency. § 1614.204(i)(1).

If the Administrative Judge finds no class relief appropriate, s/he shall determine if any finding of individual discrimination is warranted and, if so, shall recommend appropriate relief. § 1614.204(i)(2).

X. AGENCY DECISION - § 1614.204(j) and (k)

A. Action on Administrative Judge's Report of Findings and Recommendations

Within sixty (60) days of receipt of the report of findings and recommendations issued by the Administrative Judge, the agency must issue a decision to accept, reject, or modify those findings and recommendations. If the agency does not issue the final decision within 60 days, the Administrative Judge's findings and recommendations will become the final decision of the agency.

The agency must transmit its final decision to the agent within five days of the expiration of the 60-day period.

B. Required Features of the Agency Final Decision

1. The agency's final decision on a class complaint must be in writing; must be transmitted to the agent by certified mail, return receipt requested, and must include a copy of the report of findings and recommendations of the Administrative Judge. See § 1614.204(j)(2).

2. Where the Administrative Judge addresses the merits of the complaint, the agency final decision also must address the merits. It must include a finding on the issue of discrimination, address the merits of the class agent's personal claim, and include the corrective action, if any, awarded to the class agent.[(3)]

3. A decision finding discrimination should include the dates of the agent's initial contact with the EEO Counselor and the date the agency eliminated the policy or practice on which there has been a finding of discrimination.

4. The final agency decision shall inform the agent of the right to appeal or to file a civil action and of the applicable time limits.

C. Binding Nature of Agency Decision

The final agency decision finding of discrimination will be binding on all members of the class and on the agency. A finding of no discrimination is not binding on a class member's individual complaint. Class members may not "opt out" of the class action while it is pending.

D. Notification of Agency Final Decision

The agency shall notify class members and the class representative of the decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief and of the procedures to be followed. Notice shall be given by the agency within ten (10) days of the transmittal of its decision to the agent. The notice shall include the period for which the relief will be available and stating it in terms of precise calendar days, e.g., between 6/30/90 and 9/1/97.

XI. RELIEF FOR INDIVIDUAL CLASS MEMBERS - § 1614.204(l)

A. Claims for Individual Relief by Class Members Where Discrimination is Found

Where a finding of discrimination against a class has been made, there is a presumption of discrimination as to each member of the class. The agency has the burden of proving by clear and convincing evidence that a class member is not entitled to relief. See § 1614.204(l)(3).

Within thirty (30) days of receipt of notification of the final agency decision, a class member who believes that s/he is entitled to individual relief must file a written claim with the head of the agency, or with the agency's EEO Director.

The claim must include a specific, detailed showing that:

1. The claimant is a class member who was affected by the discriminatory policy or practice; and

2. The discriminatory action occurred within the period of time for which the agency found class-wide discrimination in its 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.

B. Timing of Agency Decision on Individual Claims for Relief

Within **ninety (90) calendar days** of receiving an individual claim, the agency must issue a final decision on that claim. The agency's final decision must include a notice of the right to file an appeal or a civil action within the applicable time limits. The decision must include a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K).

C. Oversight of Individual Claims for Relief

1. Where an Administrative Judge finds that the agency discriminated against the class, the Administrative Judge should include in his/her order a provision that establishes a mechanism for review of individual claims pursuant to § 1614. 204(l)(3). Under that section, a class member must file a claim with the agency within thirty (30) days of his/her receipt of notification from the agency of its final decision and the agency must issue a decision within ninety (90) days of its

receipt of the claim. That section further provides that Administrative Judges retain jurisdiction over the complaint in order to resolve any disputed claims of class members and may hold hearings or otherwise supplement the record on a claim filed by a class member.

2. To implement this section, an Administrative Judge's order should advise the agency to inform him/her in writing within sixty (60) days of the agency's receipt of a claim from a class member that it intends to dispute the class member's claim, and provide a copy of such notice to the class member. Once the agency informs the Administrative Judge and the class member of its intent to dispute the class member's claim, the Administrative Judge will issue an order tolling the 90-day period within which the agency is required to issue a decision on the class member's claim.

3. The Administrative Judge's order will advise the agency to provide a statement in support of its decision to dispute the class member's claim and any supporting evidence within fifteen (15) days of the agency's receipt of the Administrative Judge's order, providing a copy of any such submission to the class member. The class member will have 15 days from the date of service of the agency's submission to respond to the agency's submission and may file a statement and documents in support of his/her claim, providing a copy of any such submission to the agency. If service of the submission was by mail, the class member may add three days to the date that the response is due. The Administrative Judge has the discretion to enlarge the 15-day period at the written request of either party or on his/her own motion. If a party seeks an enlargement of the 15-day period, that party must provide a copy of its written request to the other party.

4. The Administrative Judge thereafter may determine whether s/he needs additional information or should hold a hearing in order to further develop the record regarding the class member's claim. At the conclusion of fact finding, the Administrative Judge will issue a decision concerning the class member's claim and forward the decision to the class member and the agency. The decision will advise the agency that the 90-day period for issuing a final decision on the claim will resume upon its receipt of the Administrative Judge's decision. The agency must issue a final decision regarding the class member's claim within the 90-day period. If the agency does not issue the final decision within the 90-day period, the Administrative Judge's decision will become the final decision of the agency.

5. A decision on a class member's claim must inform the class member of the right to appeal the decision to the Office of Federal Operations or to file a civil action and it must include EEOC Form 573, Notice of Appeal/Petition (Appendix K).

D. **Limits on the Duration of a Finding of Class-Wide Discrimination**

The agency or the Commission may find class-wide discrimination and order remedial action for any policy or practice in existence within forty-five (45) days of the class agent's initial contact with the EEO Counselor. Relief may be ordered for the time the policy or practice was in effect. Under the continuing violation theory, incidents occurring earlier than 45 days before contact with the EEO Counselor must also be remedied provided the initial contact with the EEO Counselor was timely and the earlier

incidents were part of the same continuing policy or practice found to have been discriminatory. Where contact with the EEO Counselor is timely as to one of the events comprising the continuing violation, then the counseling contact is timely as to the entire violation. See § 1614.204(l)(3). This 45-day time period does not limit the two-year time period for which back pay can be recovered by a class member.

E. **Where Class-Wide Discrimination is Not Found**

The agency shall, **within sixty (60) calendar days** of issuance of the final decision, acknowledge receipt of an individual complaint as required in § 1614.106(d) and process in accordance with the provisions of subpart A, each individual complaint that was subsumed into the class complaint.

If it is found that the class agent or any other member of the class is a victim of discrimination, the relief provisions of § 1614.501 shall apply.

XII. REPRISAL

Federal employees who are agents, claimants, representatives of agents or claimants, witnesses, or agency officials having responsibility for processing class complaints may file individual discrimination complaints if they believe they have been subjected to restraint, interference, coercion or reprisal because of their involvement in the presentation and/or processing of a class complaint. EEO counseling must precede the filing of such complaints.

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1. The term "move" in this context means that the complainant must make his/her intention to process the complaint as a class action clear to the investigator if the complaint is still in the investigation phase of the process, to the Administrative Judge if the complaint is at the hearing phase of the process, or to the agency if the investigation has been completed and the complainant has not elected to proceed to a hearing. A complainant may make his/her intention clear through a letter, a formal motion, or any means that effectively informs the agency, investigator (if the matter is within the investigation phase of the process), or Administrative Judge of the complainant's intent to pursue a class action.

2. The Administrative Judge's order to the parties should make clear what sanctions or other actions may be imposed for a failure to comply with the order within the time set forth therein. Where an order did not put a party on notice that it could be sanctioned for a noncompliance or did not put the party on notice of the type of sanction that the Administrative Judge now seeks to impose, the Administrative Judge must issue a notice to show cause to the party for an explanation why the sanction should not be imposed and provide an opportunity to cure the noncompliance before imposing the sanction.

3. Section 1614.204(j)(5) provides: "The final decision of the agency shall require any relief authorized by law and determined to be necessary or desirable to resolve the issue of discrimination."

CHAPTER 9

APPEALS TO THE COMMISSION

I. INTRODUCTION

Section 1614.401(a)-(e) identifies those entitled to file appeals to the Commission. Section 1614.402(a) provides that appeals to the Commission must be filed by an appellant **within thirty (30) days**[(1)] of receipt of an agency's dismissal, final action, or decision. If the complainant is represented by an attorney of record, the 30-day time limit shall begin to run from the date of receipt by the attorney of the notice of dismissal, final action, or final decision. If an agency determines not to implement the decision of an Administrative Judge either in full or in part, it must notify the complainant of its determination in a final order issued **within forty (40) days** of

its receipt of the Administrative Judge's decision and it must simultaneously file an appeal with the Commission. All such appeals must be filed with the Commission at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

As an alternative to mailing, appeals may be hand-delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

As a further alternative, appeals may be sent by fax to:

(202) 663-7022

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.

The individual appellant should use EEOC Form 573, Notice of Appeal/Petition. A copy of the Form is attached as Appendix K to this Management Directive. The agency shall attach a copy of EEOC Form 573 to all decisions, actions, and dismissals of equal employment complaints. The Commission has prepared a separate form that agencies may use to file appeals with the Commission. A copy of that form is attached as Appendix O.

II. ADVISING THE PARTIES OF THEIR APPEAL RIGHTS

A. Rights Following Administrative Judge Issuance of a Decision

1. Merits/Class Certification Cases

a. In a decision on the merits of a non-class complaint or concerning the issue of certification of a class action, the Administrative Judge shall advise the parties that the agency has forty (40) days from the date of its receipt of the Administrative Judge's decision to review the decision and to take final action on the decision by issuing a final order. The 40-day period within which the agency must take final action does not commence until the Administrative Judge issues an order advising the agency that the decision of the Administrative Judge is the final decision and that the agency must take final action within 40 days of its receipt thereof. Where an Administrative Judge issues a decision finding discrimination, the 40-day period will not commence until the Administrative Judge issues a final decision regarding remedies and attorney's fees.[(2)]

b. The Administrative Judge should inform the complainant of the following:

(1) where the agency's final action/final order advises the complainant that the agency accepts the Administrative Judge's decision, the agency will advise the complainant that s/he has thirty (30) days from the date the complainant receives the agency's final order to file an appeal of the final order.

(2) the agency's failure to take final action by issuing a final order within this 40-day review period will be deemed acceptance of the Administrative Judge's decision;

(3) the complainant's 30-day period for filing an appeal of the agency's final order/Administrative Judge's decision begins at the conclusion of the agency's 40-day review period;

(4) where the agency's final action/final order advises the complainant that the agency has determined not to fully implement the Administrative Judge's decision, the agency must file an appeal of the Administrative Judge's decision simultaneously with notifying the complainant of its determination (providing the complainant with a copy of the appeal) and advise the complainant of his/her right to file a separate appeal of the Administrative Judge's decision within 30 days of the complainant's receipt of the agency's final order.

2. Procedural Dismissal

When the Administrative Judge issues a procedural dismissal, s/he must advise the complainant that the complainant will have the right to file an appeal of the agency's final order within 30 days of the complainant's receipt thereof.

3. Class Action Settlement Agreements

A petition to vacate a resolution may be filed with the Administrative Judge asserting that the resolution favors only the class agent or is not fair, adequate, and reasonable to the class as a whole. An Administrative Judge's decision that a class action settlement agreement is fair, adequate, and reasonable binds all members of the class. The decision must inform the petitioner of the right to appeal the decision to the Commission. The decision must include a copy of EEOC Form 573, Notice of Appeal/Petition.

An Administrative Judge's decision that a resolution is not fair, adequate, and reasonable vacates the agreement between the class agent and the agency. The decision must inform the class agent, the petitioner, class members, and the agency, of the right to appeal the decision to the Commission. The decision must include a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K). The agency may use the separate form at Appendix O for filing its appeal with the Commission.

B. **Agency Final Action**

1. Agency Final Action

An agency final action involves agency issuance of a final order to the complainant. The final order informs the complainant whether the agency will fully implement the decision of the Administrative Judge and contains notice of the complainant's right to appeal to EEOC. The term "fully implement" means that the agency adopts without modification the decision of the Administrative Judge. If the agency's final order advises the complainant that the agency will not fully implement the decision of the Administrative Judge, the agency must file an appeal of the decision with EEOC simultaneously with issuing the final order to the complainant. In this way, an agency will take final action on a complaint referred to an Administrative Judge by issuing a final order, but it will not be provided with the opportunity of introducing new evidence or writing a new decision in the case. The agency may use the form attached hereto as Appendix O to file its appeal with the Commission. Whether the agency's final order advises the complainant that the agency will or will not fully implement the Administrative Judge's decision, the agency must provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K).

2. Notice of Rights

a. Full Implementation

Where the agency issues a final order in which it agrees to fully implement the Administrative Judge's decision, the order must inform the complainant that s/he has the right to file an appeal of the Administrative Judge's decision and agency's final order.

The agency further must inform the complainant that s/he must file an appeal within 30 days of his/her receipt of the agency's final order and the agency must provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K).

b. Less than Full Implementation

Where the agency issues a final order through which it informs the complainant that it does not intend to fully implement the Administrative Judge's final decision, the agency's final order must inform the complainant that the agency, simultaneously with the issuance of its final order to the complainant, has filed an appeal of the Administrative Judge's decision with the Commission. The agency may use the form appended hereto at Appendix O to file its appeal with the Commission.

The agency must provide the complainant with a copy of the appeal. The final order further must inform the complainant of the following:

(1) the complainant may file a separate appeal of the agency's final order;

(2) the Commission, as a general rule and in the absence of a separate appeal from the complainant, will review only the agency's decision not to fully implement the Administrative Judge's decision; and

(3) if the complainant contends that the Administrative Judge erred either in any rulings made during the pendency of the action or in the decision, the complainant must file a separate appeal from the agency's final order to challenge such errors.

The final order must inform the complainant that any such appeal must be filed within 30 days of the complainant's receipt of the final order and the agency must provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K).

C. **Agency Final Decision**

In any case where the agency issues a final decision (e.g., where the complainant elects to have the agency issue a final decision following completion of the investigation or in a class action case, where the agency issues the decision on the merits of class complaints), the agency must inform the complainant of his/her right to file an appeal with the EEOC and provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K). The agency further must inform the complainant that any such appeal must be filed within 30 days of complainant's receipt of the agency's final decision.

D. **Agency Procedural Decision**

Where the agency issues a decision dismissing a complaint in its entirety pursuant to § 1614.107(a), the agency must inform the complainant of his/her right to file an appeal with the EEOC and provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K). The agency further must inform the complainant that any such appeal must be filed within 30 days of complainant's receipt of the agency's dismissal decision.

E. **Mixed Case Complaints**

The agency must advise the complainant that s/he may appeal a final agency decision on a mixed case complaint by filing the appeal with the **Merit Systems Protection Board (not the EEOC)**. The agency further must inform the complainant that any such appeal must be filed within 30 days of his/her receipt of the agency's decision. For a fuller discussion concerning the processing of mixed cases, see Chapter 4, Section II of this Management Directive.

III. PERSONS WHO MAY APPEAL

The Commission's regulations governing appeals to the Commission are located at subpart D of Part 1614. Section 1614.401 sets out who may appeal to the Commission when an issue of employment discrimination is raised either alone or in connection with a grievance, settlement, or a Merit Systems Protection Board (MSPB) claim.

A. **A Complainant May Appeal**

1. An agency's dismissal of or final action on a complaint.[(3)]

2. An agency's alleged noncompliance with a settlement agreement in accordance with § 1614.504.

B. **An Agency Must Appeal**

1. If it determines not to fully implement an Administrative Judge's decision to dismiss or on the merits of a complaint, in an appeal filed simultaneously with the final order served on the complainant.[(4)]

2. If it determines, in a class complaint, not to fully implement an Administrative Judge's certification decision, in an appeal filed simultaneously with the final order served on the agent.[(5)]

The agency may use the form appended hereto at Appendix O to file its appeal with the Commission.

C. **An Agency May Appeal**

An Administrative Judge's decision to vacate a proposed resolution of a class complaint on the grounds that it is not fair, adequate, and reasonable to the class as a whole. The agency may use the form appended hereto at Appendix O to file its appeal with the Commission

D. **A Class Agent May Appeal**

1. An Administrative Judge's decision accepting or dismissing all or part of a class complaint.[(6)]

2. A final agency decision on the merits of the complaint.

3. An Administrative Judge's decision to vacate a proposed resolution of a class complaint on the grounds that it is not fair, adequate, and reasonable to the class as a whole.[(7)]

4. An agency's alleged noncompliance with a settlement agreement in accordance with § 1614.504.

E. **A Class Member or Petitioner May Appeal**

1. An Administrative Judge's decision finding a proposed resolution fair, adequate, and reasonable to the class as a whole if the class member filed a petition to vacate the resolution; or finding that the petitioner is not a member of the class and did not have standing to challenge the resolution.

2. An Administrative Judge's decision that a proposed resolution is not fair, adequate, and reasonable to the class as a whole.[(8)]

3. An agency's final decision on a claim for individual relief under a class complaint.

4. An agency's alleged noncompliance with a resolution in accordance with § 1614.504.

F. **A Grievant May Appeal**

1. A final decision of the agency.

2. A final decision of the arbitrator.

3. A final decision of the Federal Labor Relations Authority (FLRA) on the grievance.

4. **Exception:** A grievant may not appeal under subpart D of Part 1614, when the dispute initially raised in the negotiated grievance procedure is:

   a. still ongoing in that process,

   b. in arbitration,

   c. before the FLRA,

   d. appealable to the Merit Systems Protection Board (MSPB), or

   e. if 5 U.S.C. § 7121(d) is inapplicable to the involved agency.

IV. FILING THE APPEAL AND RESPONSE

A. How to Appeal

The complainant, agent, grievant, or individual class claimant (hereinafter appellant) must file an appeal by mailing the appeal to:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, D.C. 20013

As an alternative to mailing, appeals may be hand-delivered to:

Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

As a further alternative, appeals may be sent by fax to:

(202) 663-7022

The appellant should use EEOC Form 573, Notice of Appeal/Petition (Appendix K), and should indicate what is being appealed.

The agency also should file an appeal with the Commission by mail or hand-delivery at the above-noted addresses, or by fax at the telephone number noted above. The agency may file its appeal by using the form appended hereto at Appendix O to file its appeal with the Commission and/or by providing the Commission with a copy of the order it sends to the complainant.

Where an agency files an appeal simultaneously with providing the complainant with a final order indicating that it does not intend to fully implement the decision of the Administrative Judge, the complainant need not file a separate appeal as a prerequisite to Commission review of the propriety of the agency's decision not to implement the Administrative Judge's decision. If, however, the complainant believes that other issues presented in his/her complaint and addressed by the Administrative Judge were wrongly decided, or if the complainant believes that the Administrative Judge's decision contained errors, the complainant should file an appeal from the agency's final order in order to ensure that the Commission will address these issues as well. Although the Commission has the right to review all of the issues in a complaint on appeal, it also has the discretion not to do so and may focus only on the issues specifically raised on appeal.

B. **Service of Notice of Appeal**

The appellant shall furnish a copy of the appeal to the agency 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 agency.

The agency must certify to the Commission that it has provided the appellant with a copy of the order in which it advised the appellant that it did not intend to fully implement the Administrative Judge's decision, that it informed the appellant of his/her right to file an appeal of its decision and provided the appellant with information as to how s/he may file an appeal, and that it provided the appellant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix K).

C. **Dismissal of Appeal**

If an appellant files an appeal beyond the applicable time limits, the Commission may dismiss the appeal. The agency should advise the complainant in its dismissal decision or final order that if s/he files his/her appeal beyond the thirty (30) day period set forth in the Commission's regulations, s/he should provide an explanation as to why his/her appeal should be accepted despite its untimeliness. If the appellant cannot explain why his/her untimeliness should be excused in accordance with § 1614.604, the Commission may dismiss the appeal as untimely.

D. **Briefs and Supporting Documents**

The appellant may file a brief or statement in support of his/her appeal with the Office of Federal Operations. The brief or statement must be filed within thirty (30) days of filing the notice of appeal.

The agency may file a brief or statement in support of its final action. The brief or statement must be filed within 20 (twenty) days of its filing of its appeal.

The Office of Federal Operations (OFO) will accept briefs or statements in support of appeals by fax transmittal, provided they are no more than ten (10) pages long.

E. Statements in Opposition to an Appeal

Any statement or brief in opposition to an appeal must be submitted to OFO and served on the opposing party within thirty (30) days of receipt of the statement or brief supporting the appeal. Where both the appellant and the agency file appeals and briefs or statements in support of their appeals, both parties may file statements in opposition to the appeal of the other party. If no brief or statement supporting the appeal is filed, the party opposing the appeal must file its opposition within 60 (sixty) days of the receipt of the appeal. OFO will accept opposition briefs or statements to the appeal by fax transmittal, provided they are no more than 10 pages long.

F. Submission of Case File

The agency must submit the complaint file to OFO within 30 days of notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency. If the complaint was adjudicated by an Administrative Judge, the complaint file must include copies of all documents issued by or served on the Administrative Judge, including, but not limited to, all correspondence to and from the Administrative Judge, orders from the Administrative Judge, and motions and briefs of the parties. Agencies should develop internal procedures that will ensure the prompt submission of complaint files upon a determination not to fully implement an Administrative Judge's decision or notice that a complainant has filed an appeal.

V. APPELLATE PROCEDURE

A. Appeal Will Be Acknowledged

The appeal will be docketed upon receipt in OFO and will be acknowledged in writing.

Where both the agency and the complainant file appeals based on the same complaint following the agency's issuance of an order stating that it does not intend to fully implement the decision of the Administrative Judge, the Commission shall consolidate the appeals under a single EEOC Appeal No. and consider both appeals simultaneously.

B. Where Record is Complete

Where the record is complete, OFO shall issue a decision in accordance with § 1614.405.

C. Where Record Requires Supplementation

While the Commission retains the right to supplement the record on appeal, it is intended that this right will be exercised only in rare instances to avoid a miscarriage of justice.

1. Where the record requires supplementation, OFO may require additional information from one or both of the parties. OFO may supplement the record by an exchange of letters, memoranda, or investigation. Each party shall provide copies of such supplemental information to the other party at the time it is submitted to OFO.

2. Where the record is so incomplete as to require remand to the agency in order to complete the investigation, the Commission shall designate a time period between **thirty (30)** and **ninety (90) days** within which the agency must complete the investigation. During the period of remand, the appeal will be held in abeyance and the complaint will be monitored by OFO. Upon completion of the investigation, the agency must provide the complainant with a copy of its supplemental record and findings and return the completed record to OFO. The complainant may, **within fifteen (15) days** of receipt of the supplemental record, submit a statement concerning the supplemental record to OFO. Upon receipt by OFO, the supplemental record will be included in the appeal file and the appeal will be processed appropriately.

D. **Sanctions**

Absent good cause shown, there is no legitimate basis for the failure of either party to an appeal to comply with the appellate procedures in § 1614.404 or to respond fully and in a timely fashion to a request for information. Accordingly, where either party to an appeal fails without good cause shown to comply with the appellate procedures in § 1614.404 or fails to respond fully and in a timely fashion to requests for information, OFO shall, in appropriate circumstances, impose the following sanctions:

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.

See § 1614.404(c). OFO will aggressively utilize sanctions if parties fail, without good cause shown, to comply with the appellate procedures or to respond fully and timely to information requests.

Before OFO issues sanctions on either party, it will provide the party with a notice to show cause why the sanctions identified in the notice should not be imposed and will further provide the party with an opportunity to cure its noncompliance with a request from OFO or noncompliance with applicable appeals procedures within a reasonable period of time, to be noted in the order. If the party fails to cure its noncompliance, OFO shall impose the sanctions identified in its notice.[(9)]

E. **Appeals Decisions are Final**

An appellate decision issued under § 1614.405(a) is final pursuant to § 1614.407 unless the Commission reconsiders the case. A party may request reconsideration **within thirty (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. See § 1614.405(b); Section VII of this Chapter.

VI. STANDARDS OF REVIEW ON APPEAL

Generally, standards of review delineate the nature of the inquiry on appeal by establishing the extent to which the reviewing body will substitute its own judgment for that of the prior decision-maker. The Commission has essentially employed a de novo standard of review in issuing appeals decisions since it took over the federal sector EEO function from the Civil Service Commission pursuant to Reorganization Plan No. 1 of 1978.

The decision on an appeal from an agency's dismissal or final action shall be based on a de novo review, except that the review of the factual findings in a decision by an Administrative Judge issued pursuant to § 1614.109(i) shall be based on a substantial evidence standard of review. This Section of the Management Directive will ensure a degree of uniformity and predictability in assessing case development and in processing appeals.

A. Review of Final Decisions Issued by the Agency

Appeals of final decisions or actions issued by agencies, duly filed pursuant to § 1614.401(a), (d), or (e) will be considered by the Commission in the following manner:

1. Agency dismissals pursuant to § 1614.107 and final decisions on the merits of individual complaints pursuant to § 1614.110(b) shall be reviewed de novo.

2. The de novo standard requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker. On appeal the Commission will review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and the Commission will issue its decision based on the Commission's own assessment of the record and its interpretation of the law.

3. As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the investigation or during the hearing process. The Commission may request supplementation of the record. See § 1614.404(b).

4. Following de novo review, the Commission will issue decisions on the appeals of decisions issued pursuant to § 1614.110(b) based on a preponderance of the evidence.

5. Where appropriate, and after the requisite analysis, the Commission may adopt the findings and conclusions of the final decision issued by the agency. Such an adoption does not short-cut the review process, but merely serves to expedite communication of the result of the review.

B. **Review of Decisions Issued by Administrative Judges**

The Commission shall consider an appeal by either an agency or a complainant following a final action based on a decision from an Administrative Judge issued pursuant to § 1614.109(g)(4) (decisions without a hearing), § 1614.109(i) (decisions on individual complaints), and § 1614.204(d) and (e) (decisions on class complaints), duly filed pursuant to § 1614.401 et seq., in the following manner:

1. The review of the post-hearing factual findings in an Administrative Judge's decision shall be based on a substantial evidence standard of review. In Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477 (1951), the Supreme Court noted that substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It 'must do more than create a suspicion of the existence of the fact to be established. [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" [Citations omitted.]

2. Applying the substantial evidence review standard, the Commission will give deference to an Administrative Judge's post-hearing factual findings based on evidence in the record. Factual determinations will be distinguished from legal determinations and the Administrative Judge's factual determinations will be given deference. For example, a credibility determination of an Administrative Judge based on the demeanor or tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony of the witness or the testimony of the witness otherwise so lacks in credibility that a reasonable fact finder would not credit it.

3. A finding of discriminatory intent will be treated as a factual finding subject to the substantial evidence review standard. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982).

4. Legal determinations will be reviewed de novo on appeal.

    a. Legal determinations in decisions, whether made by an Administrative Judge or by the agency, will be reviewed using a de novo standard. There will be no presumption that the previous decision-maker was correct in his/her interpretation or application of the law.

    b. An Administrative Judge's decision to issue a decision without a hearing pursuant to § 1614.109(g) will be reviewed de novo. The substantial evidence standard of review will apply only to decisions rendered following a hearing and will not apply to decisions issued on summary judgment or to decisions issued without a hearing with the consent of the parties.

5. As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the hearing. The Commission may request supplementation of the record. See § 1614.404(b).

C. **The Responsibility of the Parties**

1. On appeal, the burden is squarely on the party challenging the Administrative Judge's decision to demonstrate that the Administrative Judge's factual determinations are not supported by substantial evidence. This burden does not exist in a de novo review. The appeals statements of the parties, both supporting and opposing the Administrative Judge's decision, are vital in focusing the inquiry on appeal so that it can be determined whether the Administrative Judge's factual determinations are supported by substantial evidence.

2. 2. In an appropriate case, and in instances where a party fails to submit a statement or brief in support of his/her appeal, the Commission may issue a summary decision. This means that the Commission has conducted the requisite review and analysis of the appropriate issues and will produce a written decision on the issues presented although some holdings may be conclusions without written analysis.

VII. RECONSIDERATION

A. Reconsideration is Not an Appeal

A request for reconsideration is not a second appeal to the Commission. A party may request reconsideration within **thirty (30) days** of receipt of a Commission decision. The Commission, in its discretion, may grant the request 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. § 1614.405(b)(1) & (2).

B. Reconsideration Procedures

1. Requests for reconsideration and any supporting statement or brief must be filed with Office of Federal Operations (OFO) **within thirty (30) days** of receipt of a decision of the Commission or **within twenty (20) days** of receipt of another party's timely request for reconsideration. OFO will accept statements or briefs in support of the request by fax transmittal, provided they are no more than ten (10) pages long. The request must also include proof of service on the opposing party.

2. The requesting party must submit any supporting documents or brief at the time the request is filed. The burden is on the requesting party to make a substantial showing that its request meets one of the two prerequisites for a granting of reconsideration.

3. The opposing party shall have **20 days** from the date of service in which to submit any brief or statement in opposition. Such brief or statement must be served on the requesting party and proof of service must be included with the submission to OFO. OFO will accept briefs or statements in opposition to the request by fax transmittal, provided they are no more than 10 pages long.

4. Failure to provide a proof of service or to submit comments within the prescribed time frame will result in the denial of the request.

C. **Reconsideration Decision is Final**

The Commission's decision on a request for reconsideration is final, and there is no further right by either party to request reconsideration. If the decision remands the complaint for further agency consideration, the parties retain the rights of appeal and reconsideration with respect to any subsequent decision.

VIII. REMEDIES

A. **An Agency Shall Provide Full Relief After Finding Discrimination**

When an agency or the Commission finds that the agency has discriminated against an applicant or employee, the agency shall provide an appropriate remedy as explained in Part 1614, subpart E.

B. **Clear and Convincing Standard Needed to Limit Relief; Duty to Cure Discrimination Remains**

1. When an Administrative Judge, agency, or the Commission finds that discrimination existed, but also finds by clear and convincing evidence that the agency would have made the same employment decision even absent the discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure that it does not recur.

2. Back pay, computed in the manner prescribed by 5 C.F.R. § 550.805, shall be awarded from the date the individual would have entered on duty, assumed the duties of the position at issue, or not removed from the position unless clear and convincing evidence indicates that the applicant or employee would not have been selected for, placed into, or removed from the position even absent discrimination. The complainant has the obligation to mitigate damages.

C. **Interest on Back Pay**

Interest on back pay shall be included in the back pay computation.

D. **Offer of a Position Must Be in Writing**

When the relief ordered includes the offer of a position or a promotion, the offer shall be made to the complainant in writing, providing the complainant fifteen (15) days from receipt of the offer to notify the agency of the acceptance or rejection. Failure to respond within the15-day time limit shall be construed as a declination. Any back pay liability shall cease to accrue with either the actual placement of the complainant into the position in question, or with the date the offer was declined.

E. **Compensatory Damages**

In its decision, the Commission will set out the amount of compensatory damages to be awarded by the respondent agency where the complainant has claimed compensatory damages, the Commission has found intentional discrimination on the merits of the complaint, and the Commission has found that the complainant is entitled to compensatory damages.

F. Attorney's Fees: 29 C.F.R. § 1614.501(e)

Attorney's fees and costs shall be awarded in accordance with § 1614.501(e) and Chapter 11 of this Management Directive.

G. Computation of Service Time

When an individual accepts an offer of employment as a remedy for discrimination, s/he shall be deemed to have performed service for the agency during the period he would have served but for the discrimination for all purposes except for meeting service requirements for completion of a required probationary or trial period.

H. Relief in Class Cases

A discussion of the relief available in class cases is set forth in Chapter 8, Section XI, of this Management Directive.

IX. COMPLIANCE

A. Relief Ordered in a Decision on Appeal

1. Relief ordered in a decision or final action on appeal to the Commission is mandatory and binding on the agency, except as provided below. The relief shall be provided in full not later than sixty (60) days after receipt of the decision unless otherwise ordered in the decision. Where the Commission has determined that an agency is not complying with a prior decision, the Commission shall notify the complainant of his/her right to seek judicial review of the agency's refusal to order the relief or commence a de novo proceeding. See § 1614.503(g).

2. 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's request for reconsideration. § 1614.502(b).

3. 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. § 1614.502(b)(2). 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 at the rate set by the IRS for the underpayment of taxes compounded quarterly from the date of the original appellate decision until payment is made.

4. 4. Where the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, the agency seeks reconsideration, and the agency provides the complainant with temporary or conditional restoration, the agency must notify the complainant that his/her restoration is temporary or conditional at the same time it seeks reconsideration. Failure of the agency to provide notification will result in the dismissal of the agency's request. § 1614.502(b)(3). Similarly, if the agency seeks reconsideration of a decision that included an award of payments of amounts owed, the agency may delay such payment provided it advises the complainant of its delay and further informs the complainant that it will pay interest on any award ultimately determined to be owed the complainant.

B. **Interim Relief**

1. Where an agency appeals from a decision of an Administrative Judge in a case involving 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. § 1614.505(a)(1).

2. An agency may decline to return a complainant to his/her place of employment if it determines that the return or presence of the complainant will be unduly disruptive to the work environment. The agency must provide prospective pay and benefits, however. § 1614.505(a)(5).

3. An agency also may delay the payment of other amounts, exclusive of pay and benefits, when it files an appeal of an Administrative Judge's decision. If an agency declines to make such payments, it will be required to pay interest on these amounts from the date of the decision until payment is made if the outcome of the appeal requires the agency to make the payment. § 1614.505(a)(3).

4. An agency must inform the Commission and the complainant in writing that it will delay making required payments at the same time that it files its appeal that it will delay making the payments of any amounts owed pending resolution of the appeal. If an agency fails to inform either the complainant or the Commission and fails further to make the payments required by the decision being appeal, the Commission will dismiss the appeal. The complainant must file a request for dismissal with the Commission within twenty-five (25) days of the date of service of the agency's appeal and provide the agency with a copy of the request. The agency will have fifteen (15) days from receipt of the complainant's request to file a response. § 1614.505(b).

C. **Sanctions**

1. There is no legitimate basis for delay in complying with a Commission order particularly in those cases where the Commission has ordered relief after a finding of discrimination.

2. The Office of Federal Operations (OFO) will aggressively utilize sanctions if the agency fails to implement the relief.

3. OFO may recommend that the Commission take enforcement action where an agency does not comply with the Commission's order. These actions include those set forth in § 1614.503, such as issuing a show cause notice to the head of the federal agency that is in noncompliance or referring the matter to the Office of Special Counsel or another appropriate agency.

4. OFO may issue a notice to the complainant that the administrative process for securing compliance has been exhausted. Such a notice will inform the complainant of the right to file a civil action for enforcement of the Commission decision and to seek judicial review of the agency's refusal to implement the relief ordered by EEOC, or of the right to commence proceedings pursuant to the appropriate statute.

5. This notice to the complainant may be issued after the Commission determines an agency is not complying with a prior decision. The notice may be issued when an agency fails or refuses to submit a report of compliance required by the Commission. This notice also may be issued upon receipt of a request from the complainant. In determining whether to issue such a notice, OFO will consider such factors as whether the agency is making reasonable efforts to comply with the Commission order or, if the notice is requested by the complainant, whether the complainant has legal representation to secure enforcement in court. After issuing such a notice, the Commission ordinarily will terminate its administrative processing of the complaint. Processing will continue, however, if the Director of OFO determines that continued processing would effectuate the purposes of the laws enforced by the Commission.

D. **Priority Consideration for Cases Remanded for Investigation**

Agencies should give priority to cases remanded for an investigation if this is necessary to comply with the time frames contained in an EEOC order. OFO will issue sanctions against agencies when it determines that agencies are not making reasonable efforts to comply with a Commission order to investigate a complaint.

E. **Remand of Dismissed Claims**

Where a complainant's appeal includes a dismissed claim that the Administrative Judge has affirmed but that OFO reverses either on appeal or on reconsideration, OFO shall remand the dismissed claim to the Administrative Judge for further processing in accordance with § 1614.109. Where a complainant appeals from an agency final decision that includes a dismissed claim that OFO reverses, OFO shall remand the dismissed claim to the agency and include an order directing the agency to process the matter in accordance with § 1614.108, except that OFO may order the completion of the investigation within a time period shorter than 180 days.

F. **Complainant May File an Appeal Alleging a Breach of a Settlement Agreement**

Where a complainant files an appeal alleging a breach of a settlement agreement and the Commission determines that the agreement was breached, the complainant may request enforcement of the settlement agreement or may request reinstatement of the underlying complaint at the point at which the processing of the complaint was stopped.

G. **Complainant May Petition the Commission for Enforcement of a Decision Issued Under the Commission's Appellate Jurisdiction**

A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. § 1614.503(a). The petition shall be submitted to OFO and shall set forth the basis for the complainant's assertion that the agency is not complying with the decision. Subsequent to the docketing of a petition, acknowledgment letters will be sent to both parties identifying the new docket number and advising both parties of the right to submit a brief or to comment on the issue in dispute. The Commission may issue a notice to the head of any federal agency which has failed to comply with a decision to show cause why there is noncompliance. § 1614.503(e). Such notice may request the head of the agency or his/her representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for noncompliance. Id. The petitioner shall be notified of any decision made on the petition.

H. **Complainant May Appeal to the Commission for Enforcement of an Agency Final Action**

A complainant may file an appeal with the Commission for enforcement of an agency's final action through which the agency has accepted the decision of an Administrative Judge. § 1614.504(a) - (c). The complainant first must notify the agency's EEO Director of the agency's alleged noncompliance with the final action within thirty (30) days of when the complainant knew or should have become aware of the agency's noncompliance. If the agency has not responded to the complainant's notice within thirty-five (35) days, the complainant may file an appeal with the Commission. If the agency has responded to the complainant's notice before the complainant files an appeal with the Commission, the complainant must file an appeal within 30 days of his/her receipt of the agency's response.

X. CIVIL ACTIONS

Filing a civil action terminates Commission processing of an appeal. See § 1614.409.

XI. NOTICE REQUIREMENTS

Agencies are required to notify complainants of their rights to appeal to the Commission and to file a civil action within the specified limitations periods. Agencies must also notify complainants of their statutory right to request court appointment of counsel for representation in connection with the filing of civil actions, which arise from Title VII and the Rehabilitation Act. See Hilliard v. Volcker, 659 F.2d 1125 (D.C. Cir. 1981). Therefore, agencies that are subject to 29 C.F.R. Part 1614 are required to include the appropriate language in every decision on

complaints which allege discrimination. Sample language is provided in Chapter 10, Section IV, of this Management Directive.

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1. All time limits stated in this Management Directive are in calendar days. The time limits in Part 1614 are subject to waiver, estoppel, and equitable tolling. 29 C.F.R. § 1614.604(c). For further guidance, see EEOC Compliance Manual, Volume II, Section 605.

2. If service of the Administrative Judge's decision was by mail without the use of certified mail/return receipt, the agency may add five days to the date that the final action is due. This rule, adding five days to the date of service, shall apply in all instances where the party being served has the right to take an action within a period of time following such service, except where the serving party uses certified mail/return receipt and can establish the date of actual receipt.

3. An agency's final action on a complaint may include either 1) a final order from the agency stating whether it will fully implement the decision of the Administrative Judge, see § 1614.110(a), **or** 2) a final agency decision on the merits of the complaint where the complainant requested an immediate final decision pursuant to § 1614.108(f). See § 1614.110(b). The regulations further provide that the agency must file an appeal with the Commission at the same time it serves the final order on the complainant following receipt of a decision from an Administrative Judge where it does not intend to fully implement the decision. The agency's filing of an appeal of an Administrative Judge's decision that it does not intend to fully implement will result in the Commission's review of the agency's decision not to fully implement the Administrative Judge's decision. The complainant need not file a separate appeal to have the Commission review the agency's actions. Where, however, the complainant contends that the Administrative Judge erred either in any rulings made during the pendency of the action or in the decision, the complainant would need to file an appeal from the agency's final order to challenge such errors.

If an agency fails to take any action during the 40-day period, the Administrative Judge's decision would be deemed ratified and the complainant would be entitled to file an appeal of the Administrative Judge's decision as ratified after the expiration of the 40-day period. The agency would not be permitted to cross-appeal or challenge any aspect of the Administrative Judge's decision in this situation.

4. If the agency issues a final order to the complainant stating that it does not intend to fully implement the decision of the Administrative Judge but fails to file an appeal, the agency's final order has no effect on the Administrative Judge's decision. If the agency fails properly to issue a final order and file an appeal simultaneously with the issuance of the order, the Administrative Judge's decision will be deemed ratified by the agency upon the expiration of the agency's 40-day period for accepting or not accepting the Administrative Judge's decision.

5. See note 3, above.

6. Included is a dismissal of a complaint that does not meet the prerequisites of a class complaint as enumerated in § 1614.204(a)(2) where the decision to dismiss informs the class agent that the complaint is being filed as an individual complaint. The Office of Federal Operations, Appellate Review Programs, will provide expedited consideration of class complaints that are dismissed for failure to meet the prerequisites of a class complaint.

7. See § 1614.204(g)(4). A petition to vacate a resolution may be filed with the Administrative Judge asserting that the resolution favors only the class agent or is not fair, adequate, and reasonable to the class as a whole. The petitioner may file an appeal with the Commission if the Administrative Judge finds the resolution fair, adequate, and reasonable to the class as a whole. If the Administrative Judge finds the agreement not fair, adequate, and reasonable, the class agent, class members, and the agency may file an appeal.

8. As noted above, where the Administrative Judge finds the agreement not fair, adequate, and reasonable, the class agent, class members, and the agency may file an appeal. If the Administrative Judge finds that the agreement is fair, adequate, and reasonable, only the petitioner may file an appeal.

9. Sanctions usually will be contained in the decision of the Commission on appeal. If the sanction is contained in a separate order and not the decision on the appeal, the sanction is not immediately reviewable. Once OFO issues a decision on an appeal, the sanctioned party may request reconsideration pursuant to § 1614.405(b). If the sanction is issued while a matter is pending review under § 1614.405(b) or is contained in a § 1614.405(b) decision, there is no administrative review available.

CHAPTER 10

ADMINISTRATIVE APPEALS, CIVIL ACTIONS, AND APPOINTMENT OF COUNSEL

I. INTRODUCTION

Aggrieved persons must be made aware of administrative and civil action time limitations which potentially may bar an aggrieved person's ability to file appeals and civil actions. The time limits specified throughout this Management Directive are stated in **calendar days.**

All parties should be aware that attorney's fees may be awarded at the administrative level and beyond under Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 2000e-16, and under the Rehabilitation Act of 1973, see 29 U.S.C. § 791, but that attorney's fees are not available at the administrative level under the Age Discrimination in Employment Act, 29 U.S.C. § 633a, or the Equal Pay Act, 29 U.S.C. § 206(d).

Finally, the agency must advise complainants that they can request that a U.S. District Court appoint counsel for them after they file suit in that court.

II. ADMINISTRATIVE APPEALS

A. Time Limits for Appeals to the Commission - 29 C.F.R § 1614.402

The following time limits apply for filing an appeal to the Commission:

1. Appeals limits for complainant's appeal of an agency's final action on or dismissal of individual complaints of discrimination: Within thirty (30) days of receipt of the dismissal or final action. See 29 C.F.R. § 1614.401(a).

2. Appeals limits for decisions on class complaints of discrimination under § 1614.402(a):

    a. 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

    b. a class member, a class agent or an agency may appeal a final decision on a petition pursuant to § 1614.204(g)(4).

    See § 1614.401(c). Appeals described in § 1614.401(c) must be filed within thirty (30) days of receipt of the dismissal or final decision.

3. Appeals limits for allegations of noncompliance with a settlement agreement or an Administrative Judge's decision that has not been appealed to the Commission or been the subject of a civil action under § 1614.504.

    a. Within thirty (30) days of the complainant's receipt of an agency's determination on an allegation of noncompliance.

    b. Thirty-five (35) days after the complainant serves the agency with an allegation of noncompliance, if the agency has not issued a determination.

    Notice to the EEO Director of noncompliance is a prerequisite to the filing of an appeal alleging breach of a settlement agreement.[(1)]

4. Appeals limits on final grievance decisions in employment discrimination claims where 5 U.S.C. § 7121(d) applies to the agency: Within 30 days of receipt of the final decision of an agency, an arbitrator, or the Federal Labor Relations Authority when employment discrimination was raised.

5. Limits on petitions for consideration of final decisions of the MSPB on mixed case appeals and mixed case complaints (5 C.F.R. § 1201.151 et seq. and 5 U.S.C. § 7702).[(2)]

    a. Within 30 days of receipt of the final MSPB decision.

b. b. Within 30 days after the decision of a MSPB field office becomes final.

6. Appeals limits for an agency's appeal if the agency's final order following a decision by an Administrative Judge does not fully implement the decision of the Administrative Judge:

   a. Within forty (40) days of receipt of the Administrative Judge's decision.

   b. Under 29 C.F.R. § 1614.401(b), an agency is required to file an appeal to the Commission if the agency's final order does not fully implement the decision of the Administrative Judge. The Commission's use of the word "may" in §1614.401(b) is not inconsistent with this requirement. The agency has the option to appeal if it is not satisfied with the Administrative Judge's decision. If the agency chooses not to appeal, however, it must fully implement the Administrative Judge's decision. In other words, when the agency decides whether it will fully implement the Administrative Judges's decision, it is also deciding whether to appeal; a decision to fully implement means that it is not appealing while a decision not to fully implement means that it is appealing.

B. **Appeals to the Commission - § 1614.504(a)**

In addition to providing for appeals to the Commission by complainants alleging breach of a settlement agreement, § 1614.504(a) provides that a complainant may file an appeal alleging agency noncompliance with a final action through which the agency has accepted the decision of an Administrative Judge. The complainant first must present his/her allegations of noncompliance to the EEO Director. The complainant thereafter may appeal:

1. Within thirty (30) days of the complainant's receipt of an agency's determination on the allegation of noncompliance.

2. Thirty-five (35) days after the complainant serves the agency with the allegation of noncompliance, if the agency has not issued a determination.

C. **Petitions to Consider MSPB Decisions**

A petition to EEOC to consider a final MSPB decision on a mixed case appeal or on the appeal of a final decision on a mixed case complaint, under § 1614.303 and § 1614.304, must be in writing and must include:

1. The name and address of the petitioner and of petitioner's representative (if any);

2. A statement of the reasons why the decision of the MSPB is alleged to be incorrect, only with regard to the issues of discrimination based on race, color, religion, sex, national origin, age, or disability;

3. A copy of the decision issued by the MSPB; and

4. The signature of the petitioner or representative, if any.

D. **Appeal to MSPB on Mixed Case Complaint**

At the time the agency issues its final decision on a mixed case complaint the agency shall advise the complainant of the right to appeal the decision to the MSPB (not the EEOC) within thirty (30) days of receipt of the agency's final decision provided at § 1614.302(d)(3).

III. CIVIL ACTIONS

A. Time Limits for Civil Actions

1. Title VII, Age Discrimination in Employment Act, Rehabilitation Act - § 1614.407.

   A complainant who has filed a non-mixed individual complaint, an agent who has filed a class complaint, or a claimant who has filed a claim for individual relief in a class action complaint may file a civil action in an appropriate United States district court:

   a. Within ninety (90) days of receipt of an agency's final action on an individual complaint, or final decision on a class complaint, if no appeal has been filed.

   b. After 180 days from the date of filing an individual or class complaint if no appeal has been filed and no final action on an individual complaint or no final decision on a class complaint has been issued.

   c. Within 90 days after receipt of the Commission's final decision on appeal.

   d. After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

2. The Equal Pay Act - § 1614.408.

   Regardless of whether the individual complainant pursued any administrative complaint processing, a complainant may file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, within three years of the date of the alleged violation of the Equal Pay Act. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is willful; liquidated damages in an amount equal to lost back wages may also be awarded. The filing of an administrative complaint does not toll the time for filing a civil action.

B. Termination of EEOC Processing

Filing a timely civil action under any of these statutes terminates Commission processing of an appeal. § 1614.409. If a civil action is filed after an appeal has also been filed, the parties are requested to notify the Commission of this event in writing.

C. Mixed Case Complaints

The Civil Rights Act of 1991 did not extend the time limit for filing a civil action in mixed case complaints. See § 1614.310, which sets forth the statutory rights to file a civil action in mixed case complaints.

IV. NOTICE OF COMPLAINANT'S RIGHT TO REQUEST COURT APPOINTMENT OF COUNSEL AND STATEMENT OF RIGHT TO APPEAL

Consistent with the court's holding in Hilliard v. Volcker, 659 F.2d 1125 (D.C. Cir. 1981), it is the Commission's policy to require all federal agencies subject to the Management Directive to inform complainants, in writing, of their statutory right to request court appointment of counsel for representation in connection with the filing of civil actions that arise under Title VII and the Rehabilitation Act.

In Hilliard, the court held that agencies must inform complainants unsuccessful in the administrative process that, in the event they file a civil action, the court has discretionary authority to appoint counsel for them. A litigant who fails to request counsel should not be penalized because an agency has been remiss in its duty to inform the complainant of the court's authority.

Therefore, all federal agencies subject to 29 C.F.R. Part 1614 **must** include the following language in **every** final action or final decision on complaints which allege discrimination on the bases of race, color, religion, sex, national origin, and/or disability:

Within 30 days of your receipt of the final action or final decision (as appropriate), you have the right to appeal this final action or final decision to:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

You also have the right to file a civil action in an appropriate United States district court. If you choose to file a civil action, you may do so

-- within 90 days of receipt of this final action or final decision (as appropriate) if no appeal has been filed, or

-- within 90 days after receipt of the EEOC's final decision on appeal, or

-- after 180 days from the date of filing an appeal with the EEOC if there has been no final decision by the Commission.

You must name the person who is the official agency head or department head as the defendant. Agency or department means the national organization, and not just the local office, facility, or department in which you might work. Do not name just the agency or department. In your case, you must name as the defendant. [The Administrative Judge or agency must supply the name of the proper person.] You must also state the official title of the agency head or department head. Failure to provide the name or official title of the agency head or department head may result in dismissal of your case.

If you decide to file a civil action, under Title VII or under the Rehabilitation Act, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action MUST BE FILED WITHIN NINETY (90) CALENDAR DAYS of the date you receive the final action or final decision (as appropriate) from the agency or the Commission.

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1. As a prerequisite to the agency determination, § 1614.504 provides :

If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance.

2. The Commission will only accept petitions for review of final MSPB decisions.

CHAPTER 11

ATTORNEY'S FEES AND COSTS

I. INTRODUCTION

In federal EEO law, there is a strong presumption that a complainant who prevails in whole or in part on a claim of discrimination is entitled to an award of attorney's fees and costs. More specifically, complainants who prevail on claims alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Rehabilitation Act of 1973, as amended, are presumptively entitled to an award of attorney's fees and costs, unless special circumstances render such an award unjust. 29 C.F.R. 1614.501(e)(1). (Complainants prevailing on claims under the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended, are not entitled to attorney's fees at the administrative level.) Only where a Title VII or Rehabilitation Act complainant rejects an offer of resolution made in accordance with 1614.109(c) and does not obtain more relief than the agency had offered, or in the rarest of other circumstances, might an agency limit or deny an award of fees.

This Chapter of the Management Directive sets forth guidance for use by persons seeking an award of attorney's fees and costs, attempting to determine entitlement to fees and costs, or seeking to limit an award. In the Chapter, the Management Directive defines "prevailing party," discusses a prevailing party's entitlement to fees, notes who may be entitled to an award of fees and what costs may be recoverable, notes how fees are computed, and describes the contents of a

fee petition and the procedure for its submission and determination. This guidance applies only to the federal sector administrative process.

II. DETERMINATION OF PREVAILING PARTY STATUS

A. A "prevailing party," within the meaning of Section 706(k) of Title VII, 42 U.S.C. 2000e-5(k), is a complainant who has succeeded on any significant issue that achieved some of the benefit the complainant sought in filing the complaint. Texas State Teachers Ass'n v. Garland I.S.D., 489 U.S. 782 (1989). The Commission has relied on a two-part test set forth in Miller v. Staats, 706 F.2d 336 (D.C. Cir. 1983), for determining whether a complainant is a prevailing party. Baldwin v. Department of Health & Human Services, EEOC Request No. 05910016 (April 12, 1991). To satisfy the first part of the test, the complainant must have substantially received the relief sought. Id. To satisfy the second part of the test, there must be a determination that the complaint was a catalyst motivating the agency to provide the relief. Id. (citing Miller, 706 F.2d at 341). A purely technical or de minimis success is insufficient to confer "prevailing party" status. Texas State Teachers Ass'n.

B. The touchstone is whether the actual relief on the merits materially alters the legal relationship between the parties by modifying the agency's behavior in a way that directly benefits the complainant. Farrar v. Hobby, 506 U.S. 103 (1992); Bragg v. Department of the Navy, EEOC Appeal No. 01945699 (March 7, 1996). Even an award of nominal monetary damages may be sufficient to meet this standard. Farrar. Monetary relief is not required; non-monetary relief such as reinstatement or a higher performance rating is sufficient. Id.

C. An attorney who represents himself is not entitled to an award of fees. Kay v. Ehrler, 499 U.S. 432 (1991). Neither a non-attorney nor a federal employee (including attorneys) who represents a complainant is entitled to an award of fees. 1614.501(e)(1)(iii).

III. PRESUMPTION OF ENTITLEMENT

A. A prevailing complainant is presumptively entitled to fees and costs unless special circumstances render such an award unjust. 1614.501(e)(1)(i); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1983); Thomas v. Department of State, EEOC Appeal No. 01932717 (June 10, 1994). Special circumstances should be construed narrowly. The following arguments are not sufficient to show special circumstances:

1. the complainant did not need an attorney;
2. the complainant's attorney worked for a public interest organization;
3. the complainant's attorney accepted the case pro bono;
4. the complainant's attorney was paid from some private fee agreement;
5. the complainant was able to pay the costs of the case;
6. the agency acted in good faith;
7. the agency took prompt action in remedying the discrimination;
8. the financial burden of any fee would fall to the taxpayers;
9. the agency has limited funds.

See Blanchard v. Bergeron, 489 U.S. 87 (1989); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221 (10th Cir. 1997); Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986); Fields v. City of Tarpon Springs, 721 F.2d 318 (11th Cir. 1983); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); see also Wise v. Department of Veterans Affairs, EEOC Request No. 05920056 (April 1, 1992).

B. 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 that does not implement the decision, and EEOC upholds the administrative judge's decision on appeal. If the agency agrees to fully implement the Administrative Judge's decision, it cannot be compelled to pay attorney's fees for fees incurred during the pre-complaint process, except that fees may be recovered for a reasonable period of time for services performed in reaching the decision whether to represent the complainant. 1614.501(e)(1)(iv). The agency and the complainant can agree, however, that the agency will pay attorney's fees for pre-complaint process representation. Id.

C. No attorney's fees may be awarded under the Age Discrimination in Employment Act or Equal Pay Act for services performed at the administrative level. Lowenstein v. Baldridge, 38 Fair Empl. Prac. Cas. (BNA) 466 (D.D.C. 1985); 1614.501(e)(1).

IV. AWARDS TO PREVAILING PARTIES IN NEGOTIATED SETTLEMENTS

A. A complainant who prevails through a negotiated settlement is entitled to attorney's fees and costs under the same standards as any other prevailing party. Maher v. Gagne, 448 U.S. 122 (1980); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); EEOC v. Madison Community Unit Sch. Dist. 12, 818 F.2d 577 (7th Cir. 1987); Cerny v. Department of the Navy, EEOC Request No. 05930899 (October 19, 1994). A settlement agreement that fails, however, to preserve the issue of fees and costs will operate as an implicit waiver of fees and costs. Wakefield v. Matthews, 852 F.2d 482 (9th Cir. 1988); Elmore v. Shuler, 787 F.2d 601 (D.C. Cir. 1986). The Commission strongly encourages parties to resolve fee and cost issues by negotiated settlement.[(1)]

B. The Administrative Judge will not review a negotiated fee agreement for fairness or reasonableness, except in class cases. Foster v. Boise-Cascade, Inc., 577 F.2d 335 (5th Cir.) (per curiam), reh'g denied, 581 F.2d 267 (5th Cir. 1978); Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881 (2d Cir. 1983), cert. denied, 466 U.S. 944 (1984). In class cases, the Administrative Judge should review the agreement to ensure that the negotiated fee is fair and reasonable to all parties.

V. AWARDS OF COSTS AND FEES FOR EXPERT AND NON-LAWYER SERVICES

A. A prevailing complainant is entitled to recovery of his/her costs. Costs include those costs authorized by 28 U.S.C. 1920. 1614.501(e)(2)(ii)(C). These include: witness fees; transcript costs; and printing and copying costs. In addition, reasonable out-of-pocket expenses may include all costs incurred by the attorney that are normally charged to a fee-paying client in the normal course of providing representation. Hafiz v. Department of Defense, EEOC Petition No. 04960021 (July 11, 1997). These costs may include such items as mileage, postage, telephone calls, and photocopying.

B. A prevailing complainant is entitled to expert fees as part of recoverable attorney's fees. 42 U.S.C. 1988. The fee is not limited to per diem expenditures, but includes all expenses incurred in connection with the retention of an expert. Id. Recovery is generally limited to testifying experts, but fees may be awarded for non-testifying experts if the complainant can show that the expert's services were reasonably necessary to the case.

C. A prevailing complainant is entitled to compensation for the work of law clerks, paralegals, and law students under the supervision of members of the Bar, at market rates, 1614.501(e)(1)(iii), but not for clerical services. Missouri v. Jenkins, 491 U.S. 274 (1989).

D. Reasonable costs incurred directly by a prevailing complainant (e.g., one who is unrepresented or who is represented by a non-lawyer) are compensable. Hafiz, supra.

Costs must be proved in the same manner as fees are, and the complainant must provide documentation, such as bills or receipts.

E. Witness fees shall be awarded in accordance with 28 U.S.C. 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness. 1614.501(e)(2)(iii).

VI. COMPUTATION OF ATTORNEY'S FEES

A. Attorney's fees will be computed by determining the "lodestar." The "lodestar" is the number of hours reasonably expended multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). By regulation, the Commission uses the same basis for calculating the amount of attorney's fees. 1614.501(e)(2)(ii)(B).

1. All hours reasonably spent in processing the complaint are compensable. 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. 1614.501(e)(1)(iv).
2. Fees for services rendered during the pre-complaint process may be awarded only under the circumstances set forth above in Section III. B. See 1614.501(e)(1)(iv).
3. An attorney is eligible for work performed at the appeals stage for an award of fees, provided the complainant prevails at this stage.
4. The number of hours should not include excessive, redundant, or otherwise unnecessary hours. Hensley, 461 U.S. at 434; Bernard v. Department of Veteran Affairs, EEOC Appeal No. 01966861 (July 17, 1998). The presence of multiple counsel at hearing or deposition may be considered duplicative in certain situations, such as where one or more counsel had little or no participation or where the presence of multiple counsel served to delay or prolong the hearing or deposition. Hodge v. Department of Transportation, EEOC Request No. 05920057 (April 23, 1992). The presence of multiple counsel is not necessarily duplicative, however, and is often justifiable. Time spent on clearly meritless arguments or motions, and time spent on unnecessarily uncooperative or contentious conduct may be deducted. Luciano v. Olsten Corp., 109 F.3d 111 (2d Cir. 1997); Clanton v. Allied Chemical Corp., 416 F. Supp. 39 (E.D. Va. 1976).
5. A reasonable hourly rate is a rate based on "prevailing market rates in the relevant community" for attorneys of similar experience in similar cases. Cooley v. Department of Veterans Affairs, EEOC Request No. 05960748 (July 30, 1998) (quoting Blum v. Stenson, 465 U.S. 886 (1984)). A higher rate for time spent at hearing may be reasonable if trial work would command a higher rate under prevailing community standards. Where multiple attorneys have worked on the case, the rate for each attorney should be determined separately. The limits on hourly rates contained in the Equal Access to Justice Act are not applicable.
6. The applicable rate for fee awards to public interest attorneys is the prevailing hourly rate for the community in general. Hodge v. Department of Transportation, EEOC Request No. 05920057 (April 23, 1992). In Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988), the court held that the prevailing market rate should also be used to determine fee awards to private, for-profit attorneys who represent certain clients at reduced rates, which reflect "non-economic" goals. See also Cooley v. Department of Veterans Administration,

EEOC Request No. 05960748 (July 30, 1998); Hatfield v. Department of the Navy, EEOC Appeal No. 01892909 (December 12, 1989).

7. The hours spent on unsuccessful claims should be excluded in considering the amount of a reasonable fee only where the unsuccessful claims are distinct in all respects from the successful claims. Hensley v. Eckerhart, 461 U.S. 424 (1983).
8. The degree of success is an important factor in calculating an award of attorney's fees. Farrar v. Hobby, 506 U.S. 103 (1992). In determining the degree of success, the relief obtained (including both monetary and equitable relief) should be considered in light of the complainant's goals. City of Riverside v. Rivera, 477 U.S. 561 (1986); Cullins v. Georgia Dep't of Transportation, 29 F.3d 1489 (1994). Where the complainant achieved only limited success, the complainant should receive only the amount of fees that is reasonable in relation to the results obtained. Hensley v. Eckerhart, 461 U.S. 424 (1983); Cerny v. Department of the Navy, EEOC Request No. 05930899 (October 19, 1994). However, a reasonable fee may not be determined by mathematical formula based on monetary relief obtained. Riverside; Cullins. The determination of the degree of success should be made on a case-by-case basis. In many cases, an award of equitable relief only or a small award of monetary damages may reflect a high degree of success. Failure to obtain the maximum damages allowable or a large monetary award generally does not reflect limited success.

B. There is a strong presumption that the lodestar represents the reasonable fee. 1614.501(e)(2)(ii)(B). In limited circumstances, the lodestar figure may be adjusted upward or downward, taking into account the degree of success, the quality of representation, and long delay caused by the agency. The lodestar may be adjusted only under the circumstances described in this sub-part.

1. An award of attorney's fees may be enhanced in cases of exceptional success. The complainant must show that such an enhancement is necessary to determine a reasonable fee. City of Burlington v. Dague, 505 U.S. 557 (1992). Conversely, a fee award may be reduced in cases of limited success. Texas State Teachers Ass'n v. Garland I.S.D., 489 U.S. 782 (1989). However, there is no requirement that fee awards be proportional to the amount of monetary damages awarded. City of Riverside v. Rivera, 477 U.S. 561 (1986).
2. An award of attorney's fees may be enhanced where the quality of representation is exceptional. McKenzie v. Kennickell, 875 F.2d 330 (D.C. Cir. 1989). Conversely, the award of attorney's fees may be reduced where the quality of representation was poor, the attorney's conduct resulted in undue delay or obstruction of the process, or where settlement likely could have been reached much earlier but for the attorney's conduct. Lanasa v. City of New Orleans, 619 F. Supp. 39 (E.D. La. 1985); Barrett v. Kalinowski, 458 F. Supp. 689 (M.D. Pa. 1978).
3. The lodestar may not be enhanced to compensate for the risk of non-payment, risk of losing the case, or difficulty finding counsel. City of Burlington v. Dague, 505 U.S. 557 (1992).
4. A lodestar may be adjusted to compensate for a long delay where the delay is caused by the agency. Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711 (1987).
5. If the Administrative Judge or agency determines that an adjustment to the lodestar is appropriate, the Administrative Judge or agency may calculate the adjustment by either adding or subtracting a lump sum from the lodestar figure or

by adding or subtracting a percentage of the lodestar. The Administrative Judge or agency has discretion to determine the amount of the adjustment. Normally, the adjustment should be no more or less than 75% of the lodestar figure. The Administrative Judge or agency must provide a detailed written explanation of why the adjustment was made, and what factors supported the adjustment. Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331 (1st Cir. 1997).

6. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. Copeland v. Marshall, 641 F.2d 880, 892 (D.C. Cir. 1980); Brown v. Department of Commerce, EEOC Appeal No. 01944999 (May 17, 1996).

C. Where a complainant rejects an offer of resolution and the final decision is not more favorable than the offer, attorney's fees and costs incurred after the expiration of the thirty (30) day acceptance period are not compensable. 1614.109(c)(3). This regulation further provides that an Administrative Judge may award attorney's fees and costs despite the complainant's failure to accept an offer of resolution where "the interests of justice would not be served" by a denial of fees. An example of when fees would be appropriate is 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). A complainant who rejected the offer for that reason, and who obtained less relief than was contained in the offer of resolution, would not be denied attorney's fees in this situation.

VII. CONTENTS OF FEE APPLICATION AND PROCEDURE FOR DETERMINATION

A. When the decision-making authority, that is, the agency, an administrative judge, or the Commission, issues a decision finding discrimination, the decision normally should provide, under the standards set forth above, for the complainant's entitlement to attorney's fees and costs. The complainant's attorney then must submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the agency or administrative judge within thirty (30) days of receipt of the decision and must submit a copy of the statement to the agency. 1614.501(e)(2)(i).[(2)]

A statement of attorney's fees and costs must be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. A verified statement of fees and costs shall include the following:

1. a list of services rendered itemized by date, number of hours, detailed summary of the task, rate, and attorney's name;
2. documentary evidence of reasonableness of hours, such as contemporaneous time records, billing records, or a reasonably accurate substantial reconstruction of time records;
3. documentary evidence of reasonableness of rate, such as an affidavit stating that the requested rate is the attorney's normal billing rate, a detailed affidavit of another attorney in the community familiar with prevailing community rates for attorneys of comparable experience and expertise, a resume, a list of cases handled, or a list of comparable cases where a similar rate was accepted; and
4. documentation of costs.

National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982). A fee award may be reduced for failure to provide adequate documentation. If

seeking an adjustment to the lodestar figure, the fee application shall clearly identify the specific circumstances of the case that support the requested adjustment. Id.

B. The agency may respond to the statement of fees and costs within 30 days of its receipt. If the agency contests the fee request, it must provide equally detailed documentation in support of its arguments. National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982).

C. Discovery into the reasonableness of the hours or rate is permissible, but discouraged. The Administrative Judge has discretion to grant or deny permission to conduct discovery by interrogatory or document request.

D. The Administrative Judge or agency will issue a decision determining the amount of attorney's fees or costs due within 60 days of receipt of the statement and affidavit. 1614.501(e)(2)(ii)(A). The decision should provide a written explanation of any award of fees and costs, including, as appropriate, findings of fact, analysis, and legal conclusions. 1614.501(e)(2)(ii)(A). The decision must include a notice of right to appeal to the EEOC.

E. The Commission encourages the parties to resolve fee and cost issues by negotiated settlement during the 30-day period for filing a fee petition. As noted in section IV. B above, the administrative judge will not review a negotiated fee agreement for fairness or reasonableness, except in class cases.

F. If the administrative judge decides to bifurcate the liability and damages determinations in a case, the decision on liability should provide for entitlement to attorney's fees and the subsequent decision on damages should also include the determination of the amount of the award of fees and costs. The complainant's attorney should be directed to submit the statement of fees and costs within 30 days of receipt of the decision finding liability. The attorney may submit a supplemental petition for fees incurred during the damages phase of the case.

VIII. MISCELLANEOUS ISSUES

A. An Administrative Judge may award interim fees pendente lite where the complainant has prevailed on an important non-procedural allegation of discrimination in the course of the case. Hanrahan v. Hampton, 446 U.S. 754 (1980); Trout v. Garrett, 891 F.2d 332 (D.C. Cir. 1989). However, interim awards should be granted only under special circumstances, such as where a complainant's attorney has invested substantial time and resources into a case over a long period of time.

B. A prevailing complainant is entitled to an award of fees for time spent on a fee claim, including time spent defending the award on appeal. Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir. 1981); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978). However, the Administrative Judge may reduce or eliminate fees for time spent on litigating the fee award where fee claims are exorbitant or the time devoted to preparing a fee claim is excessive. Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980). A reasonableness standard applies. Black v. Department of the Army, EEOC Request No. 05960390 (December 9, 1998).

C. Even absent a finding of discrimination, the administrative judge has authority to impose attorney's fees and costs as an appropriate sanction for refusal to obey discovery or other orders. 1614.109(f)(3)(v). For example, a complainant may be entitled to attorney's fees when the agency fails without good cause shown to respond to discovery requests, Shine v. U.S. Postal Service, EEOC Appeal No. 01972201 (December 12, 1998), or falsifies documents or testimony, Wichy v. Air Force, EEOC Appeal No. 01962972 (September 25, 1998). Fees and costs may be awarded for work associated with efforts to secure

discovery compliance, even when the complainant does not prevail on the merits. Stull v. Department of Justice, EEOC Appeal No. 01942827 (June 15, 1995).

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1. Where the parties enter into a settlement agreement that provides for but does not quantify the amount of attorney's fees and costs, the attorney should submit his/her statement of fees and costs and supporting documentation to the agency for determination of the amount due. The agency should issue a decision on fees within 60 days of receipt of the statement and supporting documentation. See 1614.501(e)(2)(ii)(A). If the complainant disputes the amount awarded, s/he may file an appeal with the Commission.

2. Where the Commission finds discrimination in a case in which the agency takes final action under 1614.110(a), the Commission will remand the case to the Administrative Judge for a determination of attorney's fees. Where the decision on appeal originates from a case handled exclusively by the agency (i.e., where the complainant elected a final agency decision under 1614.110(b)), the Commission will remand the case to the agency for a determination of attorney's fees.

CHAPTER 12

SETTLEMENT AUTHORITY

I. INTRODUCTION

Public policy favors the amicable settlement of disputes. It is clear that this policy in favor of settlement of disputes applies particularly to employment discrimination cases. See, e.g., Sears Roebuck & Co. v. Equal Employment Opportunity Comm., 581 F.2d 941 (D.C. Cir. 1978); Shaw v. Library of Congress, 479 F. Supp. 945 (D.D.C. 1979). Agencies are encouraged to seek resolution of EEO complaints through settlement at any time during the administrative or judicial process. Agencies and EEO complainants should be creative in considering settlement terms. In this chapter, we discuss the authority for settlements of EEO disputes and various options for those settlements.

II. AUTHORITY

Title VII of the Civil Rights Act of 1964 expressly encourages the settlement of employment discrimination disputes without litigation. Courts have consistently encouraged the settlement of discrimination claims and have upheld those settlements when challenged. See, e.g., Occidental

Life Insurance Co. v. Equal Employment Opportunity Comm., 432 U.S. 355 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

The Supreme Court held in Chandler v. Roudebush, 425 U. S. 840 (1976), that federal employees have the same rights under the employment discrimination statutes as private sector employees, thus recognizing the right of federal employees to enter into voluntary settlements with federal agencies. As a result, section 717 of Title VII of the Civil Rights Act of 1964 authorizes agencies to fashion settlements of EEO disputes in resolution of such claims. The same analysis applies to disputes brought under section 501 or 505 of the Rehabilitation Act of 1973, section 15 of the Age Discrimination in Employment Act of 1967 and the Equal Pay Act. See Matter of Albert D. Parker, 64 Comp. Gen. 349 (1985).

Conciliation and voluntary settlement are critical to efforts to eradicate employment discrimination, both in the public and private sectors. The legislative history of section 717 of Title VII is unequivocal in stressing that the broadest latitude exists in determining the appropriate remedy for achieving this end.[(1)]

The Equal Employment Opportunity Commission's strong support for settlement attempts at all stages of the EEO complaint process is codified in 29 C.F.R. § 1614.603, which states, "Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage."[(2)] Settlement agreements entered into voluntarily and knowingly by the parties are binding on the parties. Settlements may not involve waiver of remedies for future violations. Settlements of age discrimination complaints must also comply with the requirements of the Older Workers Benefits Protection Act, 29 U.S.C. § 626, involving waivers of claims. That is, a waiver in settlement of an age discrimination complaint must be knowing and voluntary.[(3)]

The Department of Justice Office of Legal Counsel has affirmed the broad authority of agencies to settle EEO disputes by applying remedies a court could order if the case were to go to trial. In an opinion interpreting the authority of an agency to settle a Title VII class complaint, the Department's Office of Legal Counsel advised that a complainant can obtain in settlement whatever the agency concludes, in light of the facts and recognizing the inherent uncertainty of litigation, that a court could order as relief in that case if it were to go to trial. In the case it reviewed, which alleged discrimination in classification decisions, the Office of Legal Counsel determined that the agency could agree not to reclassify positions of specific employees downward because a court could enjoin reclassification of the positions of those employees if the court found some cognizable danger of recurrent violation. The Office of Legal Counsel found the proposed settlement valid under Title VII even though the Office of Personnel Management contended that the agency's authority to reclassify pursuant to applicable statutes, rules and regulations cannot be superseded by settlement.

The relief provided by an agency to settle an EEO dispute cannot be greater than the relief a court could order if that particular dispute were to go to trial. For example, assume that a GS-9 employee files an EEO complaint alleging discrimination in the denial of a promotion to the level of a GS-11. If the employee has met the time-in-grade and any other job-related requirements, it is appropriate to offer in settlement a retroactive promotion to GS-11. It would not be appropriate, however, to propose a promotion to a GS-12 position for which the employee has not met the requirements. However, if an individual was denied promotion to a GS-11

position and one or more individuals who got the promotion at that time was subsequently promoted to GS-12 based on a career ladder, then it may be appropriate to offer a GS -12 position in settlement of the complaint.

On the other hand, parties are encouraged to be creative in resolving an employment dispute and may agree to settle a complaint for relief that may be different than that which a court might order, as long as it is no greater than what a court might order. For example, an agency may settle a complaint involving the termination of an employee by agreeing to pay for or provide outplacement services to help the former employee find a new job, provided that the cost of the outplacement services does not exceed the total monetary relief a court could order if the complainant were to prevail in the case. In another example, an agency could agree to reassign a complainant to a different supervisor or office in a settlement of a complaint alleging discriminatory failure to promote, where the complainant and the supervisor who made the promotion decision do not get along.

III. TITLE VII AUTHORITY INDEPENDENT OF BACK PAY ACT

The Comptroller General of the United States has considered objections to settlements of EEO disputes in a number of cases. In these decisions, the Comptroller General has confirmed the authority of agencies to enter into settlements of EEO claims and considered ancillary questions about settlements.

In one of these decisions, the Comptroller General affirmed that Title VII contains authority for remedying employment discrimination and this authority is independent of the authority contained in the Back Pay Act to provide back pay only where a finding has been made of "an unwarranted and unjustified personnel action." 5 U.S.C. § 5596. "The connection between Title VII and the Back Pay Act arises only because EEOC has provided in its regulations on remedial actions that when discrimination is found, an award of back pay under Title VII is to be computed in the same manner as under the Back Pay Act regulations." Matter of Equal Employment Opportunity Commission, Informal Settlement of Discrimination Complaints, 62 Comp. Gen. 239, 242 (1983). The authority to award back pay is derived from Title VII; the regulations borrow the formula for calculating the amount of back pay owed from the Back Pay Act.

The independent Title VII authority to settle EEO claims is significant because unlike the Back Pay Act, section 717 of Title VII does not limit awards of back pay to situations where there has been a finding of an unjustified or unwarranted personnel action. Thus, there is no impediment to an award of back pay as part of a settlement without a finding of discrimination.

When evaluating the risk of litigation versus the cost of settlement, agencies should include the cost of a federal retirement annuity in their consideration if an annuity would become payable immediately. This reflects the actual cost to the government of the proposed settlement and should be considered when deciding whether the settlement is in the interest of the government. This calculation may lead an agency to explore alternative solutions such as purchasing a private annuity. The purchase of a private annuity may not be desirable in all instances, but can be considered as a possible alternative. Following are some examples that reflect this calculation:

- An employee at a GS-14, step 10, separates at age 50 with 25 years of service. His only annuity eligibility is for a deferred annuity at age 62. The present value of this deferred

benefit (when the employee is age 50) is $259,992. If, under the terms of a settlement agreement, his separation is changed to an involuntary separation (thus entitling him to an immediate discontinued service retirement benefit), the value of the benefit is $691,546. Thus, the cost to the government resulting from the settlement is the difference, or an additional $431,554.

- An employee at a GS-14, step 10, separates at age 55 with 30 years of service, and therefore is eligible for an immediate annuity. The value of this annuity is $843,800. If, in settlement, she is retroactively promoted to a GS-15, step 10, for three years, the value of her annuity becomes $992,669. This means the settlement costs the government an additional $148,869 in retirement annuities.

- An employee at GS-14, step 10, separates at age 56 with 30 years of service and is eligible for an immediate annuity valued at $825,588. If, pursuant to a settlement, he is retroactively considered a law enforcement officer for 20 years of his federal career, the value of his retirement benefit becomes $1,027,344. Thus, the settlement adds $201,756 to the government's cost of his retirement.

- An employee at a GS-14, step 10, separates at age 50 with 25 years of service. When the employee is 55, the value of her deferred annuity payable at age 62 is $364,653. If the employee is returned to the agency's rolls for five years, enabling her to retire immediately, her retirement benefit has a value of $1,044,361. This settlement would add $679,708 to the government's costs.

- In settlement, the level of a GS-12, step 10, employee is retroactively changed to GS-14, step 10, for a period of three years. Assuming that she is entitled to an immediate annuity, the value of her retirement benefit is raised from $582,132 to $817,945. Thus, the additional cost to the government of this settlement is $235,813.

IV. NO FINDING OF DISCRIMINATION NECESSARY FOR SETTLEMENTS

It has long been the practice in both the private sector and the federal sector for employers and agencies to enter into settlements that contain cash payments where there has been neither a finding of discrimination, either judicially or administratively, nor an admission by the employer or agency of any wrongdoing.

The Comptroller General has supported these settlements, stating "it is beyond question that an agency has the general authority to informally settle a discrimination complaint and to award back pay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination." Matter of Equal Employment Opportunity Commission, Informal Settlement of Discrimination Complaints, 62 Comp. Gen. 239, 242 (1983).

V. CASH AWARDS WITHOUT CORRESPONDING PERSONNEL ACTIONS

Settlements of EEO disputes may contain monetary payments that are independent of any personnel action, provided that the monetary payment does not exceed the amount of back pay, attorney's fees,[(4)] costs or damages[(5)] the employee would have been entitled to in the case if discrimination had been actually found.

The Comptroller General has considered settlements of EEO disputes comprised of monetary payments unconnected to personnel actions on at least two occasions and held that they were authorized and appropriate.

[W]e conclude that Federal agencies have the authority in informally settling discrimination complaints filed under Title VII of the Civil Rights Act of 1964, as amended, to make awards of backpay, attorney's fees or costs, without a corresponding personnel action and without a finding of discrimination, provided that the amount of the award agreed upon must be related to backpay and may not exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made.

Id., 62 Comp. Gen. at 244; Matter of Albert D. Parker, 64 Comp. Gen. 349 (1985).

VI. PERSONNEL ACTIONS WITH LUMP SUM PAYMENTS

An agency may informally settle an EEO complaint by providing a retroactive personnel action, but providing for a lump sum payment in lieu of back pay. As long as the settlement does not exceed the relief to which the complainant would be entitled if a finding of discrimination had been made, it is authorized.

If the settlement provides for a retroactive personnel action, all appropriate contributions to the retirement funds must be made. Settlements may resolve claims actually made and also claims that could be made, provided that the factual predicate for the claims that could be made has occurred. For example, an agency may settle a complainant's formal complaint alleging failure to promote and include relief for the complainant's retaliation claim, which has not been raised, except in the settlement discussions.

Since the Civil Rights Act of 1991 provided for award of compensatory damages in appropriate cases, settlements often provide for one lump sum amount covering monetary relief even when there is a personnel action involved as well. In these cases, parties can agree to an overall figure in the settlement that represents damages, back pay and attorney's fees. That figure can reflect the maximum amount a court could award, and need not be limited to an amount that the agency believes a complainant can prove in court. The settlement agreement does not need to contain a separate breakdown of the lump sum showing individual amounts of back pay, damages and fees. The lump sum agreed to by the parties can be equal to or less than the total amount of back pay, damages and fees that would be awarded if a finding of discrimination were made. A lump sum cannot, under any circumstances, exceed the amount that the agency concludes, in light of the facts and recognizing the inherent uncertainty of litigation, a court could award if a lawsuit were brought.

If a lump sum settlement is intended to award enhanced retirement benefits as part of its terms, the rates of basic pay or grade and step deemed to be received by the complainant, and the periods during which each rate of pay was received, must be specified in the settlement terms. OPM advises that if this specific information is not set out in the settlement document, the terms of the settlement will not be included in the calculation of the complainant's retirement benefits.

VII. IMPLEMENTING SETTLEMENT AGREEMENTS

There may be some instances where a proposed informal settlement appears to be at odds with normal personnel procedure or practice contained in regulations implementing Title 5 of the United States Code or processing guidance of the Office of Personnel Management. Such situations could arise where Office of Personnel Management regulations or guidance foresee personnel actions taken in the normal course of business and do not generally discuss personnel actions taken pursuant to court order or a settlement. Title VII provides authority to enter into settlements of EEO complaints[(6)], and, likewise, Title VII provides authority for agencies to effectuate the terms of those settlements.

Chapter 32, Section 6(b) of OPM's Guide to Processing Personnel Actions describes the procedure for documenting personnel actions taken as the result of a settlement agreement, court order, EEOC or MSPB decision. The purpose of this procedure is to protect the privacy of the employee.

Rather than including personal and irrelevant settlement information on the employee's SF-50, the SF-50 may be processed with the computer code "HAM." ("HAM" is a computer code that prints on the SF-50 a citation to 5 C.F.R. § 250.101.) If an agency's computer system does not permit the use of the citation "HAM," then the SF-50 may cite to 5 C.F.R. § 250.101. This section of the Code of Federal Regulations indicates that the personnel action is processed under an appropriate legal authority.

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1. S. Rep. No. 92-415, 92nd Cong., 1st Sess. 15 (1971), reprinted in Senate Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 424 (Comm. Print 1972).

2. One of the mechanisms for settling complaints is the offer of resolution, which is set forth in 29 C.F.R. § 1614.109(c). Offers of resolution are not, however, the only way to settle complaints; they are a particular method, which, in certain circumstances, can limit an agency's liability for attorney's fees and costs.

3. Section (f)(2) of OWBPA in conjunction with sections (f)(1)(A) through (E) set forth the minimum standards. A settlement agreement is knowing and voluntary when the complainant is given a reasonable period of time to consider the settlement agreement, and the waiver is worded in a reasonably understandable way, specifically refers to rights or claims under the ADEA, and does not waive future rights. In addition, the settlement agreement must provide something of value in exchange for the waiver and must advise the complainant to consult with an attorney before signing the agreement.

4. Attorney's fees are not available during the administrative process of complaints brought under the Age Discrimination in Employment Act or the Equal Pay Act.

5. EEOC has the authority to award compensatory damages during the administrative process. Gibson v. West, 527 U.S. 212 (1999). Agencies, therefore, are authorized to pay compensatory damages in a settlement during the administrative process. Compensatory damages should be calculated separately from back pay, other benefits and fees, and are limited to no more than $300,000.

6. As noted earlier in this chapter, the same analysis applies to EEO complaints filed under the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act of 1963.

Appendix A EEO-MD-110

EEO COUNSELING TECHNIQUES

This attachment can be used to develop or refine counseling techniques when traditional counseling is selected.Below are suggested methods to follow in each step of the counseling process.

EEO counseling consists of the following steps:

1. Preparing for the effort
2. Holding discussions
3. Assessing the situation
4. Determining appropriate resolution technique(s)
5. Using informal resolution technique(s)

In reviewing each step, the Counselor must remember that each informal resolution situation will be different and each Counselor will have his/her own style.There will probably be times when the Counselor will need to make modifications to fit the situation.

A. Meeting with the Aggrieved Person

1. Initial Actions

a. Upon contact by an aggrieved person, the Counselor should record the date and set an appointment for the initial counseling session to discuss the dispute.Before the initial meeting, the Counselor should advise the aggrieved person of his/her right to be accompanied, advised, and represented by a representative at any stage in the complaint process, including the counseling stage.

Also, the Counselor must advise the aggrieved person that the aggrieved person will remain anonymous during counseling unless s/he chooses not to remain anonymous. 1614.105(g).

b. The Counselor should begin the initial meeting with the aggrieved person by explaining the role of the Counselor. The Counselor should then give him/her an opportunity to explain the problem.The Counselor should create an atmosphere which is open to good communication and dialogue.

c. The Counselor should listen attentively in order to get an understanding of the issues involved (the facts as the aggrieved person sees them and the action(s) alleged to be discriminatory).Once the aggrieved person has had the opportunity to relate the dispute fully, the Counselor will be in a better position to define the issue(s) and basis(es) involved, determine if the problem comes under the purview of the anti-discrimination laws, and determine if special procedures apply.

d. The Counselor should find out if the aggrieved person tried to resolve the problem or brought the problem to the agency's attention before seeking counseling and, if so, how.Part of the problem might be that s/he did not use the appropriate mechanisms to handle the problem prior to seeking counseling and, if properly handled, the problem may be easily resolved.

e. The Counselor should ask the aggrieved person whether s/he is willing to meet with agency officials.

f. If the dispute is to be handled under Part 1614, the Counselor should provide the aggrieved person with an overview of informal counseling and the discrimination complaint process under Part 1614, including required notifications and time frames, and answer any questions s/he may have about counseling and the complaint process.

g. If a dispute involves employment discrimination and the aggrieved person chooses to have his/her case processed by the agency, the EEO Counselor must provide counseling, regardless of whether the EEO Counselor believes the case has merit.

2. Disputes Not Involving Discrimination

After listening to and asking questions of the aggrieved person, it may become apparent that s/he is not alleging discrimination on one or more of the bases protected by the anti-discrimination laws.For example, a person may allege that s/he was the target of reprisal for union activities.In the absence of facts to show that the union activities are related to participation in protected EEO activities or related to opposing discriminatory practices, the Counselor can offer other alternatives for redress.

3. Disputes Involving Prohibited Discrimination

When the dispute involves an allegation of discrimination, the Counselor should proceed with the initial counseling session and do the following:

a. Determine whether special procedures apply (i.e., mixed case, negotiated grievance procedure, or age).Also, advise the aggrieved individual how the agency's alternative dispute resolution (ADR) process works in counseling, and of the aggrieved person's option to choose ADR during the counseling stage of the process where the agency agrees to offer ADR in the particular case.

b. Find out as many specifics as possible concerning the individual's reasons for believing discrimination has occurred.

c. Ask the aggrieved person what it would take, in his/her view, to resolve the problem.For example: The aggrieved person alleges race discrimination in an agency's selection of trainees for a computer training program.The Counselor should determine what the aggrieved person will accept to resolve the problem.Suppose the aggrieved person will accept being placed at the top of the agency's waiting list for the next available opening.The Counselor may be able to resolve this dispute by presenting the offer to agency officials as a first step.If the

agency agrees, the Counselor has avoided the need to formulate a resolution strategy.

Learning early on exactly what it is that the aggrieved person is seeking may well provide the basis for a prompt resolution and save everyone time.

d. Make sure the aggrieved person understands that s/he cannot be forced to agree to any proposed solutions or to reach an agreement with the agency and that s/he may file a formal complaint.

e. Conclude the initial EEO counseling session by making sure that the procedural requirements of 29 C.F.R. Part 1614 have been followed and that enough information has been obtained to attempt resolution.

B. Meeting with Agency Officials

1. Explain the aggrieved person's allegations and summarize the reasons or facts s/he gave for believing there has been discrimination.The aggrieved person's name can be used only if anonymity has been waived in writing.

2. Explain or answer any questions about EEO counseling and the federal complaint process.Emphasize that the Counselor's role is to attempt to resolve a dispute.If counseling is successful and resolution is reached, then the need to file a formal complaint is avoided.

3. Give the agency an opportunity to present its position on the matters raised by the aggrieved person and ask agency officials to suggest ways the problem might be resolved.

4. Try to get a sense of the relationship between the aggrieved person and the responding agency official (assuming the aggrieved person did not request anonymity).Is the relationship hostile, perhaps because of past dealings?Is the agency official interested in meeting with the aggrieved person?

5. Make sure that agency officials understand that the agencycannot be forced to enter into an agreement as a result of EEO counseling.

C. Considering Factors in Situation

The Counselor's approach to a given situation will depend on several factors, including the following:

1. Nature of the alleged discriminatory acts and characteristics of the dispute between the parties.

2. Relationship between the aggrieved person and the agency.

3. Whether the Counselor must gather facts beyond those provided by the aggrieved person and the agency.

4. Acceptance by the aggrieved person and the agency of various resolution techniques.

5. The Counselor's willingness to participate in various resolution techniques.

D. Conducting the Inquiry

1. Focus on the Issue(s) and Basis(es)

The Counselor may be required to interview witnesses and review agency records.An inquiry into an EEO dispute begins when the Counselor attempts to gather information following the initial meeting with the aggrieved person. Upon completion of this initial meeting with the aggrieved person, the issue(s) raised should be clearly defined and the basis(es), i.e., race, color, sex (including equal pay), religion, national origin, age, reprisal, and/or disability, identified.The Counselor should keep in mind that the aggrieved person is best able to assist in defining the issue(s) since s/he is an involved party.The Counselor should not conclude an initial interview with the aggrieved party without a clear understanding of the issue(s) and basis(es).The direction the inquiry will take depends upon the Counselor's understanding of the issue(s) and basis(es). If the issue(s) involves a personnel action, it will be necessary to identify the action with as much specificity as possible.For example, if the aggrieved person alleges discrimination in a promotion action, the Counselor must at least determine the position applied for, and whether the aggrieved person was qualified, was on the list of best qualified candidates, was interviewed, and whether a selection was made.This information will help to focus the inquiry so that the Counselor will know what portion of the personnel action is at issue.The Counselor must include dates to ensure that the dispute was raised in a timely manner.For those issues that involve actions other than personnel actions documented by an SF-50, the data gathering approach is the same, but gathering information can be more difficult.

2. Data Gathering from Witnesses and Agency Records

a. Once the issue(s) and basis(es) are defined, the Counselor will need to determine if it is necessary to gather information from sources other than the aggrieved person and agency representative in order to attempt resolution.Potential sources of information could include witnesses and written documentation or records.

If the Counselor determines that witness interviews are necessary, s/he should attempt to interview witnesses who have direct knowledge of a particular situation.The Counselor should limit witness interviews to those persons who can provide information that will help the Counselor better understand the dispute so that resolution can be attempted.Sometimes witness interviews will be the only source of information other than information obtained from the aggrieved person and the agency.Such disputes would include allegations of harassment, either sexual or otherwise, or situations where the issue raised is one of inappropriate conduct or treatment based on a prohibited reason.In addition to interviewing witnesses to obtain information, it may be necessary to review agency records as part of the inquiry into the dispute.

b. Early in the process, the Counselor must determine what documents control the action taken; i.e., whether there is a written agency procedure that must be

followed in certain situations.For example, if the issue involves a promotion action, the Counselor should decide if it is necessary to review the applicable promotion plan and, if so, determine where the plan is maintained.The Counselor may be able to obtain needed information from official personnel folders, supervisors' working files, or wherever the personnel action is maintained, such as a promotion folder.By making inquiries, the EEO Counselor will soon learn where such documents are kept and who maintains the records.

When looking at individual records, the EEO Counselor should keep in mind that his/her role is to achieve informal resolution at the lowest possible level, so the number of records reviewed should be kept to a minimum.Only records of the aggrieved person and of those who allegedly received different, more favorable treatment should be examined in an effort to achieve informal resolution.

The Counselor's first contact may be at the personnel office, but the Counselor may determine other sources for obtaining needed documents.

For situations which EEO Counselors encounter often, the following types of issues will require review of certain records:

(1) Promotion - The promotion folder should include the vacancy announcement, job description, ranking/rating factors, and SF- 171 or applications of at least the aggrieved person and the selectee.The Counselor should notify the personnel office that an EEO inquiry was made concerning a promotion action.The Counselor should request that documents relating to the promotion action, which might ordinarily be destroyed, be retained while the inquiry is pending.

Time and Attendance - Agency regulations/orders on time and attendance, time and attendance records of the aggrieved person and person(s) the aggrieved person is comparing himself/herself to, and how each is treated.

Training -Agency procedures for requesting and recommending training, any forms required, training approved and denied with reason(s).

Appraisal/Rating - Agency regulations/orders on system implementation and administration, elements and standards, performance requirements, rating of the aggrieved person, and ratings prepared by same rating and/or reviewing official of similarly situated employees.

c. In reviewing documentation, the Counselor should copy only documents needed in the discussions that will follow the initial inquiry.Notes should be kept, but the identity of comparators should not be revealed to the aggrieved person.Review of documents should be restricted to those that relate to the issue(s) raised by the aggrieved person and are necessary to resolve the concerns informally at the lowest possible level.

EEO counseling will often involve the use of various techniques to bring about early resolution. For example, it may include:

(1) Holding separate meetings, followed by joint meetings, and then telephone contact to work out details of an agreement;

(2) Holding a joint meeting to set forth the facts as both sides see them, followed by separate meetings with the parties in which the various possibilities for resolution are explored; or

(3) Conducting a conference call or separate telephone calls to the parties during which the dispute is resolved.Care should be taken to protect anonymity unless waived.

E. Developing a Resolution Strategy for 30-Day Counseling Period

1. Joint Meetings (An aggrieved person must agree to a joint meeting)

a. Advantages:

(1) Gives the aggrieved person and the agency an opportunity to present the facts as each sees them and to clarify points of confusion or misunderstanding.

2) Gives the parties an opportunity to explore directly with each other the means for resolving issues underlying the problems.

(3) Helps the parties establish a more constructive working relationship by getting a better understanding of each other's concerns.

(4) Enables the parties to "shake hands" on any agreements reached and to work together to put them in writing.

(5) Allows the Counselor better control of the process, making sure that the parties treat each other as equals and that threats or coercion are not used.

b. Disadvantages:

(1) Risks a blow-up, a hardening of positions, and increased antagonism.

(2) May require the parties to call a recess to explore changes in position with others (e.g., counsel).

(3) May be difficult to schedule.

(4) Can be costly when the parties are in different locations.

c. The Counselor Should Use This Approach When:

(1) The parties' positions are based on different facts or different perceptions of the same facts.

(2) The parties have not had an opportunity to talk with each other or would like a way to reopen discussions.

(3) The Counselor is confident that s/he will be able to control the joint meeting.

2. Separate Meetings

   a. Advantages:

   (1) Allows the Counselor to learn more about the parties' specific concerns and priorities.

   (2) Allows the Counselor to explore alternatives.

   (3) Allows the parties to ask questions they do not want to ask in front of the other party.

   (4) Prevents the possibility of intimidation.

   (5) May be easier to schedule than a joint meeting.

   b. Disadvantages:

   (1) May lead the parties to wonder what the Counselor is saying to the other side.

   (2) Unless the resolution reached through separate meetings is re-stated in a joint meeting or through a conference call, the parties do not have the opportunity to talk with each other to make sure each has the same interpretation of the agreement.It is easier for the parties to blame the Counselor for any future misunderstanding about the resolution.

   (3) May put the Counselor in the position of having to pass messages back and forth between parties.Misunderstanding of the messages may occur in their transmission.

   c. The Counselor Should Use This Approach When:

   (1) The parties' hostility and antagonism can get in the way of substantive discussions.

   (2) The Counselor needs a better understanding of issues and priorities to be able to control a subsequent joint meeting.

   (3) The Counselor needs to help one or both parties be realistic about possible solutions.

   (4) Scheduling is a problem.

   (5) The parties do not have a current relationship.

(6) One party is afraid to meet with the other.

3. Telephone Communication

   a. Advantages:

      (1) May be easier to schedule and quicker than joint meetings.

      (2) Less costly.

      (3) For advantages of conference calls, refer to advantages of joint meetings.

      (4) For advantages of separate calls, refer to advantages of separate meetings.

   b. Disadvantages:

      (1) Impersonal communication resulting from the inability to see how the person is responding to what is said.Harder to gain the rapport needed to explore issues and alternatives.

      (2) For disadvantages of conference calls, refer to disadvantages of joint meetings.Note: it may be easier to hang up the telephone than leave a meeting chaired by an EEO Counselor.

      (3) For disadvantages of separate calls, refer to disadvantages of separate meetings.

   c. The Counselor Should Use This Approach When:

      (1) The parties are in different locales and are not logistically able to meet face to face.

      (2) The issues are comparatively easy to deal with, such as those based on a misunderstanding or incorrect information.

      (3) The Counselor needs more information to determine if counseling is productive, and scheduling a meeting for this purpose is too time-consuming.

4. Attempting Resolution

   When the Counselor has a good grasp of the issues involved and has decided on which EEO counseling technique to use, s/he is ready to attempt resolution. Resolution of an EEO problem means that the aggrieved person and the agency come to terms with a problem and agree on a solution.The Counselor should generally concentrate on resolving individual cases independently but, when appropriate, should ask for assistance from the EEO officer in reaching a solution or correcting a problem.When asking the EEO officer for help, the Counselor should relate what s/he has learned in the inquiry (using the aggrieved person's name only if s/he has given permission) and be prepared to recommend specific action.

There is no set formula for a Counselor to follow in attempting a resolution using the techniques described. The Counselor can attempt resolution by talking with the parties separately or together.The Counselor can talk with them together only if the aggrieved person has given permission; otherwise, they must be spoken with separately.

The following subsections highlight barriers faced when attempting resolution and provide guidance on how to attempt resolution using the EEO counseling techniques of joint meetings, separate meetings, and telephone communication.

5. Barriers to Informal Resolution

In order to resolve an EEO dispute, the agency and the aggrieved person must agree on a solution.However, *only the agency has the authority to resolve an EEO dispute*. Like most situations involving two parties, the Counselor can expect barriers to resolution of EEO disputes.These barriers can be put up by both parties.The challenge is to overcome these barriers and work out a solution.

Sometimes barriers can be overcome by bringing the parties together and having them candidly discuss their attitude toward working out a solution.Other times, barriers can be lessened by helping the parties explore possible outcomes if the dispute is escalated to the formal complaint level.However, the EEO Counselor must recognize that not all barriers can be overcome and attempts at resolution should end when it is apparent that the parties are unable to come to an agreement.

a. Some agency barriers are listed below:

(1) "There was no discrimination, so nothing should be done."

(2) "The decision at issue was correctly made, procedures were correct, nothing should be done for the aggrieved person."

(3) "Resolution will encourage frivolous complaints."

(4) "Subordinates and supervisors will lose respect for a manager who settles rather than fights."

b. Aggrieved persons may also impose barriers to successful resolutions of problems.Such barriers may include:

(1) "Discrimination must be punished."

(2) "My manager must be disciplined."

(3) "My manager must apologize"

(4) "No remedy is sufficient."

(5) "The agency must pay punitive damages."[(1)]

F. Attempting Resolution Using the Joint Meeting Technique

This subsection outlines the steps and activities involved in arranging and conducting joint meetings.The Counselor should make sure the aggrieved person has consented to joint meetings with the agency before arranging a joint meeting.

1. Arranging a Joint EEO Counseling Session

    a. The Counselor should select a location convenient for both parties.

    b. The Counselor should arrange a date and time convenient to both parties, but as soon as possible.

    c. If there does not seem to be a mutually acceptable time for the parties to meet, consider the following questions:

        (1) Is there a suitable and feasible alternative to the joint meeting?If so, the Counselor should use it.

        (2) Does the scheduling problem appear to be real, or does it appear to be a delaying tactic?

        (3) If the scheduling problem appears to be real, how do the parties feel about postponing the meeting?Would a request for an extension make resolution within 30 days impossible?

        (4) If the scheduling problem is more of a delaying tactic and if there is no suitable alternative to a joint meeting, the Counselor should terminate counseling.

    d. The Counselor should determine who will be attending the meeting and let all parties know who will be present.

    e. The Counselor should let the parties know the way the meeting will be run and suggest ways the parties can prepare for the meeting.Each party should understand that the Counselor chairs the meeting but will not take a position on the merits of either party's position or the merits of any proposed solutions made by the parties, and that the Counselor will not make decisions for the parties.

    f. The Counselor should explain that the purpose of the meeting is to provide each party with an opportunity to present the facts and problems as each sees them, to clarify the issues, to establish points of agreement and disagreement, and to explore the possibility of some form of voluntary resolution acceptable to both parties.

    g. The Counselor should suggest that the parties review the facts of the case as they know them and think about what it would take to resolve the problem as they see it.

    h. The Counselor should point out the confidentiality of discussions to both parties.

i. If at the last minute one of the parties calls to cancel, the Counselor should try to determine if the reason is legitimate.If it appears it is, the Counselor should reschedule the meeting as quickly as possible.If rescheduling becomes a problem, an alternative to the joint meeting should be explored. If there is a question about the reason for cancellation or if a party cancels more than one meeting, the Counselor should decide whether informal resolution efforts should be terminated.

2. Conducting a Joint EEO Counseling Session

The Counselor should:

a. Start the meeting on time.

b. Make sure everyone at the table knows everyone else and the reason each person is there.

c. Set the tone and establish ground rules.This is the time to restate the purpose of the meeting, the EEO Counselor's role, and the role and responsibility of the parties.

d. Work with the parties toward resolution.

e. Prepare to handle the unexpected.

(1) If one party does not appear for the meeting, the Counselor should find out why.Discuss the issues involved with the party who does appear.Try to get a sense of what it would take to resolve the dispute.See if the party is interested in continuing EEO counseling and is willing to reschedule the meeting.

(2) If one of the parties is about to break off discussions and leave in a huff, the Counselor should try to calm the parties down and do the following:

- Help both parties save face by getting them to put aside emotions and address the problem.
- Talk to the parties separately, if necessary.
- Not dwell on the incident if discussions resume, but remind the parties that a resolution does not have to be achieved and that it is okay to agree to disagree and to end informal resolution.The Counselor can explain to the parties that a decision to end informal resolution efforts should be a conscious, deliberate one, not one simply made in a moment of anger.

f. If one of the parties accuses the Counselor of bias and asks the Counselor to leave, the Counselor should leave provided the other party is willing to continue the meeting without the Counselor.If the other party is not willing to continue, the meeting should be adjourned.

(1) Later, if appropriate, the Counselor can clarify what happened and try to regain acceptance.

(2) Apologize for any misconceptions that might have been created.

(3) Decide whether to terminate EEO counseling.

3. Ending the Joint EEO Counseling Session

A joint EEO counseling session can end in one of the following ways:

a. With a resolution.The Counselor should explain that s/he will draw up a written agreement to be signed by both parties.

b. Without resolution but with an agreement to keep trying.The Counselor should explain that she will arrange the next meeting.Keep in mind the requirement, pursuant to1614.105(d), to conduct the final interview no later than the 30th day of initial contact by the aggrieved person, unless the aggrieved person and the EEO Director (or his delegatee) agree in writing to postpone the final interview. 1614.105(e).

c. Without a resolution and with a decision to end EEO counseling.The Counselor should explain to the aggrieved person that s/he will set up a final counseling session at which time the Counselor will explain the next steps.

The Counselor should make sure that each party agrees on the way the meeting is ending.

G. Attempting Resolution Using the Separate Meeting Technique

1. What Should Be Done Up Front

Separate EEO counseling sessions with each party can be used in place of or to supplement joint meetings.If separate meetings are to be used, the parties should know:

a. That the Counselor will be meeting separately with the parties.

b. The purpose of the meetings.

c. That what is said in the meetings is intended to be confidential.

d. That the Counselor will not serve as an advisor to the parties or comment directly on the substance of a proposal.

2. Handling Special Situations

The following paragraphs describe situations which may occur in separate meetings and suggest ways each situation might be handled.

a. The agency concedes directly or indirectly that there may be some merit to what the aggrieved person sees as a problem.

(1) The Counselor can explore alternative solutions to the problem, for example, suggesting that the agency consult with appropriate officials to review the dispute and merits with a view towards possible resolution.The Counselor should consult with his/her EEO officer to discuss the dispute before a suggestion is made to the agency to consult with legal counsel.

(2) The Counselor must be careful not to prejudge a case because a formal investigation may not find the situation to be as the parties described it.

(3) The Counselor may assist the agency and the aggrieved person in reaching an acceptable resolution of the dispute.

b. The aggrieved person concedes directly or indirectly that there may be no merit to the allegations.(S/he thinks that there was unfair treatment, but it may not have been in violation of the anti-discrimination laws and regulations.)In such a case, the Counselor can examine alternative solutions to the problem.

c. The parties may ask the Counselor for his/her opinion regarding the strength of the allegation. The Counselor should:

(1) Inform the parties that s/he cannot comment on the strength or weakness of a given situation.

(2) Let the parties judge the strength and weakness of an allegation.

H. Attempting Resolution Using Telephone Communication

The general procedures outlined for joint and separate meetings also apply to telephone conference calls and separate telephone calls to each party.However, at the start of the conversation the Counselor should:

1. Ask if anyone else is on the line.

2. Remind parties that recording the conversation is prohibited.

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1. Under the Civil Rights Act of 1991, punitive damages are not available against a federal employer.

Appendix B EEO-MD-110

EEO COUNSELOR CHECKLIST

At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities. At a minimum those rights include the following:

a. The right to anonymity.

b. The right to representation throughout the complaint process including the counseling stage. The EEO Counselor should make clear to the aggrieved person that the EEO counselor is not an advocate for either the aggrieved person or the agency but acts strictly as a neutral in the EEO process.

c. The right to choose between the agency's alternative dispute resolution (ADR) process or EEO counseling, where the agency agrees to offer ADR in the particular case, and information about each procedure.

d. The possible election requirement between a negotiated grievance procedure and the EEO complaint procedure. See Chapter 4, Section III of this Management Directive.

e. The election requirement in the event that the claim at issue is appealable to the Merit Systems Protection Board (MSPB), i.e., the dispute is a mixed case. See Chapter 4, Section II of this Management Directive.

f. The requirement that the aggrieved person file a complaint within 15 calendar days of receipt of the Counselor's notice of right to file a formal complaint in the event s/he wishes to file a formal complaint at the conclusion of counseling or ADR.

g. The right to file a notice of intent to sue when age is alleged as a basis for discrimination and of the right to file a lawsuit under the ADEA instead of an administrative complaint of age discrimination, pursuant to 1614.201(a).

h. The right to go directly to a court of competent jurisdiction on claims of sex-based wage discrimination under the Equal Pay Act even though such claims are also cognizable under Title VII.[(1)]

i. The right to request a hearing before an EEOC Administrative Judge except in a mixed case after 180 calendar days from the filing of a formal complaint or after completion of the investigation, whichever comes first.

j. The right to an immediate final decision after an investigation by the agency in accordance with 1614.108(f).

k. The right to go to U.S. District Court 180 calendar days after filing a formal complaint or 180 days after filing an appeal.

l. The duty to mitigate damages, e.g., that interim earnings or amounts that could be earned by the individual with reasonable diligence generally must be deducted from an award of back pay.

m. The duty to keep the agency and EEOC informed of his/her current mailing address and to serve copies of appeal papers on the agency.

n. Where counseling is selected, the right to receive in writing within 30 calendar days of the first counseling contact (unless the aggrieved person agrees in writing to an extension) a notice terminating counseling and informing the aggrieved of:

(1) the right to file a formal individual or class complaint within 15 calendar days of receipt of the notice,

(2) the appropriate official with whom to file a formal complaint, and

(3) the complainant's duty to immediately inform the agency if the complainant retains counsel or a representative. Any extension of the counseling period may not exceed an additional sixty (60) calendar days.

o. Where the aggrieved person agrees to participate in an established ADR program, the written notice terminating the counseling period will be issued upon completion of the dispute resolution process or within ninety (90) calendar days of the first contact with the EEO Counselor, whichever is earlier.

p. That only those claims raised at the counseling stage or claims that are like or related to those that were raised may be the subject of a formal complaint, and how to amend a complaint after it has been filed.

q. The identity and address of the EEOC field office to which a request for a hearing must be sent in the event that the aggrieved person files a formal complaint and requests a hearing pursuant to 1614.108(g).

r. The name and address of the agency official to whom the aggrieved person must send a copy of the request for a hearing. The EEO Counselor should advise the aggrieved person of his/her duty to certify to the Administrative Judge that s/he provided the agency with a copy of a request for a hearing. See also Chapter 7, Section I, of this Management Directive.

s. The time frames in the complaint process.

t. The class complaint procedures and the responsibilities of a class agent, if the aggrieved person informs the EEO Counselor that s/he wishes to file a class complaint. See Chapter 8, Section II of this Management Directive.

u. That rejection of an agency's offer of resolution made pursuant to 1614.109(c) may result in the limitation of the agency's payment of attorney's fees or costs. See Chapter 6, Section XIII, of this Management Directive.

v. That the agency must consolidate two or more complaints filed by the same complainant after appropriate notice to the complainant. 1614.606. The EEO Counselor should advise the complainant that when a complaint has been consolidated with one or more earlier complaints, the agency shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days of the filing of the first complaint and that the complainant may

request a hearing before an EEOC Administrative Judge at any time after 180 days of the filing of the first complaint.

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1. Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. Equal Pay Act complaints may be processed administratively under Part 1614. In the alternative, a complainant in the EPA claim may go directly to a court of competent jurisdiction.

Appendix C EEO-MD-110

INFORMATION ON OTHER PROCEDURES

A. Negotiated Grievance Procedures in Collective Bargaining Agreements

1. Aggrieved Person Makes Election.

At the initial counseling session, the Counselor must inform the aggrieved person of the possible applicability of the election of remedies provisions from the Civil Service Reform Act of 1978, 5 U.S.C. 7121(d), concerning negotiated grievance procedures.

a. In order for an aggrieved person to be covered under 7121(d), both of the following conditions must be met:

(1) S/he must be employed in a federal agency subject to the provisions of 7121(d); and

(2) S/he must be covered by a collective bargaining agreement at the agency where the grievance arises. The agreement must also permit allegations of discrimination to be raised in the negotiated grievance procedure.

b. If these conditions are met, then the Counselor must inform the aggrieved person that 7121(d) applies. This means that the aggrieved person must be informed of the requirement that s/he choose one (not both) of the following:

(1) a right to have his/her allegations of discrimination addressed in the negotiated grievance procedure of the collective bargaining agreement with a caution that the opportunity to raise allegations of discrimination will be lost if not raised in the grievance process; or

(2) a right to have his/her allegations of discrimination addressed under 29 C.F.R. Part 1614.

(3) An election to proceed under Part 1614 is indicated only by the filing of a formal complaint, in writing. Use of the pre-complaint process does not constitute an election to proceed under Part 1614.

(4) Allegations of discrimination that are raised by employees not covered by 7121(d) are to be processed as EEO complaints under Part 1614 regardless of whether they are also pursuing a grievance on the same claim (e.g. a five day suspension from work) under a collective bargaining agreement not covered by 7121(d).[(1)]

(a) Under 1614.301(c), the complaint may be held in abeyance while the grievance on the same claim is processed. The abeyance shall terminate without further notice upon the issuance of a final decision on the grievance. The

complaint may be held in abeyance only if the aggrieved is provided written notice of the abeyance.

(b) The notice of abeyance shall state that the abeyance is instituted pursuant to 1614.301(c) and that time limits for processing the complaint contained in 1614.106 and for appeal to the Commission contained in 1614.402 will also be held in abeyance until fifteen (15) days following the issuance of the final decision on the grievance.

(c) If the EEO complaint is held in abeyance, the time limits for processing are tolled until a final decision is rendered in the grievance process.

2. Election is Final

   a. Pursuant to 1614.301, EEO Counselors are required to inform an aggrieved person that once s/he decides which forum s/he will use-the negotiated grievance procedure in a collective bargaining agreement covered by 7121(d) or Part 1614-the aggrieved person is precluded from using the other forum to address the same claim. This preclusion holds regardless of whether discrimination is actually raised. For example, if an aggrieved person elects to have a dispute involving a claim of discrimination addressed under the terms of a collective bargaining agreement by filing a grievance, s/he could not also file a formal complaint of discrimination under Part 1614 on the same claim. This bar to a subsequent formal EEO complaint would hold true even if the complainant failed to raise the discrimination claim in the grievance, as long as the grievance process could have addressed the discrimination allegations.

   b. If an agency issues a decision rejecting the grievance either because the individual is not covered by the collective bargaining agreement, the collective bargaining agreement does not contain a provision that allows allegations of discrimination to be raised in the grievance process, or because the grievance was untimely filed, the agency shall include appeal rights to the EEOC. The case shall be processed as a complaint under Part 1614. 29 C.F.R. 1614.301(b).

3. Appeals

   Unless the grievance is a mixed case, the complainant has the right to appeal a final decision on his/her grievance that contains a discrimination allegation to the Commission as provided in subpart D of 29 C.F.R. Part 1614. If the grievance is a mixed case, the complainant has the right to appeal to MSPB.

B. Mixed Cases

1. MSPB Mixed Case Complaints and Appeals

   In addition to negotiated grievance procedures, an aggrieved person may present an allegation that constitutes a mixed case. A mixed case is one which alleges discrimination in connection with a claim which is also appealable to the MSPB. Two criteria determine whether a case is a mixed case.

a. The employee has standing to file an appeal to the MSPB. The following employees generally have a right to appeal to the MSPB:[(2)]

(1) competitive service employees not serving a probationary period under an initial appointment;

(2) career appointees to the Senior Executive Service;

(3) non-competitive service preference eligible employees with one or more years of current continuous service (e.g., postal employees and attorneys with veterans preference); and,

(4) non-preference eligible excepted service employees with two or more years of current continuous service; and

b. The allegations which form the basis of the discrimination complaint can be appealed to the MSPB. Most MSPB appealable claims fall into one or more of the following six categories:

(1) reduction-in-grade or removal for unacceptable performance;

(2) removal, reduction in grade or pay, suspension for more than fourteen (14) days, or furlough for thirty (30) days or less for such cause as will promote the efficiency of the service;

(3) separation, reduction-in-grade, or furlough for more than 30 days, when the action was effected because of a reduction-in-force;

(4) reduction-in-force action affecting a career SES appointee;

(5) reconsideration decision sustaining a negative determination of competence for General Schedule employees; and

(6) disqualification of an employee or applicant because of a suitability determination.

2. Choosing a Forum

If both criteria for a mixed case are met, the EEO Counselor must notify an aggrieved person that s/he must choose the forum in which s/he wishes to proceed. Where a negotiated grievance can also be filed, the Counselor must explain that the aggrieved person must choose to proceed in one of three forums: the MSPB appeal process, the internal EEO process, or the negotiated grievance process (see Section C.1 above).

a. The EEO Counselor is initially responsible for identifying mixed cases and for advising aggrieved persons of their right to pursue the claim as a mixed case complaint or as a mixed case appeal. The Counselor must identify mixed cases early in order to ensure that aggrieved persons are fully informed of their complaint processing options.

b. An aggrieved person may choose to raise allegations of discrimination in a mixed case either as an appeal to the MSPB ("mixed case appeal") or as a discrimination complaint with the agency under 29 C.F.R. Part 1614 ("mixed case complaint"), but not both. Whichever action the employee files first is considered an election to proceed in that forum.

c. An election to proceed under 29 C.F.R. Part 1614 is made when the aggrieved person files a formal complaint in writing. Use of the EEO counseling process is not an election to proceed under Part 1614.

d. If an employee chooses to file an appeal with the MSPB on a mixed case, the agency must thereafter dismiss any subsequently filed complaint on the same claim, regardless of whether the allegations of discrimination are raised in the appeal to the MSPB. Upon dismissal, the agency must advise the employee to raise the allegations of discrimination in connection with his/her appeal to the MSPB.

e. Where the agency disputes MSPB jurisdiction, (for timeliness, coverage, or any other reason) the agency shall notify the complainant that it is holding the mixed case complaint in abeyance until the MSPB administrative judge rules on the jurisdictional issue. During this period, all time limitations for processing or filing will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC.

   If the MSPB administrative judge finds that MSPB has jurisdiction over the claim, the agency shall dismiss the mixed case complaint under 1614.107(a)(4).

f. If the employee elects to file a mixed case complaint under Part 1614, the agency must process the complaint in a manner substantially similar to any other discrimination complaint, except that the employee is not entitled to a hearing before an EEOC administrative judge. An aggrieved person's appeal rights will be to the MSPB, not the EEOC. Following a final decision from MSPB, an aggrieved person may petition EEOC to consider that decision as it pertains to the allegations of discrimination.

3. Constructive Discharge

A discriminatory constructive discharge occurs when the employer discriminatorily creates working conditions that are so difficult, unpleasant, or intolerable that a reasonable person in the aggrieved person's position would feel compelled to resign. In other words, the aggrieved person is essentially forced to resign under circumstances where the resignation is tantamount to the employer's termination or discharge of the employee.

Similarly, in coerced or involuntary retirement cases, the aggrieved person alleges that s/he was essentially forced to retire, for example, because of age, and the retirement decision was not voluntary. Discriminatory coercion or involuntary retirement allegations are, if supported, tantamount to the employer discharging the employee.

a. MSPB dismissal may "unmix" a case

An employee with MSPB appeal rights who alleges that s/he was constructively discharged or coerced into retirement because of discrimination should be advised to file a mixed case complaint or a mixed case appeal. Where the merits of the claim of discrimination cannot be reached for lack of jurisdiction, the case will be considered no longer mixed.

b. An unmixed appeal-referral to counseling

If an aggrieved person files a mixed case appeal with MSPB and MSPB dismisses the appeal for lack of jurisdiction, the agency shall promptly notify the individual in writing of the right to contact an EEO Counselor within forty-five (45) days of receipt of this notice and to file an EEO complaint, subject to 1614.107. The complaint will be processed as a non-mixed case. See 1614.302(b).

c. A complainant in a case that becomes "unmixed" complaint after completion of the agency's investigation and subject to the notice set forth at 1614.108(f) need not be referred back to EEO counseling and the 1614.108(f) notice should be issued.

d. When a mixed case complaint is "unmixed" by a finding by the MSPB of no jurisdiction, the individual has a right to elect between a hearing before an EEOC administrative judge or an immediate final decision. See 1614.302(b).

C. Age Discrimination in Employment Act Complaints

When a person contacts an EEO Counselor with a complaint of age discrimination, the EEO Counselor must make the person aware of two important options:

1. The person may choose to file a formal complaint under 29 C.F.R. Part 1614; or

2. The person may bypass the administrative complaint process in Part 1614 and file a civil action directly in an appropriate U.S. District Court after first giving the EEOC not less than thirty (30) days notice of intent to file such action. Such notice must be filed within 180 days after the date of the alleged discrimination. The notice may be mailed to EEOC Headquarters at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
P.O. Box 77960
Washington, DC 20013

hand delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
131 M Street, NE

Suite 5SW12G
Washington, DC 20507

or sent by facsimile to:

(202) 663-7022

3. Because it is not clear which statute of limitations applies, an aggrieved person choosing to bypass the administrative process should initiate the civil action as soon as possible after the expiration of the 30-day waiting period that follows the notice of intent to sue.

D. Equal Pay Act

1. When a person contacts an EEO Counselor with a complaint of wage-based sex discrimination, the EEO Counselor should advise the person that s/he may file a civil action in federal district court within two years, or three years if the violation is willful, of the date of the alleged violation, regardless of whether s/he has pursued an administrative action against the agency. The EEO Counselor further should advise the person that the filing of an EEO complaint under Part 1614 alleging a violation of the EPA does not toll the time for filing a civil action.

2. The EEO Counselor further should advise the person that if s/he seeks to allege a violation of Title VII's prohibition against sex discrimination based on the same allegation, s/he must raise the Title VII allegation in the administrative process even if s/he files a civil action on the EPA allegation.

3. The EEO Counselor also should advise the person that notwithstanding the two/three-year limitations period applicable to the current action under the EPA, in order to present an administrative EPA claim, the aggrieved person must contact an EEO Counselor within forty-five (45) days of the date the aggrieved person becomes aware of or reasonably suspects a violation of the EPA.

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1. Employees of the U.S. Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority are not subject to 5 U.S.C. 7121(d).

2. The following employees generally do not have a right to appeal to the MSPB:

1. Probationary employees (see 5 C.F.R. 315.806 for exceptions);

2. Non-appropriated fund activity employees;

3. Excepted service employees with less than two years current continuous service; and

4. Employees serving under a temporary appointment limited to one year or less.

Appendix D EEO-MD-110

(SAMPLE)

NOTICE OF POSSIBLE APPLICABILITY OF 5 U.S.C. 7121(d) TO ALLEGED DISCRIMINATORY ACTION

(29 C.F.R. Part 1614)

Section 1614.105 of the regulations of the U.S. Equal Employment Opportunity Commission requires that upon an aggrieved person's initial contact with the Equal Employment Opportunity (EEO) Counselor, or as soon thereafter as possible, the Counselor shall inform each aggrieved person of the possible applicability of 5 U.S.C. 7121(d) to the alleged discriminatory action which caused the aggrieved person to seek EEO pre-complaint counseling. Further, the EEO Counselor must communicate to the aggrieved person the substance of 29 C.F.R. 1614.301 concerning the election of remedies.

Section 1614.301 (Relationship to Negotiated Grievance Procedure) provides as follows:

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

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

(c) When a person is employed by an agency not subject to 5 U.S.C. 7121(d) and is covered by a negotiated grievance procedure, claims of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in 1614.106 and for appeal to the

Commission contained in 1614.402 may be held in abeyance during processing of a grievance covering the same claim as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

Accordingly, if you are alleging discrimination on the grounds of race, color, religion, sex, national origin, age, disability, and/or reprisal, and if you wish to pursue the claim, you must make an election to pursue it either as a complaint with your agency under 29 C.F.R. Part 1614 or in a negotiated grievance procedure, if the following conditions apply:

1. You are an employee of a federal agency subject to the provisions of 5 U.S.C. 7121(d), and

2. You are covered by a collective bargaining agreement which permits claims of discrimination to be raised in a negotiated grievance procedure.

If those two conditions apply to you, then you must elect one or the other procedure, but not both. An election is made as follows:

1. By filing a grievance in writing (whether or not the grievance has raised a claim of discrimination), or

2. By filing a written formal EEO complaint with your agency under Part 1614. Use of the pre-complaint process (counseling) under 1614.105 does not constitute an election.

If you have further questions concerning the possible applicability of 5 U.S.C. 7121(d) to you, you should immediately contact a representative of the employee organization which has a negotiated agreement with your agency or ask the EEO Counselor for further information and assistance.

Appendix E EEO-MD-110

SAMPLE RESOLUTION LETTER

Aggrieved Person's Name
Aggrieved Person's Address

RE: Resolution of EEO Dispute

Dear [Aggrieved Person]:

This refers to the dispute which you first discussed with me on [DATE] when you alleged discrimination because of [IDENTIFY BASIS OF DISCRIMINATION] when on [IDENTIFY DATE OF ALLEGED DISCRIMINATORY EVENT] the following occurred: [IDENTIFY ALLEGED DISCRIMINATORY EVENT] _____
_____
_____
_____
_____. The purpose of this letter is to set out the terms of the informal resolution.

[INSERT TERMS OF RESOLUTION] _____
_____
_____
_____

If you believe the agency has not complied with the terms of the informal resolution, you may, under 29 C.F.R. § 1614.504, notify the Director of Equal Employment Opportunity in writing within 30 days of the date of the alleged violation, requesting that the terms of the informal agreement be specifically implemented. Alternatively, you may request that the claim be reinstated for further processing from the point processing ceased.

The agency has signed the terms of the resolution as indicated by the signature of the agency official. Your signature and date below will verify your receipt of this letter and will signify your agreement with the terms of the informal resolution of this dispute as set out above. Enclosed is a duplicate copy of this letter. Please date and sign the original and the copy in the spaces provided and return the copy to me for inclusion in the counseling file. I will send a signed copy to the agency. You may keep the original.

Sincerely,

_____ _____ _____

EEO Counselor Agency Official Aggrieved Person

Date: Date: Date:

Appendix F EEO-MD-110

NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT
(Sample)

SUBJECT : Notice of Right To File a Discrimination Complaint

FROM : EEO Counselor DATE:

TO : (Name of Person Counseled)

This is to inform you that because the dispute you brought to my attention has not been resolved to your satisfaction, you are now entitled to file an individual or class-based discrimination complaint based on race, color, religion, sex, national origin, physical or mental disability, age, and/or reprisal. If you file a complaint, it must be in writing, signed, and filed within fifteen (15) calendar days after receipt of this notice, with any of the following officials authorized to receive discrimination complaints:

- Field Installation Head
  (Provide name and address)

- Agency Director of Equal Employment Opportunity
  (Provide name and address)

- Agency Head
  (Provide name, title, and address)

- Other Official(s) as designated by the Agency, for example, an agency Equal Employment Opportunity Officer, the Hispanic Program Coordinator, the Disability Program Coordinator, or the Federal Women's Program Coordinator
  [Provide name(s) and address(es)]

A complaint shall be deemed timely if it is received or postmarked before the expiration of the 15-day filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the filing period.

If you file your complaint with one of the officials listed above (other than the EEO officer), it will be sent to the activity EEO officer for processing. Therefore, if you choose to file your complaint with any of the other officials listed above, be sure to provide a copy of your complaint to the EEO officer to ensure prompt processing of your complaint.

The complaint must be specific and contain only those issues either specifically discussed with me or issues that are like or related to the issues that you discussed with me. It must also state whether you have filed a grievance under a negotiated grievance procedure or an appeal to the Merit Systems Protection Board on the same claims.

If you retain an attorney or any other person to represent you, you or your representative must immediately notify the EEO officer, in writing. You and/or your representative will receive a written acknowledgment of your discrimination complaint from the appropriate agency official.

If you file a complaint, you should name _____ (The Counselor should provide the name and title of the agency head or department head. Agency or department means the national organization, and not just the local office, facility or department in which the aggrieved person might work.)

_____
(Signature Block)
EEO Counselor

NOTE:

A copy of this notice must be provided to the EEO officer with the EEO Counselor's report and will be made a part of the complaint file.

Appendix G EEO-MD-110

EEO COUNSELOR'S REPORT
29 C.F.R. § 1614.105

I. REQUIRED ELEMENTS

A. AGGRIEVED PERSON

Name:

Job Title/Series/Grade:_____

Place of Employment:_____

Work Phone No:_____ Home Phone No:_____

Home Address: _____
_____
_____

B. CHRONOLOGY OF EEO COUNSELING

Date of Initial Contact:

Date of Initial Interview:_____

Date of Alleged Discriminatory Event:_____

45th Day After Event:_____

Reason for delayed contact beyond 45 days, if applicable:
_____
_____
_____

Date Counseling Report Requested:_____

Date Counseling Report Submitted:_____

C. BASIS(ES) FOR ALLEGED DISCRIMINATION

1) [ ] Race (Specify)_____
2) [ ] Color (Specify)_____
3) [ ] National Origin (Specify)_____
4) [ ] Sex (Specify)_____
5) [ ] Age (Date of Birth)_____

6) [ ] Mental Disability (Specify)_____
7) [ ] Physical Disability (Specify)_____
8) [ ] Religion (Specify)_____
9) [ ] Reprisal (Identify earlier event and/or opposed practice, give date)_____

D. PRECISE DESCRIPTION OF THE ISSUE(S) COUNSELED

E. REMEDY REQUESTED

F. EEO COUNSELOR'S CHECKLIST - THE COUNSELOR ADVISED THE AGGRIEVED PERSON IN WRITING OF THE RIGHTS AND RESPONSIBILITIES CONTAINED IN THE EEO COUNSELOR CHECKLIST.

II. SUMMARY OF INFORMAL RESOLUTION ATTEMPTS

A. IF THE COUNSELOR ATTEMPTED RESOLUTION

1. Personal Contacts

2. Documents Reviewed

3. Summary of Informal Resolution Attempt

B. IF AGGRIEVED OPTED FOR ADR, COUNSELOR'S STATEMENT THAT THE ADR PROCESS WAS FULLY EXPLAINED TO THE AGGRIEVED INDIVIDUAL/SUMMARY OF INFORMATION GIVEN TO THE AGGRIEVED INDIVIDUAL AND THE AGENCY BY THE COUNSELOR

_____ _____
Name of EEO Counselor Telephone Number

_____ _____
Signature of Counselor Office Address

_____
Date

Appendix H EEO-MD-110

EEOC NOTICE
Number 915.002
Date 7/17/95

1 . SUBJECT: Equal Employment Opportunity Commission's Alternative Dispute Resolution Policy Statement

2. PURPOSE: This policy statement sets out the Commission's policy on Alternative Dispute Resolution

3. EFFECTIVE DATE: Upon receipt

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix 6, Attachment 4, a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Legal Services, Office of Legal Counsel

6. INSTRUCTIONS: File in Volume 11 of the Compliance Manual.

7. SUBJECT MATTER.

I. **Introduction**

The Equal Employment Opportunity Commission (EEOC) is firmly committed to using alternative methods for resolving disputes in all of its activities, where appropriate and feasible. Used properly in appropriate circumstances, alternative dispute resolution (ADR) can provide faster, less expensive and contentious, and more productive results in eliminating workplace discrimination, as well as in Commission operations.

The use of ADR is fully consistent with EEOC's mission as a law enforcement agency. It is squarely based in the statutes creating and enforced by the Commission Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act and the Americans with Disabilities Act. The use of ADR is also predicated on the Administrative Dispute Resolution Act (ADRA), pursuant to which this policy is being adopted, Executive Orders 12778 and 12871, and the National Performance Review. Finally, the Commission's 1995 ADR Task Force Report made a strong and persuasive case for the use of ADR programs.

II. **Core Principles Governing Commission ADR Programs**

Any use of ADR under Commission auspices will be governed by certain core principles. Above all, any Commission ADR program must further the agency's mission. It must also be fair, which requires voluntariness, neutrality, confidentiality, and enforceability. Recognition of the differing circumstances that obtain in the Commission's District Offices suggests that ADR be flexible enough to respond to varied and changing priorities and caseloads. In addition, any EEOC ADR programs must have adequate training and evaluation components.

A. **Furthering the Commission's Mission**

First and foremost, an effective ADR program must further the EEOC's dual mission: vigorously enforcing federal laws prohibiting employment discrimination and resolving employment disputes. ADR will complement current systems in operation by facilitating early resolution of disputes where agreement is possible, thereby freeing up resources for identifying, investigating, settling, conciliating or litigating other matters.[(1)] These improvements in our enforcement efforts should, in turn, enhance the Commission's credibility as a law enforcement agency, encourage victims to come forward, and make the process of filing a charge less daunting. However, as a law enforcement agency, the Commission will vigorously enforce the statutes over which it has jurisdiction and will not hesitate to seek appropriate legal remedies through litigation when warranted.[(2)]

B. **Fairness**

Any ADR enterprise developed and implemented by the EEOC must be fair to the participants. both in perception and reality. Fairness should be manifested throughout all Commission ADR proceedings by incorporating each of the core principles identified in this policy as well as by providing as much information about the ADR proceeding to the parties as soon as possible. Fairness requires that the Commission provide the opportunity for assistance during the proceeding to any party who is not represented. Fairness also requires that any Commission-sponsored program include the following elements:

1. Voluntariness

   ADR programs developed by the Commission will be voluntary for the parties because the unique importance of the laws against employment discrimination requires that a federal forum always be available to an aggrieved individual. The Commission believes that parties must knowingly, willingly and voluntarily enter into an ADR proceeding. Likewise, the parties have the right to voluntarily opt out of a proceeding at any point prior to resolution for any reason, including the exercise of their right to file a lawsuit in federal district court. In no circumstances will a party be coerced into accepting the other party's offer to resolve a dispute. If the parties reach an agreement, the parties will be allowed to settle as long as the proposed agreement is lawful, enforceable, and both parties are informed of their rights and remedies under the applicable statutes.

2. Neutrality

   Commission ADR proceedings will rely on a neutral third party to facilitate resolution of the dispute. ADR proceedings are most successful where a neutral or impartial third party, with no vested interest in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. Neutrality will help maintain the integrity and effectiveness of the ADR program.

   The facilitator's duty to the parties is to be neutral, honest, and to act in good faith. Those who act as neutrals under EEOC auspices should possess a thorough

knowledge of EEO law, and must be trained in mediation theory and techniques.[(3)]

3. Confidentiality

Maintaining confidentiality is an important component of any successful ADR program. Subject to the limited exceptions imposed by statute or regulation, confidentiality in any ADR proceeding must be maintained by the parties, EEOC employees who are involved in the ADR proceeding, and any outside neutral or other ADR staff. This will enable parties to ADR proceedings to be forthcoming and candid, without fear that frank statements may later be used against them. To accomplish this purpose, the Commission will be guided by the nondisclosure provisions of Title VII and the confidentiality provisions of ADRA which impose limitations on the disclosure of information. In order to encourage participation in a Commission sponsored ADR program, the Commission will include confidentiality provisions in all of its ADR programs or projects, and will notify the parties to the dispute of the protection offered by confidentiality provisions.

In order to ensure confidentiality, those who serve as neutrals for the Commission should be precluded from performing any investigatory or enforcement function related to charges with which they may have have been involved. The dispute resolution process must be insulated from the investigative and compliance process.

4. Enforceability

Any agreement reached during an ADR proceeding must be enforceable. An allegation that an ADR settlement agreement has been breached should be brought to the attention of the EEOC official responsible for that program function. The Commission will review and investigate the allegation and determine whether it will utilize its authority and resources to seek enforcement of the agreement.

C. **Flexibility**

The ADR program must be flexible enough to respond to the variety of challenges the Commission and its individual offices face. The Commission recognizes that there cannot be one ADR model which will work for all of its programs or all of its offices within the same program. Within the parameters set by the Commission, Commission staff should be able to adapt ADR techniques to fit specific program needs. Because offices operate in different cultures and milieus, and because the nature of the workload varies from office to office, Commission offices will need maximum flexibility in implementing an ADR program.

D. **Training and Evaluation**

Commission-sponsored ADR programs should include training and evaluation components. A successful ADR scheme requires that EEOC provide appropriate training and education on ADR to its own employees, the public, persons protected under the

applicable laws, employers and neutrals. In addition, an evaluation component is essential to any ADR program in order to determine whether the program has achieved its goals, and how the program might be improved to be more efficient and achieve better results.

III. CONCLUSION

Through this Policy Statement, the Commission affirms its commitment to the use of ADR techniques throughout its programs, where appropriate and feasible, including charge processing, litigation, federal sector EEO complaint processing, internal EEO complaint processing, labor-management relations and contract administration.

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1. These procedures will continue to be governed by current standards except as specifically discussed in this document.

2. The Commission remains cognizant that there are instances in which ADR may not be appropriate or feasible, such as in cases in which there is a need to establish policies or precedents, where resolution of a dispute would have a significant effect on non-parties, where a full public record is important, where the agency must maintain continuing jurisdiction over a matter, or where it would otherwise be inappropriate.

3. The Commission will accept as sufficient such training as is generally recognized in the dispute resolution profession.

Appendix I EEO-MD-110

APPEALABLE ACTIONS -- 5 C.F.R.

The Counselor should determine whether the individual has appeal rights for the appealable actions listed below.

Part	Action
302	Denial of restoration after recovery from compensable injury of an excepted service employee
315	Termination during probation (under limited circumstances)
317	Certain involuntary reassignments or demotions connected with conversions to Senior Executive Service
330	Improper application of re-employment priority rights
351	Reduction-in-force
352	Denial of re-employment rights under various circumstances
353	Denial of restoration following military duty; recovery of competitive service employees from certain injuries
432	Reduction-in-grade and removal based on unacceptable performance
531	Denial of within-grade increases
731	Adverse suitability determinations
752	Adverse actions by agencies -- Removal -- Suspensions for more than 14 days -- Reduction-in-grade (demotion) -- Furloughs for 30 days or less
831	All adverse retirement decisions of OPM except termination of annuity payments
930	Adverse actions involving administrative law judges

Appendix J EEO-MD-110

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DISTRICT OFFICES AND GEOGRAPHIC JURISDICTIONS

Atlanta District Office
EEOC
100 Alabama Street, S.W.
Suite 4R30
Atlanta, Georgia 30303-8704

Commercial No:	404/562-6930
Hearings Unit Phone No:	404/562-6928
Hearings Fax No:	404/562-6909
TTY No:	404/562-6801

Geographic Jurisdiction: The **State of Georgia** and **State of South Carolina counties of** Allendale, Bamberg, Barnwell, Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Hampton, Jasper, and Williamsburg.

Baltimore Field Office
EEOC
City Cresent Building
10 South Howard Street, 3rd Floor
Baltimore, Maryland 21201-2529

Commercial No:	410/962-3932
Hearings Unit Phone No:	410/962-7711
Hearings Fax No:	410/962-6633
TTY No:	410/962-6065

Geographic Jurisdiction: The State of Maryland.

Birmingham District Office
EEOC
Ridge Park Place, Suite 2000
1130 22nd St., South
Birmingham, Alabama 35205-2870

Commercial No:	205/212-2100
Hearings Unit Phone No:	205/212-2139
Hearings Fax No:	205/212-2105
TTY No:	205/212-2112

Geographic Jurisdiction: **The State of Alabama**; the **State of Florida counties of** Bay, Calhoun, Escambia, Franklin, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, and Washington; and the State of **Mississippi except for the counties of** Alcorn, Benton, Coahoma, Desoto, Itawamba, Lafayette, Lee, Marshall, Panola, Pontotoc, Prentiss, Quitman, Tate, Tippah, Tishomingo Tunica, and Union *which should be **sent** to the **Memphis District office.***

Charlotte District Office
EEOC
129 W. Trade St., Suite 400
Charlotte, North Carolina 28202-5306

Commercial No:	704/344-6682
Hearings Unit Phone No:	704/344-6861
Hearings Fax No:	704/344-6731
TTY No:	704/344-6684

Geographic Jurisdiction: **The States of North Carolina and South Carolina except for the counties of** Allendale, Bamberg, Barnwell, Beaufort, Berkeley,

Charleston, Colleton, Dorchester, Georgetown, Hampton, Jasper, and Williamsburg *which should be **sent** to the **Atlanta District Office;*** **The State of Virginia except for the counties of** Arlington, Clarke, Fairfax, Fauquier, Frederick, Loudoun, Prince William, Stafford, Warren, and the State of Virginia Independent Cities of Alexandria, Fairfax City, Falls Church, Manassas, Manassas Park, Winchester, Quantico, Dumfries, and Occoquan *which should be **sent** to the **Washington Field Office.***

Chicago District Office
EEOC
500 West Madison Street, Suite 2000
Chicago, Illinois 60661-2506

Commercial No:	312/353-2713
Hearings Unit Phone No:	312/886-0193
Hearings Fax No:	312/886-5391
TTY No:	312/353-2421

Geographic Jurisdiction: **The State of Illinois except for the counties of** Alexander, Bond, Calhoun, Clinton, Greene, Jackson, Jersey, Macoupin, Madison, Monroe, Perry, Pulaski, Randolph, St. Clair, Union, and Washington *which should be **sent** to the **St. Louis District Office.***

Cleveland Field Office
EEOC
1240 E. Ninth Street, Room 3001
Cleveland, Ohio 44199

Commercial No:	216/522-2001
Hearings Unit Phone No:	216/522-7326
Hearings Fax No:	216/522-7430
TTY No:	216/522-8441

Geographic Jurisdiction: **The State of Ohio counties of** Ashland, Ashtabula, Athens, Belmont, Carroll, Columbiana, Coshocton, Crawford, Cuyahoga, Delaware, Erie, Fairfield, Franklin, Geauga, Guernsey, Harrison, Hocking, Holmes, Huron, Jefferson, Knox, Lake, Licking, Lorain, Mahoning, Marion, Medina, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Portage, Richland, Stark, Summit, Trumbull, Tuscarawas, Vinton, Washington and Wayne.

Dallas District Office
EEOC
207 S. Houston Street, 3rd Floor
Dallas, Texas 75202-4726

Commercial No:	214/253-2700
Hearings Unit Phone No:	214/253-2732
Hearings Fax No:	214/253-2739
TTY No:	214/253-2710

Geographic Jurisdiction: **The State of Texas counties of** Anderson, Andrews, Archer, Armstrong, Bailey, Baylor, Bell, Borden, Bosque, Bowie, Brewster, Briscoe, Brown, Callahan, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coleman, Collin, Collingsworth, Comanche, Cooke, Coryell, Cottle, Crane, Crosby, Culberson, Dallam, Dallas, Dawson, Deaf Smith, Delta, Denton, Dickens, Donley, Eastland, Ector, Ellis, El Paso, Erath, Falls, Fannin, Fisher, Floyd, Foard, Franklin, Freestone, Gaines, Garza, Glasscock, Gray, Grayson, Gregg, Hale, Hall, Hamilton, Hansford, Hardeman, Harrison, Hartley, Haskell, Hemphill, Henderson, Hill, Hockley, Hood, Hopkins, Howard, Hudspeth, Hunt,

Hutchinson, Jack, Jeff Davis, Johnson, Jones, Kaufman, Kent, King, Knox, Lamar, Lampasas, Lamb, Leon, Limestone, Lipscomb, Loving, Lubbock, Lynn, McLennan, Marion, Martin, Midland, Milam, Mills, Mitchell, Montague, Moore, Morris, Motley, Navarro, Nolan, Ochiltree, Oldham, Palo Pinto, Panola, Parker, Parmer, Pecos, Potter, Presidio, Rains, Randall, Reagan, Red River, Reeves, Roberts, Robertson, Rockwall, Runnels, Rusk, Scurry, Shackelford, Sherman, Smith, Somervell, Stephens, Sterling, Stonewall, Swisher, Tarrant, Taylor, Terry, Throckmorton, Titus, Upshur, Upton, Van Zandt, Ward, Wheeler, Wichita, Wilbarger, Winkler, Wise, Wood, Yoakum, and Young; and the **State of New Mexico counties of** Dona Ana, Eddy, Grant, Hidalgo, Lea, Luna, Otero, and Sierra.

Denver Field Office
EEOC
303 E. 17th Avenue, Suite 510
Denver, Colorado 80203-1258

Commercial No: 303/866-1300
Hearings Unit Phone No: 303/866-1356
Hearings Fax No: 303/866-1085
TTY No: 303-866-1950

Geographic Jurisdiction: The States of Colorado and Wyoming.

Detroit Field Office
EEOC
477 Michigan Avenue, Room 865
Detroit, Michigan 48226-9704

Commercial No: 313/226-4600
Hearings Unit Phone No: 313/226-4641
Hearings Fax No: 313/226-4610
TTY No: 313-226-7599

Geographic Jurisdiction: **The State of Michigan and the State of Ohio counties of** Allen, Defiance, Fulton, Hancock, Henry, Lucas, Ottawa, Paulding, Putnam, Sandusky, Seneca, Van Wert, Williams, Wood, and Wyandot.

Houston District Office
EEOC
1919 Smith Street, 7th Floor
Houston, Texas 77002-8094

Commercial No: 713/209-3320
Hearings Unit Phone No: 713/209-3383
Hearings Fax No: 713-209-3381
TTY No: 713-209-3439

Geographic Jurisdiction: **The State of Texas counties of** Angelina, Austin, Brazoria, Brazos, Calhoun, Chambers, Colorado, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Lavaca, Liberty, Madison, Matagorda, Montgomery, Nacogdoches, Newton, Orange, Polk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler, Victoria, Walker, Waller, Washington, and Wharton.

Indianapolis District Office
EEOC
101 West Ohio Street, Suite 1900
Indianapolis, Indiana 46204-4203

Commercial No: 317/226-7212
Hearings Unit Phone No: 317/226-6430
Hearings Fax No: 317-226-5571
TTY No: 317-226-5162

Geographic Jurisdiction: **The States of Indiana, Kentucky; the State of Ohio counties of** Adams, Auglaize, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Fayette, Gallia, Greene, Hamilton, Hardin, Highland, Jackson, Lawrence, Logan, Madison, Mercer, Miami, Montgomery, Pickaway, Pike, Preble, Ross, Scioto, Shelby, Union, and Warren; and **the State of Kentucky counties of** Bath, Boone, Bourbon, Boyd, Bracken, Breathitt, Campbell, Carter, Elliott, Fleming, Floyd, Gallatin, Grant, Greenup, Harrison, Johnson, Kenton, Knott, Lawrence, Letcher, Lewis, Magoffin, Martin, Mason, Menifee, Montgomery, Morgan, Nicholas, Pendleton, Perry, Pike, Powell, Robertson, Rowan and Wolfe.

Los Angeles District Office
EEOC
255 E. Temple, 4th Floor
Los Angeles, California 90012-3334

Commercial No:	213/894-1000
Hearings Unit Phone No:	213/894-1064
Hearings Fax No:	213-894-5482
TTY No:	213-894-1121

Geographic Jurisdiction: **The State of California counties of** Fresno, Imperial, Inyo, Kern, Kings, Los Angeles, Madera, Mariposa, Merced, Mono, Orange, Riverside, San Benito, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Tulare, and Ventura; **The State of Hawaii and the State of Nevada counties** of Clark, Esmeralda, Lincoln, Mineral, and Nye; **The U.S. Possessions of American Samoa, Guam, Northern Mariana Islands, and Wake Island.**

Memphis District Office
EEOC
1407 Union Avenue, Suite 621
Memphis, Tennessee 38104-3629

Commercial No:	901/544-0115
Hearings Unit Phone No:	901/544-0073
Hearings Fax No:	901/544-0111
TTY No:	901/544-0112

Geographic Jurisdiction: **The States of Arkansas and Tennessee, and the State of Mississippi counties of** Alcorn, Benton, Coahoma, Desoto, Itawamba, Lafayette, Lee, Marshall, Panola, Pontotoc, Prentiss, Quitman, Tate, Tippah, Tishomingo Tunica, and Union.

Miami District Office
EEOC
One Biscayne Tower
2 South Biscayne Boulevard, Suite 2700
Miami, Florida 33131-1804

Commercial No:	305/808-1740
Hearings Unit Phone No:	305/808-1820
Hearings Fax No:	305/808-1836
TTY No:	305/808-1742

Geographic Jurisdiction: **The Commonwealth of Puerto Rico and the U.S. Virgin Islands. The State of Florida counties of** Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, Desoto, Dixie, Duval, Flagler, Gilchrist, Glades, Gadsden, Hamilton, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Jefferson, Lafayette, Lake, Lee, Leon, Levy, Madison, Manatee, Marion, Martin, Miami

Dade, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, Sarasota, Seminole, St. Johns, St. Lucie, Sumter, Suwannee, Taylor, Union, Volusia, and Wakulla;

Milwaukee Area Office
EEOC
310 West Wisconsin Avenue, Suite 800
Milwaukee, Wisconsin 53203-2292

Commercial No: 414/297-1111
Hearings Unit Phone No: 414/297-4133
Hearings Fax No: 414/297-1115
TTY No:

Geographic Jurisdiction: **The States of Iowa, Minnesota, North Dakota, South Dakota and Wisconsin.**

New Orleans Field Office
EEOC
1555 Poydras St., Suite 1900
New Orleans, Louisiana 70112

Commercial No: 504/589-2825
Hearings Unit Phone No: 504/589-2329
Hearings Fax No: 504/595-6861
TTY No: 504/589-2958

Geographic Jurisdiction: **The State of Louisiana.**

New York District Office
EEOC
33 Whitehall Street
New York, New York 10004-2112

Commercial No: 212/336-3620
Hearings Unit Phone No: 212/336-3620
Hearings Fax No: 212/336-3624
TTY No: 212/336-3622

Geographic Jurisdiction: **The States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, and the State of New Jersey counties of** Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union, and Warren.

Philadelphia District Office
EEOC
The Bourse Building, 21 South 5th Street
Suite 400
Philadelphia, Pennsylvania 19106-2515

Commercial No: 215/440-2600
Hearings Unit Phone No: 215/440-2800
Hearings Fax No: 215/440-2805
TTY No: 215/440-2610

Geographic Jurisdiction: **The States of Delaware, Pennsylvania, and West Virginia. The State of New Jersey *except* for the State of New Jersey counties of** Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union, and Warren *which should be **sent** to the **New York District Office.*** **The State of Ohio except for the State of Ohio counties under the jurisdiction of the Cincinnati Area Office** (Adams, Auglaize, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Fayette, Gallia, Greene, Hamilton, Hardin, Highland, Jackson, Lawrence, Logan, Madison, Mercer, Miami, Montgomery, Pickaway, Pike, Preble, Ross, Scioto, Shelby, Union, and Warren; **and The State of State of Ohio counties of** Allen, Defiance, Fulton, Hancock, Henry, Lucas, Ottawa, Paulding, Putnam, Sandusky, Seneca,

Van Wert, Williams, Wood, and Wyandot. **and the State of Kentucky counties of** Bath, Boone, Bourbon, Boyd, Bracken, Breathitt, Campbell, Carter, Elliott, Fleming, Floyd, Gallatin, Grant, Greenup, Harrison, Johnson, Kenton, Knott, Lawrence, Letcher, Lewis, Magoffin, Martin, Mason, Menifee, Montgomery, Morgan, Nicholas, Pendleton, Perry, Pike, Powell, Robertson, Rowan, and Wolfe) ***which should be sent to the Indianapolis District Office.***

Phoenix District Office
EEOC
3300 N. Central Avenue, Suite 690
Phoenix, Arizona 85012-2504

Commercial No:	602/640-5000
Hearings Unit Phone No:	602/640-5039
Hearings Fax No:	602/640-5071
TTY No:	602/640-5072

Geographic Jurisdiction: **The States of Arizona and Utah. The State of New Mexico *except* for the State of New Mexico counties of** Dona Ana, Eddy, Grant, Hidalgo, Lea, Luna, Otero, and Sierra *which should be* ***sent*** *to the* ***Dallas District Office***. The states of **Colorado, and Wyoming** which should be sent to the **Denver Field Office.**

St. Louis District Office
EEOC
The Robert A. Young Building
1222 Spruce Street, 8th Fl., Rm. 8.100
St. Louis, Missouri 63103-2828

Commercial No:	314/539-7800
Hearings Unit Phone No:	314/539-7800
Hearings Fax No:	314/539-7894
TTY No:	314/539-7803

Geographic Jurisdiction: **The States of Kansas, Missouri, Nebraska, Oklahoma, and the State of Illinois counties of** Alexander, Bond, Calhoun, Clinton, Greene, Jackson, Jersey, Macoupin, Madison, Monroe, Perry, Pulaski, Randolph, St. Clair, Union, and Washington.

San Antonio Field Office
EEOC
5410 Fredericksburg Road, Suite 200
San Antonio, TX 78229-3555

Commercial No:	210/281-7600
Hearings Unit Phone No:	210/281-7676
Hearings Fax No:	210/281-2520
TTY No:	210/281-7610

Geographic Jurisdiction: **The State of Texas counties of** Aransas, Atascosa, Bandera, Bastrop, Bee, Bexar, Blanco, Brooks, Burleson, Burnet, Caldwell, Cameron, Coke, Comal, Concho, Crockett, De Witt, Dimmit, Duval, Edwards, Frio, Gillespie, Goliad, Gonzales, Guadalupe, Hays, Hidalgo, Irion, Jim Hogg, Jim Wells, Karnes, Kendall, Kennedy, Kerr, Kimble, Kinney, Kleberg, La Salle, Lee, Live Oak, Llano, McCulloch, McMullen, Mason, Maverick, Medina, Menard, Nueces, Real, Refugio, San Patricio, San Saba, Schleicher, Starr, Sutton, Terrell, Tom Green, Travis, Uvalde, Val Verde, Webb, Willacy, Williamson, Wilson, Zapata, and Zavala.

San Francisco District Office

Commercial No:	415/625-5600

EEOC
305 The Embarcadero, Suite 500
San Francisco, California 94105

Hearings Unit Phone No: 415/625-5633
Hearings Fax No: 415/625-5644
TTY No: 415/625-5610

Geographic Jurisdiction: **The State of Montana; The State of California counties of** Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba; and **the State of Nevada *except* for the State of Nevada counties of** Clark, Esmeralda, Lincoln, Mineral, and Nye *which should be **sent** to the **Los Angeles District Office.***

Seattle Field Office
EEOC
Federal Office Building
909 First Avenue, Suite 400
Seattle, Washington 98104-1061

Commercial No: 206/220-6883
Hearings Unit Phone No: 206/220-6870
Hearings Fax No: 206/220-6869
TTY No: 206/220-6882

Geographic Jurisdiction: **The States of Alaska, Idaho, Oregon, and Washington.**

Washington Field Office
EEOC
1801 L Street, N.W., Suite 100
Washington, D.C. 20507-1002

Commercial No: 202/419-0700
Hearings Unit Phone No: 202/419-0701
Hearings Fax No: 202/419-0705
TTY No: 202/419-0702

Geographic Jurisdiction: **The District of Columbia and the State of Virginia counties of** Arlington, Clarke, Fairfax, Fauquier, Frederick, Loudoun, Prince William, Stafford, Warren, and the State of Virginia Independent Cities of Alexandria, Fairfax City, Falls Church, Manassas, Manassas Park, Winchester, Quantico, Dumfries, and Occoquan.

NOTICE OF APPEAL/PETITION
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OFFICE OF FEDERAL OPERATIONS
P.O. Box 77960
Washington, DC 20013

Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.):	
Home/mailing address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code):	
E-mail address (if any):	

Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's complaint number:	
Location of the duty station or local facility in which the complaint arose:	
Has a **final action** been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint?	_____Yes; Date Received _____(Remember to attach a copy) _____No _____This appeal alleges a breach of settlement agreement
Has a complaint been filed on this same matter with the EEOC, another agency, or through any other administrative or collective bargaining procedures?	_____No ____Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)

Has a civil action (lawsuit) been filed in connection with this complaint?	_____No _____Yes **(Attach a copy of the civil action filed)**

NOTICE: Please **attach a copy of the final decision or order** from which you are appealing. If a hearing was requested, please attach a copy of the agency's final order and a copy of the EEOC Administrative Judge's decision. Any comments or brief in support of this appeal MUST be filed with the EEOC **and** with the agency **within 30 days** of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand delivered, or faxed to the EEOC at the address above.

Signature of complainant or complainant's representative:	
Date:	

EEOC Form 573 REV 1/01

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974. Public Law 93-597. Authority for requesting the personal data and the use thereof are given below.)

1. **FORM NUMBER/TITLE/DATE**: EEOC Form 573, Notice of Appeal/Petition, January 2001
2. **AUTHORITY**: 42 U.S.C. § 2000e-16
3. **PRINCIPAL PURPOSE**: The purpose of this questionnaire is to solicit information to enable the Commission to properly and efficiently adjudicate appeals filed by Federal employees, former Federal employees, and applicants for Federal employment.
4. **ROUTINE USES**: Information provided on this form will be used by Commission employees to determine: (a) the appropriate agency from which to request relevant files; (b) whether the appeal is timely; (c) whether the Commission has jurisdiction over the issue(s) raised in the appeal, and (d) generally, to assist the Commission in properly processing and deciding appeals. Decisions of the Commission are final administrative decisions, and, as such, are available to the public under the provisions of the Freedom of Information Act. Some information may also be used in depersonalized form as a data base for statistical purposes.
5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION**: Since your appeal is a voluntary action, you are not required to provide any personal information in connection with it. However, failure to supply the Commission with the requested information could hinder timely processing of your case, or even result in the rejection or dismissal of your appeal.

Send your appeal to:

The Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, D.C. 20013

Appendix L-1 EEO-MD-110

MODEL FOR ANALYSIS
DISPARATE TREATMENT

PRIMA FACIE CASE

1) Membership in protected group

2) Complainant treated differently from similarly situated employees not in protected group

a) Were compared employees in same chain of command as complainant?

b) Were compared employees in same work unit as complainant?

OR

In the absence of comparative evidence, is there other evidence that indicates that the agency's actions may have been motivated by discrimination?[(1)]

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for its treatment of complainant and the compared employees/applicants? How did the agency respond to other evidence, if any, of discrimination?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for its treatment of complainant is pretextual?

Appendix L-2 EEO-MD-110

MODEL FOR ANALYSIS HIRING/PROMOTION

PRIMA FACIE CASE

1) Complainant is a member of a protected group

2) Was there a vacancy?

3) Did complainant apply?

4) Was complainant qualified; was complainant rejected?

5) Was the vacancy filled? If so, was the selectee a member of complainant's protected group?

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for rejecting complainant?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for rejecting complainant is pretextual?

Appendix L-3 EEO-MD-110

MODEL FOR ANALYSIS
DISCHARGE/DISCIPLINARY ACTION

PRIMA FACIE CASE

1) Complainant is a member of a protected group

2) Was complainant qualified for the position s/he was performing?

3) Was the complainant satisfying the normal requirements of the position?

4) Was the complainant discharged or otherwise disciplined?

5) Was the complainant replaced by an employee outside the protected group or was s/he singled out for discharge or discipline while similarly situated employees were retained or not comparably disciplined?

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for disciplining complainant?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for discipline or discharge of complainant is pretextual? E.g., Did the agency treat other individuals with similar performance problems more favorably than complainant?

Appendix L-4 EEO-MD-110

MODEL FOR ANALYSIS
RETALIATION

PRIMA FACIE CASE

1) Had the complainant previously engaged in protected activity or opposed unlawful discrimination?

2) Was the agency aware of complainant's activity?

3) Was complainant contemporaneously or subsequently adversely affected by some action of the agency?

4) Does some connection exist between complainant's activity and the adverse employment decision (e.g., the adverse employment decision occurred within such a period of time that a retaliatory inference arises)?

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for the adverse employment decision?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for the employment decision is pretextual?

Appendix L-5 EEO-MD-110

MODEL FOR ANALYSIS
DISABILITY--REASONABLE ACCOMMODATION

PRIMA FACIE CASE -- Where Complainant Alleges a Failure to Provide a Reasonable Accommodation:

1) Does complainant have a physical or mental impairment?

2) Does this impairment substantially limit complainant's ability to perform a major life activity (e.g., caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working)? Provide evidence on the activities affected, how they are affected, and the degree to which they are affected (cannot do the activity at all, can only do the activity with assistive devices or equipment, can only do the activity for a limited period of time, etc.).

3) Does the agency know of the complainant's disability?

4) Is the complainant otherwise qualified (i.e., does the complainant meet the education, skills, and experience requirements of the job)?

5) What are the essential functions of the complainant's job?

6) Did complainant request accommodation? What accommodation, if any, did the complainant suggest?

7) What action did the agency take to identify possible accommodation or attempt accommodation? Did the agency make an individualized assessment of the complainant, comparing his/her qualifications and limitations with the job requirements? What actions did the agency take to consider the complainant's suggested accommodations?

8) If an accommodation has been identified, will this accommodation enable complainant to perform the essential functions of the job, i.e., is it effective?

9) Did the agency provide an accommodation?

10) If the agency did not provide an accommodation, what reason has the agency given for its refusal?

11) If the agency contends that a particular accommodation would impose an undue hardship on its operations, are these reasons sufficient to establish an undue hardship defense given:

a) the overall size of the agency's program (the number of employees, number and type of facilities and size of budget);

b) type of agency operation (composition and structure of work force);

c) nature and net cost of accommodation.

Appendix L-6 EEO-MD-110

MODEL FOR ANALYSIS
DISABILITY--DISPARATE TREATMENT

PRIMA FACIE CASE -- Where Complainant Alleges Disparate Treatment

1) Does complainant have a physical or mental impairment?

2) Does this impairment substantially limit complainant's ability to perform a major life activity (e.g., caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working)? Provide evidence on the activities affected, how they are affected, and the degree to which they are affected (can't do the activity at all, can only do the activity with assistive devices or equipment, can only do the activity for a limited period of time, etc.).

3) Does complainant have a record or history of a substantially limiting impairment (from which complainant may have recovered in whole or in part)?

OR

Was complainant regarded as having such an impairment (whether or not the complainant has an impairment or a substantially limiting impairment)?

4) Does the agency know of complainant's disability?

5) Is complainant qualified to perform the essential functions of the job with or without reasonable accommodation:

a. Is complainant otherwise qualified (i.e., does the complainant meet the educational and experience requirements of the job)?

b. What are the essential functions of complainant's job?

c. Can complainant perform the essential functions of the job with or without accommodation? If an accommodation is necessary, see Model for Analysis -- Disability -- Reasonable Accommodation, Attachment A-5.

6) Was complainant treated differently from similarly situated employees who were not disabled or who had different disabilities?

a. Were compared employees in the same chain of command?

b. Were compared employees in the same work unit?

OR

Is there direct evidence which shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for treating complainant differently than other similarly-situated employees who were not disabled or who had different disabilities?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for its treatment of complainant is pretextual?

Appendix L-7 EEO-MD-110

MODEL FOR ANALYSIS
RELIGIOUS ACCOMMODATION

PRIMA FACIE CASE

1) Does complainant hold a religious belief which conflicts with employment requirements? (Note: only in the rarest of cases, where the evidence appears very clear that the complainant does not sincerely hold the religious belief or does not sincerely engage in the religious practices that may need an accommodation should an investigator challenge the sincerity of the belief or practice.)

2) Has complainant informed his/her superior of a conflict?

3) Has complainant been penalized for failing to comply with employment requirements?

REBUTTAL

1) Belief or practice not of religious nature.

2) Agency could not accommodate without undue hardship.

DUTY TO ACCOMMODATE -- RELIGIOUS COMPENSATORY TIME

To allow employees to work additional hours (overtime, compensatory time) to make up for the time required by their personal religious belief (Pub. L. No. 95-390, 5 U.S.C. 5550a, "Compensatory Time Off for Religious Observances").

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1. In this model and in the models set forth below, keep in mind the Supreme Court's decision in O'Connor v. Consolidated Coin Caterer's Corp., 517 U.S. 308 (1996), in which the Court ruled that comparative evidence is not an essential element of a prima facie case of discrimination. In the absence of such evidence, the complainant must come forward with other evidence sufficient to create an inference of discrimination.

Appendix M EEO-MD-110

SAMPLE TITLE PAGE

Title Page

(Agency Letterhead)

)
(COMPLAINANT) :
(Complainant's Address) :
(Complainant's City, State, Zip):
)
Complainant :
)
)
and)
)
) AGENCY CASE NO.___
(AGENCY HEAD) :
(Title) :
(Agency Name)) OTHER NUMBERS
(Agency Address)
(P.O. Box))
(City, State, Zip))
Agency :

INVESTIGATIVE REPORT

Appendix N EEO-MD-110

REQUEST FOR A HEARING FORM

EEOC Hearings Unit
_____ District/Field Office
_____
_____
_____

Dear Sir/Madam:

I am requesting the appointment of an Equal Employment Opportunity Commission Administrative Judge pursuant to 29 C.F.R. § 1614.108(g). I hereby certify that either more than 180 days have passed from the date I filed my complaint or I have received a notice from the agency that I have thirty (30) days to elect a hearing or a final agency decision.

My name: _____
_____

Agency
name &
address _____
_____

Agency No.:_____
_____

In accordance with section 1614.108(g), I have sent a copy of this request for a hearing to the following person at the agency:

Name: _____
_____

Address
(if different
from above)_____
_____

Sincerely

[Name of Appellant]

Appendix O EEO-MD-110

Notice of Appeal - Agency
to the Equal Employment Opportunity Commission
Office of Federal Operations

1. Agency (please print or type):

2. Address:

3. Name of agency representative:

4. Telephone (including area code): E-mail address:

5. Name, address. telephone no. of complainant:

Complainant's Social Security No.:

6. If the complainant is represented, name, address, and telephone no. of representative:

7. Agency complaint number:

8. Name of Administrative Judge, District/Field Office location, and EEOC Hearings U nit No.:

9. Date of agency final action (include a copy):

10. T o your knowledge, does the complainant have any appeals pending at OFO? If so, please indicate the EEOC Appeal Nos.:

11. Signature of agency representative: Date:
NOTICE: Before mailing this appeal, please be sure to **attach a copy** of the final action and the Administrative Judge's decision from which you are appealing. Please serve a copy of this appeal form on the complainant, with a copy of your final action. **Any statement or brief in support of this appeal shall be submitted within twenty (20) days of the date this appeal is filed. Agencies must forward the complaint file to the EEOC within thirty (30) days of the submission of this appeal.**
FOR EEOC USE ONLY: **OFO DOCKET NO.:**