

AFGE – Women’s and Fair Practices Departments

Fighting Discrimination in the Federal Government

A Guide for AFGE Representatives and Members



2012

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

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

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What is Discrimination?

Discrimination is the act of treating or considering an individual based on his or her membership in a certain protected group, rather than based on individual merit.

Unlawful discrimination occurs when an individual or a group of people are treated less favorably than another person or group because of their membership in a certain protected group (e.g., because of race, color, national origin, ethnicity, gender, pregnancy, marital status, age, disability, religion, or other characteristic protected under anti-discrimination or human rights legislation).

Workplace discrimination frequently occurs in decisions concerning:

- who to hire
- what terms, conditions, and benefits to offer employees
- who to train and how
- who to consider and ultimately select for transfer, promotion, or dismissal

Where Should I Bring My Complaint?

What	Where	How	When
Lost opportunity or hostile work environment based on: <ul style="list-style-type: none"> • Race • Color • Sex, including: <ul style="list-style-type: none"> ○ sexual harassment ○ pregnancy ○ transgender • National Origin • Religion • Age • Disability, including: <ul style="list-style-type: none"> ○ failure to accommodate • Reprisal for protected EEO activity • Genetic Information 	EEOC	EEO Complaint	Contact the agency's EEO counselor within 45 days of the event
Contract violation: <ul style="list-style-type: none"> • EEO violation • Any other CBA violation 	Arbitration	Negotiated Grievance Duty of Fair Representation	Varies, see the union's collective bargaining agreement
Adverse action, including: <ul style="list-style-type: none"> • Removal • Termination • Suspension for more than 14 days • Reduction in grade or pay • Furlough without pay for 30 days or fewer 	MSPB	MSPB Appeal	File within 30 days of the event
Whistleblowing	MSPB	Individual right of action, pursuant to statute	Within 65 days of the Office of Special Counsel (OSC)'s investigation closure or within 120 days after notice of closure

Forum Selection Exercises



1) Supervisor schedules a mandatory staff meeting on the Hindu holiday of Diwali. An Indian employee tells the supervisor that he cannot attend because he is Hindu and therefore obligated to celebrate Diwali. The supervisor excuses the employee after stating, “Diwali, that doesn’t sound like a real holiday.” This is the only staff meeting that the employee misses that year. On the employee’s next evaluation, the supervisor criticizes the employee’s “poor attendance” at staff meetings. Where is the correct forum for the employee to address the evaluation?

(2) Supervisor fires a male employee for passing a note while at work to a female employee that says, among other things, “without your pig tail you will never go to heaven you sh— sucking bi—.” Where is the correct forum for the male employee to review the termination of his employment? Based on Carter v. Chrysler Corp. (1999).

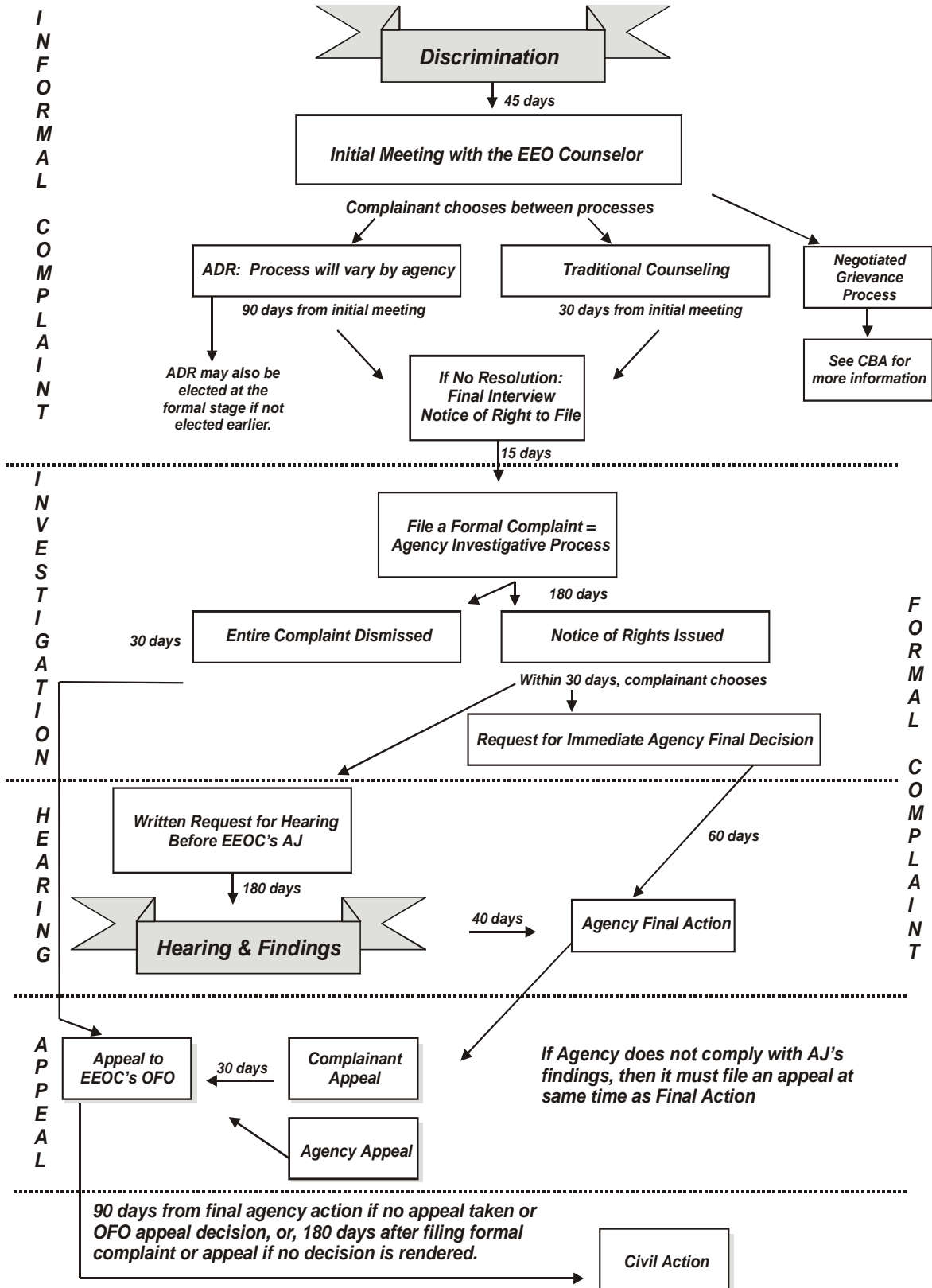
(3) Supervisor at a federal agency refuses to promote any individual who has his or her tongue or eye-brow(s) pierced. Where is the correct forum for a tongue-pierced individual to grieve if he or she is the best-qualified individual to receive the promotion and yet does not receive the promotion?

(4) Two employees, one Caucasian and one African-American, have been absent from work without approved leave on three occasions in the last month. As a result, the Caucasian employee is suspended without pay for 14 days. The African-American employee is suspended without pay for 15 days. Where is the correct forum for the African-American employee to have the suspension reviewed?

Remember:

- While several remedies might be possible, you may only select ONE!
- You get the process to which you complain first IN WRITING!
- You have to stick with the ONE you choose! So choose carefully!

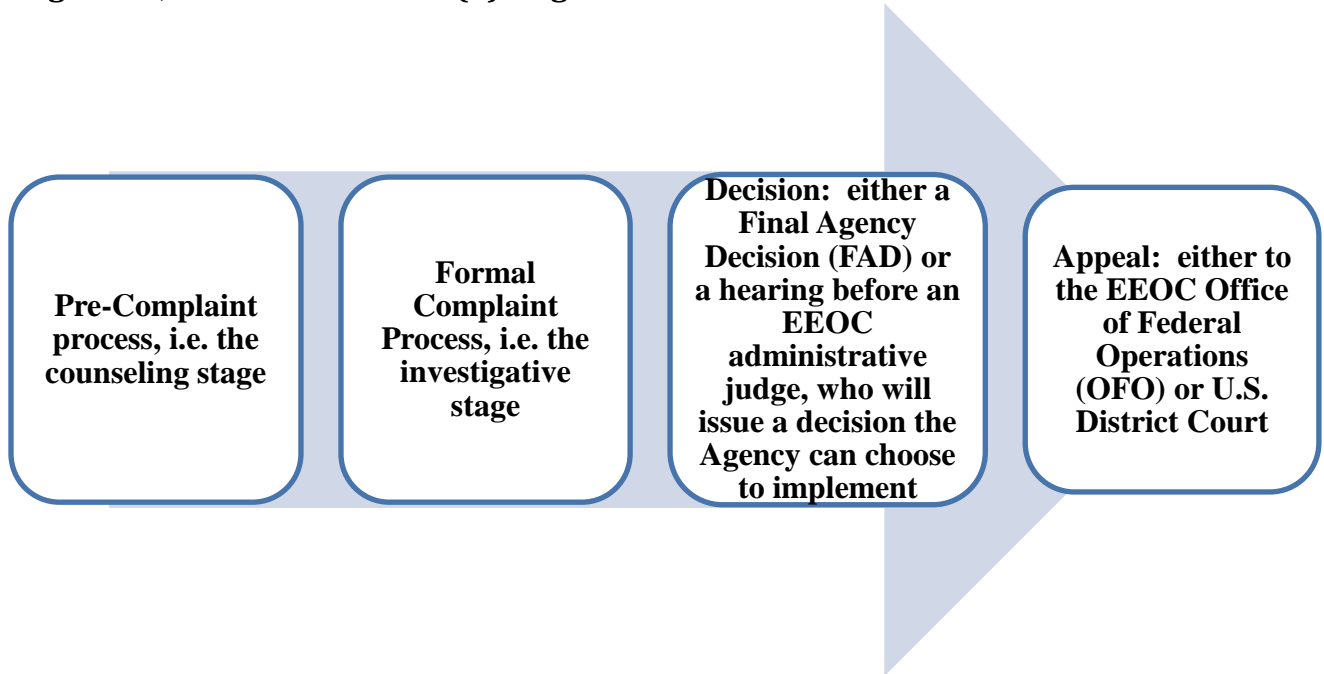
Overview of the EEO Complaint Process



Stages of the EEO Complaint Process

Since 1992, the EEOC has been hearing complaints under the administrative process codified at 29 C.F.R. Part 1614 (“Part 1614”) (*See* Appendix 1). The availability of an Alternative Dispute Resolution (ADR) process is also required as part of the administrative procedure, although neither party is required to participate in ADR. If this ADR process is unsuccessful, the individual may file an action in federal district court.

In general, Part 1614 has four (4) stages:



The Initial Contact with the Agency's EEO Counselor

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

- If the aggrieved person cannot reach a counselor in person, he or she should send a written document or email so there is documentation that contact was timely made.
 - **Remember:** The EEO counselor is employed by the agency against which the individual is filing a complaint. It is the counselor's job to try to resolve the individual's complaint; however, the counselor may be biased and is not the aggrieved person's representative.

The Aggrieved Person's Responsibilities at the Initial Meeting or During the Initial Call:

- The aggrieved person has the right to remain anonymous during the counseling phase, unless he or she consents otherwise in writing.
- The aggrieved person must be very specific and provide a complete account of all discriminatory events during the consultation with the EEO counselor. Failure to include a discriminatory event at this point may prevent the employee from raising the issue later, which means that the individual may not be able to obtain a hearing on the excluded issue.
- The aggrieved individual may bring a representative, including his or her union representative, to this meeting.
- **Remember:** The EEO counselor is appointed to this position by the agency. He or she does not represent the aggrieved employee and may not have the employee's best interests at heart.



The EEO Counselor's Responsibilities at the Initial Meeting:

- The EEO counselor is responsible for advising the aggrieved person in writing of his or her rights and responsibilities relating to the EEO process.
- The EEO counselor should give the aggrieved person literature and documents that will further explain the EEO process.
- This rights and responsibilities literature should include information about an individual's right to choose to participate in either:
 - The negotiated grievance process,
 - The traditional agency EEO process, and/or
 - The agency's ADR process.

1. The Informal Complaint Stage – Counseling

Usually, by this point, the aggrieved person is deciding whether to participate in:

- 1) the negotiated grievance process,
- 2) the traditional agency EEO process, or
- 3) the ADR process, if one exists for that particular case.



DID YOU WRITE DOWN...?

- ✓ The date you 1st tried to meet the EEO Counselor
- ✓ The date you actually met with the EEO Counselor

If the employee chooses the negotiated grievance process, the employee usually does not participate in the traditional EEO pre-complaint process. The employee may choose to pursue ADR at any time, but once ADR is chosen, the EEO complaint process ceases, and resumes only if no resolution is reached through ADR.

Some collective bargaining agreements may toll the deadline for filing a grievance if an employee is completing the informal counseling stage. Be careful to check your contract for the exact language regarding deadlines.

The Pre-Complaint Traditional Agency EEO Process	The Pre-Complaint ADR Process
<p>The counselor has 30 days to complete his or her obligations, unless the aggrieved person agrees in writing to extend this period for no more than an additional 60 days.</p> <p>Within this period, the counselor must:</p> <ul style="list-style-type: none">• Advise the individual about the availability of alternate remedies (such as union grievance)• Determine the issues of the complaint• Conduct a limited inquiry• Seek a resolution• Advise the individual of his or her right to file a formal complaint• Prepare a report documenting counseling efforts	<ul style="list-style-type: none">• Agencies are required to have an ADR process in place.• However, agencies are permitted to make case-by-case decisions whether ADR is appropriate for a given case.• If the aggrieved person chooses to participate in ADR, the pre-complaint period is extended to 90 days.• Agencies should have an official at the ADR session with full authority to resolve the dispute. If another agency official is necessary for the discussion, the agency is responsible for making sure that the official is reachable.

If the Informal Complaint Stage Provides No Resolution ...

If the EEO Counselor is unable to resolve the dispute within 30 days from the date the aggrieved person contacted the counselor, or, if the parties agreed to try ADR and the ADR process did not resolve the issue within 90 days, then the aggrieved will meet or speak with an agency EEO counselor for a final interview within the time period allotted for resolution.

- Demand your right to meet in a timely manner.
- If the EEO Counselor does not set up a final interview within a reasonable time, contact the EEO Counselor in writing and ask for a final interview. Keep a copy of this letter or email.

At the final interview, the counselor is required to:

- Notify the aggrieved individual of the right to file a formal complaint with the agency and how to do so. This information is commonly referred to as a Notice of Right to File."
- Notify the aggrieved individual that if the individual decides to file a formal complaint,
 - the agency has 180 days to investigate the complaint,
 - after the investigation, the individual will have the right to either ask the agency to issue a Final Agency Decision on the case, or ask an EEOC Administrative Judge to decide the case at a hearing.
- Prepare a report. The report's content will vary based on which process the aggrieved employee used.



Notice of Final Interview

2. Formal Complaint—Investigative Stage

If the aggrieved individual wants to file a formal complaint of discrimination, he or she must do so within 15 days of receiving a notice of final interview. Don't forget to keep a copy of what you file!

The complaint must:

- 1) Be in writing
- 2) Specify the EEO matters alleged, dates of events, names of Responsible Management Officials (RMOs), and resolution sought
- 3) Be signed by the aggrieved employee (now called the "complainant").



Where to file a formal complaint:

- The EEO counselor should specify in the notice of final interview where the formal complaint should be filed, *i.e.* mailed.
- If this information is missing, typically, a formal complaint should be filed with the Agency's Director of Equal Employment Opportunity, with the Agency Chief, with the Field Installation Head, or with another official designated by the agency.
- It is also best to provide a copy of the formal complaint to the Agency's EEO Officer to ensure prompt processing.

Dismissal of a Complaint

The agency (or an AJ at the hearing stage) may dismiss certain allegations or even an entire complaint if:

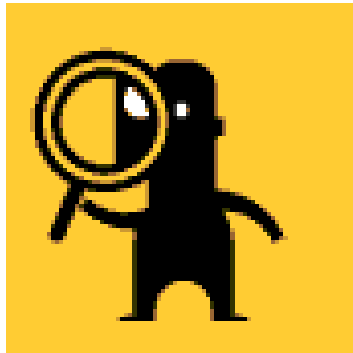
- the Complainant failed to make contact with the EEO office within 45 days of the discriminatory event;
- the agency is merely proposing to take action;
- an allegation addresses issues already pending before, or previously decided by, the agency;
- the complaint was not filed within 15 days of the notice of final interview;
- the complaint fails to state a claim under Title VII, the ADEA, or the Rehabilitation Act;
- the complaint is the subject of a pending lawsuit;
- the complaint is a spin-off complaint, *i.e.* a second complaint alleging dissatisfaction with the processing of a previously filed complaint;
- the complaint is part of a clear pattern of abuse of the EEO process;
- the complainant elects to pursue the matter under a negotiated grievance procedure; and/or
- the complainant fails to respond to a written request to provide relevant information within 15 days of receiving the request.

If a portion of the complaint is dismissed by the agency, the Complainant may:

- 1) file (at the end of the 180 day investigative period) for a hearing before an AJ regarding the entire complaint and ask for a review of the partial dismissal, or
- 2) appeal the dismissal after final action is taken on the entire complaint.

If the entire complaint is dismissed by the agency, this is considered the agency's final decision. The final decision must include notice of the right of the Complainant to appeal the dismissal to the EEOC's Office of Federal Operations within 30 days of notice of the dismissal.

Investigation of Allegations



- Allegations that are accepted by the agency must be investigated by the agency within 180 days from the date of the last amendment to the complaint, but no more than 360 days from the first allegation.
 - The parties may agree to extend the **180 day time limit, but cannot extend it for more than 90 days.**
- The Complainant will receive a copy of the allegations as accepted by the Agency for investigation. If the Complainant does not agree with the phrasing of the complaint, s/he will usually have **5 days** to respond with the correction.
- During the investigation, the agency investigator has the authority to administer oaths and to require statements from witnesses and/or management officials.
- The agency or investigator may use an exchange of letters or memos, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods that can investigate the matter at issue.
- It is very important that the complainant respond promptly to requests from the investigator for information because a failure to do so could result in the agency's dismissal of the complaint.
- The investigator does not have to include every piece of evidence provided. If you have important evidence that is not accepted, hold on to it for the hearing stage.
- The investigator is provided by the Agency, and is not a representative of the Complainant.
- You may amend the complaint to include like or related matters by contacting the EEO counselor you initiated contact with in the informal stage.

- Remember, if you amend your complaint, the Agency receives another 180 days to investigate, but no more than 360 days.
- Beyond that, the Complainant does not have to agree to extend the investigative period if the Agency requests it.

After the Investigation:

- Once the investigation is complete, the agency must provide the complainant a copy of the investigative file, which is called the Report of Investigation (ROI).
- At the same time, the agency must also provide the complainant a notice of his or her right to request a hearing before an AJ (see below) or to request an immediate final decision from the agency (see below).
- AFGE strongly recommends that the complainant choose a hearing instead of the immediate final decision from the agency!

Demand to go to the Next Step & File for a Hearing at the EEOC



The Hearing Stage

- When a complainant requests a hearing within the allotted time, the AJ will hold a closed hearing and issue findings of fact and conclusions of law on the complaint within 180 days of the request for a hearing, unless the AJ finds good cause to extend this time period.
 - Note: Due to a backlog of cases, an AJ may fail to make the 180 day deadline.
- The AJ may dismiss a complaint for any reason an agency could have, even if the agency did not do so.

a. How to Request a Hearing

- 1) To request a hearing before an Administrative Judge, the Complainant must send a written request directly to the EEOC.
 - If the Complainant accidentally sends the request to the Agency, then the agency must notify the local EEOC field office.
- 2) The Complainant must also send a courtesy copy to the agency's EEO office.
- 3) The request must be submitted within 30 days after receipt of the investigative file from the agency.
 - However, if
 - 180 days have expired since the Complainant filed a formal complaint, and
 - the Agency has not completed its investigation and has not provided a copy of the investigative file, and
 - the Agency has not provided notice of right to request a hearing, the Complainant may still request a hearing before an Administrative Judge. See http://www.eeoc.gov/federal/faq_fsfp.html.



b. The Acknowledgment and Order

- Soon after a request for hearing is made, the case will be assigned to an Administrative Judge (AJ), and the parties will receive an Acknowledgment and Order (A&O) from the AJ notifying the parties of certain significant deadlines in the case.
- It is very important to review the Acknowledgment and Order for deadlines and other responsibilities, as some deadlines occur within just 20 days of receipt. Note the date you received the Acknowledgment and Order, and read every line.
- Most Acknowledgment and Orders will set forth strict time deadlines regarding requests for discovery, responding to discovery, and motions to compel. Be sure to meet these deadlines, as the Complainant may miss the opportunity to participate in discovery, suffer sanctions, or have a case dismissed for failure to make a deadline.
- If more time is necessary, a party may submit a motion to the Administrative Judge to extend the deadline before the deadline expires.
- You can also check Chapter 7 of Management Directive 110 (MD-110) for related discovery procedures and/or questions.
- Remember: Unless stated otherwise, “days” means calendar days, not just weekdays.

c. Discovery

- Discovery is a process by which each party learns more about the other side’s case before the case proceeds to a hearing.
- This is an excellent opportunity to collect all the information that was left out of the Report of Investigation (ROI).
- Although the discovery process is governed entirely by the AJ’s orders, discovery requests are made directly by each party to the other party.
- Do NOT send your discovery requests or responses to the Judge.
- The Complainant can produce or request information that was not included in the Report of Investigation.
- Both parties are under a continuing obligation, until the date of the hearing, to produce any relevant information that is discovered.
- Information not produced during discovery will generally not be admissible at hearing.



(1) Forms of Discovery

Samples of written discovery requests are found in Appendix 2 of this workbook. Use these samples as a template for drafting your own discovery requests.

Types of Discovery Requests

Interrogatories	<ul style="list-style-type: none">❖ Written questions that must be responded to in writing❖ Absent specific authorization from the AJ, neither party may serve more than one set of interrogatories nor ask more than 30 questions total (no subparts allowed)
Document Requests	<ul style="list-style-type: none">❖ Parties also may ask the other party to produce up to 30 documents in the other party's control through a written request for documents.❖ Be specific in identifying the document or type of document requested❖ Remember: You do not need to ask for documents already contained in the Report of Investigation (ROI)
Admissions of Fact	<ul style="list-style-type: none">❖ Each party may request that the other side admit or deny certain facts❖ This helps narrow and define the scope of the dispute before the hearing
Depositions	<ul style="list-style-type: none">❖ Both parties are present, a witness is questioned, and the questions and answers are recorded or transcribed❖ The purpose of a deposition is to ask questions that may lead to relevant information.❖ Generally, the party requesting the deposition pays for the deposition. Employees will get official time for any deposition in which they are involved.❖ If a party was already interviewed during the investigatory stage, the Complainant can rely on the affidavit in the ROI and may not need a deposition.

(2) Preparing and Responding to Discovery Requests

Discovery is an opportunity for the Complainant to get information from the agency. However, the agency also has the right to conduct discovery and to request information from the complainant. Complainants must respond to any discovery requests from the agency within the deadlines established in the AJ's Acknowledgement and Order.

When responding to a discovery request:

- The Complainant may provide the answer and cite to a specific tab and/or page in the ROI.
 - If the Complainant objects to the discovery request, because the request is irrelevant, not reasonably calculated to lead to admissible evidence, etc., state the specific objection.
 - If the request calls for privileged information, state so and why the information is privileged.
 - The Complainant does not have to sign a general waiver for health information, etc. Rather, ask the Agency to identify specifically what information is sought and provide it directly.
 - The Complainant does not have to respond to questions about criminal or credit history if irrelevant to the claims.
 - The Complainant does not have to identify all witnesses at this point, as the Complainant is still collecting information through discovery to identify potential witnesses.
-
- The Complainant can request additional time from the Agency to respond, but provide a date certain for answering and the reasons why the delay is needed. Remember, when answering requests for admissions, a party must respond in writing, stating that they “admit” or “deny” each fact requested for admission. Only admit if the statement is 100% accurate. Otherwise, deny and explain.
 - Some AJs will rule that a failure to deny a requested fact is an admission.

(3) Failure to Respond to Discovery Requests

If the agency fails to respond, or fully respond, to Complainant's discovery requests within the time limit imposed by the Acknowledgement and Order:

- 1) The Complainant must make informal attempts, such as sending reminder letters or calling opposing counsel, to obtain the requested information, within the deadlines set forth in the Acknowledgment and Order.
- 2) If these attempts are unsuccessful, a complainant may file a motion to compel discovery.
 - Before doing so, a complainant should check the Acknowledgment and Order (or Chapter 7 of MD-110) to determine if filing a motion to compel is the appropriate next step.
 - The motion must be filed with the Administrative Judge, and served on/mailed to the opposing party (Agency).
 - The motion must contain:

- a. a certification that a copy was served on the opposing party,
- b. a statement that the Complainant attempted to resolve the discovery dispute with the Agency, and
- c. a copy of the disputed questions and answers.
- Note: If a Complainant fails to respond to the agency’s discovery requests, the Agency must follow this same procedure to force a Complainant to comply.

The Administrative Judge (AJ) will then make a decision on the motion to compel. The decision may include:

- An order requiring the party to produce the requested discovery responses within a certain time.
- An order that documents, witnesses, or other evidence be produced at the hearing.
- A denial of the motion.
- An “order to show cause” why sanctions should not be imposed on the non-responsive party.

If the AJ orders a party to produce discovery and the party fails to respond fully, the AJ may impose sanctions, which would allow the Administrative Judge to draw adverse inferences against the party, exclude other evidence, issue a decision against the interest of the party, or take other appropriate action.

d. Settlement and Offers of Resolution

- Generally, each Acknowledgment and Order requires the parties to engage in settlement discussions before the hearing. A complainant therefore must make a good faith effort to resolve the complaint.
- Sometimes agencies make a specific type of settlement offer called an “offer of resolution”, which is a settlement offer made in writing, from the time a case is first assigned to an AJ until 30 days before the date of the hearing, that includes a notice to the complainant explaining the possible consequences of failing to accept the offer.
- Sometimes the agency will simply state that it is open to receiving offers.
- The Complainant can simply email opposing counsel that the Complainant is open to receiving settlement offer, or can provide more concrete terms for a settlement offer.
- Complainant should inform the agency that s/he is open to receiving settlement offers or state the specific form of a settlement proposal.

The importance of an offer of resolution:

- If a complainant rejects an agency’s offer of resolution and wins at the hearing, but wins a less favorable award than was offered by the agency in its offer of resolution, the complainant may not receive attorney fees or costs incurred after the end of the 30-day offer or resolution acceptance period.
- This means that the complainant could be personally responsible for paying his or her attorney for work at the hearing, which can be expensive.
- It is therefore very important to discuss any offer of resolution with your representative and to consider it carefully.



e. Summary Judgment or Decision without a Hearing

- The Administrative Judge may determine by him- or herself, or upon the motion by a party, that there is no dispute over the facts of the case to merit a hearing. In such a case, the AJ may simply issue a “summary judgment” *i.e.* a decision on the matter.
- A summary judgment decision may serve to limit the issues discussed at the hearing or eliminate the hearing entirely.
- If the agency makes a motion for summary judgment, and the complainant does not reply, the AJ will likely grant the agency’s motion, which will prevent the complainant from obtaining a hearing.

How to reply with a “Motion in Opposition”:

- The Complainant or his or her representative must oppose the motion within the timeframe specified in the Acknowledgment and Order.
- Identify for the AJ each and every material fact that the Complainant disagrees with in the Agency’s Motion for Summary Judgment.
- Point out to the AJ where disputed facts exist in the documents in the agency's report of investigation, in additional documents obtained during discovery, or in witness affidavits. If you are relying on documents not in the ROI, make sure to attach them to your Motion in Opposition.
- The Complainant should send this Motion in Opposition to the AJ and serve a courtesy copy on the Agency.
- The Agency may file a Reply to your Motion, but you do not file another response.



f. Hearing Preparation

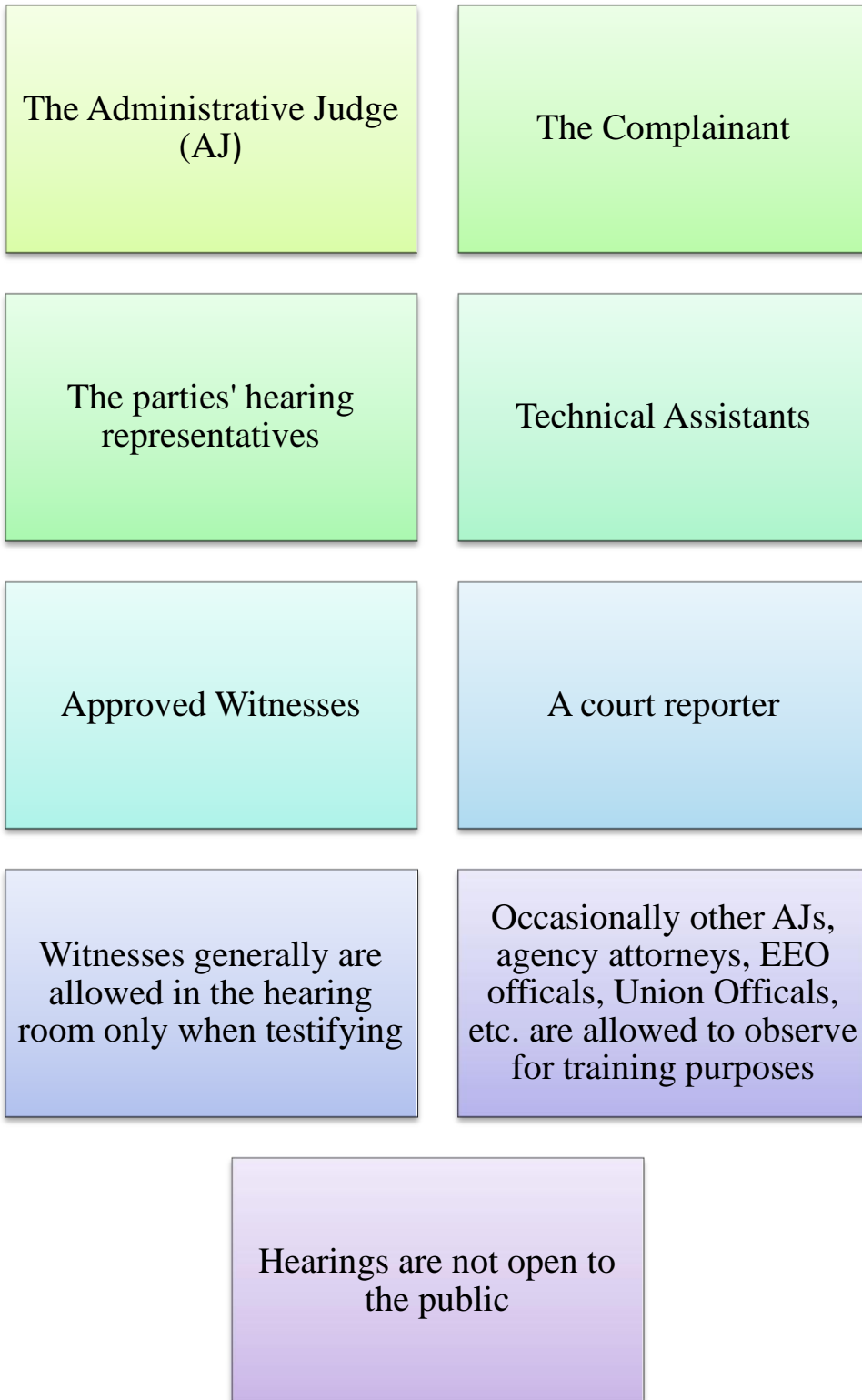
If the case survives a Motion for Summary Judgment, the case will proceed to hearing. Prior to hearing, the AJ will issue a Scheduling Order, which will require the parties exchange Prehearing Reports and attend a Prehearing Conference. The AJ will usually require that the Prehearing Report include witnesses, a summary of settlement efforts, and proposed exhibits. The AJ will rule on what witnesses and exhibits will be permitted at the hearing.

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



g. The Hearing

Who may attend the hearing?



Basic components of an evidentiary hearing

1. AJ's Introductory Statement: The AJ may give an introductory statement on the record highlighting the procedures to be followed for the hearing.
2. Parties' Opening Statements: Generally, each party is allowed to make an opening statement. While these opening statements can be helpful to help frame the case, they are not evidence. In most cases, the complainant gives the first opening statement, followed by the agency. Either party may decide to forego their opening statement.
3. Presentation of Evidence: The Complainant has the burden of proving that the agency has discriminated against him or her and that he or she is entitled to relief. The complainant presents evidence first. Evidence may take the form of documents, live witness testimony, photographs, objects, etc.
4. Witnesses: Only witnesses approved by the AJ are permitted to testify at the hearing. The AJ will administer oaths to the witnesses directing them under penalty of perjury to testify truthfully. The party calling a witness examines the witness first. The opposing party may then cross-examine the witness. The AJ may also question the witness.
5. Exhibits: Before the hearing, each party should mark for identification with sequential numbering any additional documents the party intends to offer into evidence (*e.g.*, Complainant's Exhibit No. 1). Provide copies of all exhibits to the AJ, witness, court reporter and to the agency representative. Documents in the ROI are automatically admitted into evidence and must not be entered separately at the hearing.
6. Objections: The Agency or the Complainant may object to any question asked a witness or any document offered into evidence. The AJ will rule on each objection.
7. Closing Statements: Usually, each party is allowed to give a closing statement, either orally or written, that summarizes the evidence and points of law they want the AJ to consider. However, like opening statements, closing statements are not evidence themselves.



3. Final Agency Action

a. Following a Decision by the AJ at a Hearing

- Once the AJ issues a decision, the agency has 40 days from receipt of the AJ's decision to take final action on the complaint by issuing a "final order."
- The final order will notify the aggrieved person
 - whether or not the agency will fully implement the AJ's decision
 - of the complainant's right to appeal to EEOC
- If the agency decides not to (fully) comply with the administrative judge's decision, then the agency must file an appeal of the decision with the EEOC on the same day the agency issues the final order.
- So if the agency loses, and wants to appeal, it must:
 - Submit any statement or brief in support of the appeal within 30 days of filing the appeal.
 - Provide interim relief pending the resolution of the appeal.

What is interim relief?

- In a case involving removal, separation, or suspension continuing beyond the date of the order, if the AJ orders that the complainant be reinstated, the agency must reinstate the employee pending the result of the appeal.
- Exception: If the agency determines that the return or presence of the complainant will be "unduly disruptive," then the agency does not have to reinstate the complainant but must still pay salary and provide benefits as if the person were reinstated.

b. Final Agency Decision (FAD)

- When a Complainant requests an immediate final decision, a "Final Agency Decision," instead of a hearing, then the Agency shall take final action within 60 days of the Complainant requesting an immediate agency decision.
- When a Complainant does not reply to the notice of right to a hearing or immediate final decision, then the agency shall take final action within 60 days of the 30-day period during which the complainant had the right to reply.
- The final decision must include notice of the right to appeal to the Commission, or to file a civil action, and the name of the proper defendant and the applicable time limits for appeals and lawsuits.

4. Appeals to the Commission

a. Requesting an Appeal

- If the Complainant loses at the hearing, the Complainant may appeal the AJ's decision.
- The Complainant must file a notice of appeal within 30 days of the dismissal of a complaint or receipt of the agency's final action.
 - To appeal, send **EEOC Form 573** and a **certificate of service** to
 Equal Employment Opportunity Commission
 Office of Federal Operations
 P.O. Box 77960
 Washington, DC 20013
- Any statement or brief submitted by the Complainant in support of the appeal must be submitted within 30 days of the notice of appeal.
- The Complainant must also send a courtesy copy to the opposing party.
- The Agency then has 30 days to oppose an appeal.

b. Standard of Review for the Appeal

- No new evidence will be considered on appeal unless there is a showing that the evidence was not readily available before the decision being appealed was rendered.
- In some cases, the OFO will essentially evaluate the evidence as if the OFO were the judge. This kind of review is called "*de novo*" review.
 - An appeal from a final agency decision (meaning in those cases in which there was no hearing) receives *de novo* review.
 - An appeal from a summary judgment decision will also be reviewed *de novo*.
- In other cases, the OFO gives more deference to the underlying decision and will uphold the underlying decision if the decision is supported by "substantial evidence" in the record.
- An appeal from a decision after a hearing by the AJ will be subject to two standards of review.
 - For findings of facts based on testimonial or documentary evidence, the OFO will uphold the AJ's decision if the decision is supported by "substantial evidence" in the record. For example, a finding that discriminatory intent did not exist is a finding of fact.
 - However, conclusions of law made by an AJ will be reviewed *de novo*. **This holds true regardless of whether or not there was a hearing. For example, if the AJ ruled in favor of the Agency's Motion for Summary Judgment.**
- The OFO has been very slow in deciding appeals, averaging 2–3 years to render a decision.

c. Request for Reconsideration

- Once the OFO rules on an appeal, the decision is binding unless either party decides to ask the OFO to reconsider its decision.
- The OFO does not have to reconsider their decision, and it may reject any request for reconsideration.
- A party asking for reconsideration of an OFO decision must do so within 30 days from receipt of the OFO decision and must show that:
 - **The OFO’s decision involved a clearly erroneous interpretation of material fact or law; or**
 - **The OFO’s decision will have a substantial impact on the policies, practices or operations of the agency**
- If the Agency is the party requesting the reconsideration, the Complainant should oppose the Agency’s motion in writing and explain why the Agency did not meet either of the above requirements for the OFO to grant reconsideration.

d. Right to Civil Action

In certain instances, a federal employee has the right to file a discrimination complaint in a federal district court. Note: In all cases, filing a civil action terminates EEOC processing of an appeal.

Requirements for filing a civil action

- Under Title VII of the Civil Rights Act or the Rehabilitation Act (29 C.F.R. Part 1614):
 - Within 90 days of receipt of the final action where no administrative appeal has been filed,
 - After 180 days from the date of filing a formal EEO complaint if an administrative appeal has not been filed and final action has not been taken,
 - Within 90 days of receipt of EEOC's final decision on appeal, or
 - After 180 days from the filing of an appeal with EEOC if there has been no final decision by the EEOC.
- Under the Age Discrimination in Employment Act (ADEA) (29 C.F.R. Section 1614.201):
 - A Complainant may proceed directly to federal court after giving the EEOC notice of his or her intent to sue.
 - An ADEA Complainant who initiates the administrative process in 29 C.F.R. Part 1614 may also file a civil action within the four time frames noted above.
- Under the Equal Pay Act (*See* 29 C.F.R. Section 1614.409):
 - A complainant may file a civil action within 2 years (3 years for willful violations), regardless of whether he or she has pursued an administrative complaint.

Representation

- At all stages of the administrative process, including the counseling stage, a Complainant may be represented by a representative of his or her choosing.
- The Complainant is entitled to a reasonable amount of time to prepare the complaint and work on his or her case.
- The Agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the complainant's choice of a specific representative or to provide leave to allow the complainant and representative to confer.
- In addition, a representative may be disqualified where his or her representation conflicts with his/her workplace duties.
- Union representatives need not use the official time reserved under their contract for representation, but are instead permitted to use EEO official time for complaint representation if they are an employee of the agency and otherwise on duty.
- The Complainant and the representative shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or by EEOC.



Dissatisfaction with the Complaint Process

At some point in the complaint process, all complainants feel dissatisfied with the system. The complaint process described above can be extremely frustrating. Complainants may feel as though their time is being wasted or that they are being given the run-around. However, some complainants have experienced problems with the system that go beyond the typical aggravation of dealing with a bureaucracy.

When a Complainant feels as though the processing of his or her complaint has been handled in an outrageous or shocking manner, the complainant may file an additional complaint concerning the processing. Part 1614 allows for the filing of such a complaint, which will be evaluated along with the underlying complaint and not as its own separate matter.

A Complainant who wishes to complain regarding the mishandling of the EEO process should register his or her complaints with the official who is currently responsible for the underlying EEO complaint. Such officials may be the EEO counselor, the agency investigator, or the AJ. The official must record the complaint and its content in their final report or record.

EEO Laws Applicable to Federal Employees

Federal Equal Employment Opportunity (“EEO”) laws mandate that employment terms and conditions and employment-related decisions be based on such relevant job factors as skills, education, training, merit, and experience, and not on such protected characteristics as race, religion, national origin, color, sex, disability, and/or age.

Federal employees (and applicants to federal employment) generally are protected by four civil rights statutes: Title VII of the Civil Rights Act (including the amendments in the 1991 Civil Rights Act), the Age Discrimination in Employment Act, the Rehabilitation Act, and the Equal Pay Act.

Bargaining unit members may elect to grieve equal employment discrimination matters under their AFGE collective bargaining agreements. Alternatively, the U.S. Merit Systems Protection Board will review allegations of discrimination that relate to an individual’s appeal of an adverse action (such as removals or suspensions of more than 14 days). However, the vast majority of EEO discrimination claims are processed in the "agency complaint processing system" set forth at 29 C.F.R. Part 1614 (*see* Appendix 1). Part 1614 is further explained by the EEOC in Management Directive-110 (MD-110). MD-110 can be found on EEOC’s website: www.eeoc.gov.

Federal Statutes

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

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

On April 20, 2012, the EEOC issued a decision extending Title VII protections to transgender employees. In Macy v. Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012), the EEOC held that discrimination against transgender individuals constitutes sex discrimination against an individual.

Further, in April 2012, the EEOC issued guidance explaining that an employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended. *See* Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#I.

b. The Age Discrimination in Employment Act of 1963, 29 U.S.C. Section 633



The ADEA was enacted in 1963 and made applicable to federal employees in 1974. It prohibits age discrimination and applies to persons who are 40 years of age or older. Under the ADEA, a person who believes he or she has been discriminated against because of his or her age (40 and over) does not have to exhaust his or her administrative remedies. Thus, if a person files an informal complaint of discrimination with an agency EEO counselor and the complaint is not resolved, the person can choose to proceed through the administrative process or to file a lawsuit in federal court. *See* 29 C.F.R. Part 1614.408. In 2004, the Supreme Court issued a decision that allows employers to favor its older workers over its younger workers, even when all of the workers are aged forty or over and, therefore, protected by the ADEA. General Dynamics Land Sys. Inc. v. Cline, 540 U.S. 581 (2004). This means, for example, that if a federal employee is 42 years old and is not selected for a promotion, but the selectee is 45, the non-selected employee does not have a claim under the ADEA.

Further, the United States Supreme Court in Gomez-Perez v. Potter, 553 U.S. 474 (2008), held that a federal employee who filed a charge of age discrimination under the ADEA may assert a retaliation claim under the federal-sector provision of the ADEA.

c. The Rehabilitation Act of 1973, 29 U.S.C. Section 791

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

d. The Equal Pay Act of 1966, 29 U.S.C. Section 206

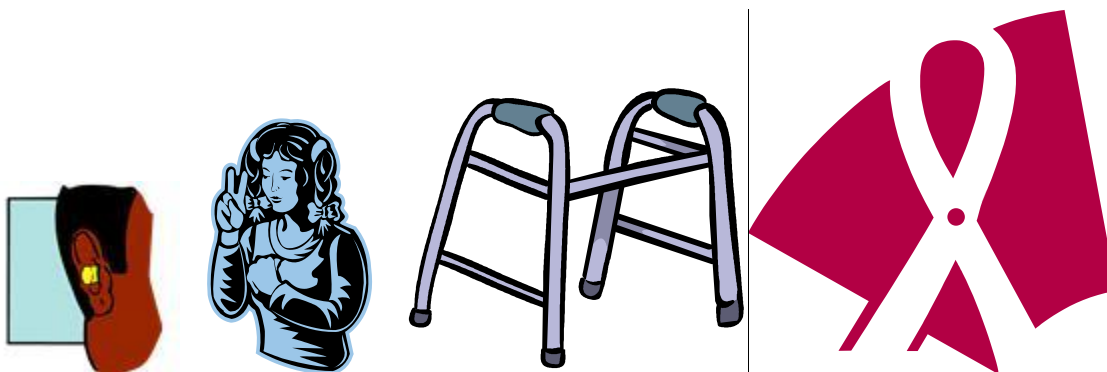
The EPA was applied to the federal sector workforce by the Fair Labor Standards Act amendments of 1974. The EPA prohibits paying men and women different wages for "equal work" when the performance of such work requires equal skill, effort, and responsibility, and the work is performed under equal working conditions. A person who believes he or she has been discriminated against in violation of the Equal Pay Act does not have to exhaust his or her administrative remedies. This means that if a person files an informal complaint of discrimination with an agency EEO counselor and the complaint is not resolved, the person can choose to proceed through the administrative process, as a sex discrimination claim, or to file a lawsuit in federal court. *See* 29 C.F.R. Part 1614.408.

e. The Pregnancy Discrimination Act of 1978

The Pregnancy Discrimination Act requires an agency to treat pregnant employees the same as a non-pregnant employees. However, neither the Pregnancy Discrimination Act nor the Rehabilitation Act requires an agency to give preferential treatment or accommodations to pregnant women solely because of their pregnancy. Pregnancy discrimination is litigated as a sex discrimination claim.

f. Genetic Information Nondiscrimination Act of 2008 (GINA)

GINA renders it illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs - referred to as "covered entities") from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.



g. Discrimination Against Individuals with Disabilities

The **Rehabilitation Act of 1973**, as amended, protects qualified employees and applicants with disabilities in the federal government from employment discrimination based on disability. In 1992, the substantive employment standards of the **Americans with Disabilities Act (ADA)**, 42 U.S.C. Section 12111, *et seq.*, were made applicable to the Federal Government through the Rehabilitation Act. In 2008, the **ADA Amendments Act** was enacted and became effective on January 1, 2009. This law made a number of significant changes to the definition of “disability.”

A disabled employee or applicant is either an:

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

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

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

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

Bringing an EEO Case

It is unlawful for the federal government to discriminate against an employee or applicant on the protected bases of race, color, religion, sex, national origin, age, disability, or genetic information. These eight protected bases constitute the different types of EEO (or equal employment opportunity) cases that may be brought against a federal agency through the EEO complaint process. In order to win an EEO case, the employee must prove that the lost opportunity was due to unlawful discrimination on one of the protected bases. This means that if the employer simply does not like an employee for personal reasons, or prefers another employee for personal reasons, and those reasons are not one of the protected eight bases, the EEO claim may not prevail.

One proves a case by providing evidence. There are two types of evidence: direct and indirect (also called circumstantial).

Direct evidence is the most powerful evidence and is often analogized to a smoking gun. Such evidence of unlawful discrimination would include statements of hostility toward a protected class (race, color, sex, etc.), such as "I didn't think a woman (or a person with a disability) could do that job," or a slur. If an employee has credible direct evidence, he or she may win the case based on that alone.

Without direct evidence, however, an employee may provide indirect or circumstantial evidence to prove disparate treatment or disparate impact. This can include looking at similarly situated employees that do not share the complainant's protected bases who received preferential treatment.



Types of EEOC Cases

A. Disparate Treatment Cases

Definition:

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

Disparate Treatment

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

Examples:

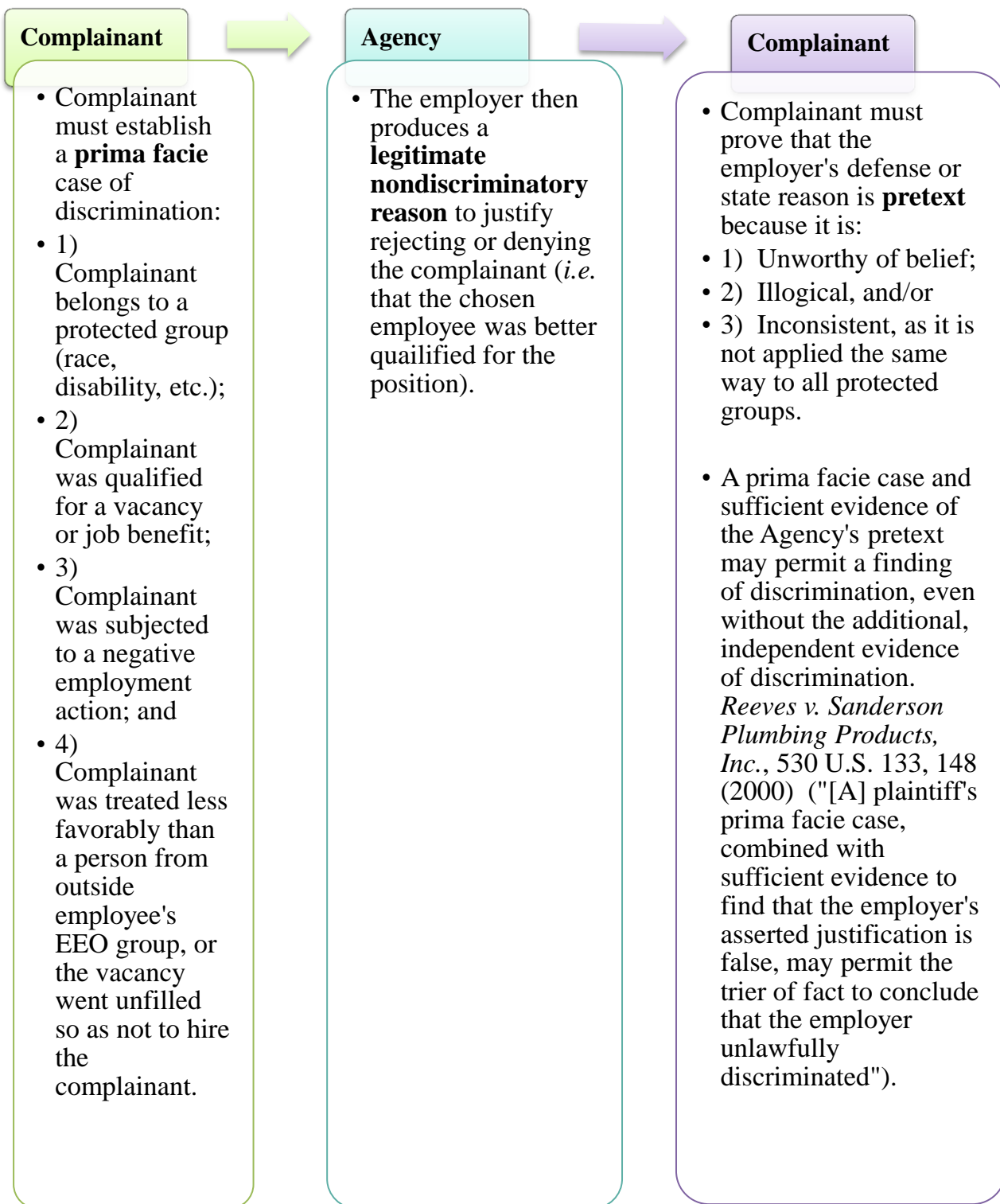
- An employer does not select a female job applicant because the employer does not want a female to fill that job.
- An employer treats one employee less favorably than another due to the employee's membership in a protected group.

Proving disparate treatment:

- Provide either direct or indirect (circumstantial) evidence.
- Direct evidence of disparate treatment is rare because few employers will admit to discriminating. Therefore, most cases of disparate treatment are proven by indirect (circumstantial) evidence.
- As shown in the following chart, complainants alleging disparate treatment must prove their initial *prima facie* case as well as rebut the agency's defense.



Proving Disparate Treatment



B. Disparate Impact Cases

Definition:

Disparate Impact

- **disparate impact** analysis challenges an agency's facially neutral rule or policy that is not job-related but has an adverse effect on a particular protected group.

Examples:

- A requirement that job applicants must have obtained a high school diploma or have passed a “general intelligence” test, because these requirements tend to screen out a disproportionate number of black applicants.
- A job advertisement that sets forth a minimum height requirement, which may tend to screen out a high proportion of female or Asian applicants.
- Disparate impact cases include both objective employment practices, such as the above requirements, and subjective employment practices, such as interviews or performance appraisals.

Proving disparate impact:

The *prima facie* case:

- A Complainant must demonstrate that each challenged employment practice causes a disparate impact, unless the elements of the employer's decision-making process cannot be separated, in which case the entire process may be analyzed as a whole.
- A Complainant must make a *prima facie* case of discrimination by showing that each challenged practice or selection method has a substantial adverse impact on a specific protected group.

Possible agency defenses:

- The requirement is job-related for the position and is consistent with business necessity.
- The job requirement is a bona fide occupational qualification (“BFOQ”).
 - The BFOQ defense applies to all Title VII protected groups, except race and color.
 - The agency acknowledges that it discriminates, but contends that doing so is essential to its business. For example, airlines legitimately raise age as a BFOQ for pilots, because the FAA does not allow individuals over a certain age to fly commercial aircrafts, and employing pilots permitted to fly is essential to the airline’s business.
 - The EEOC scrutinizes BFOQ defenses carefully.

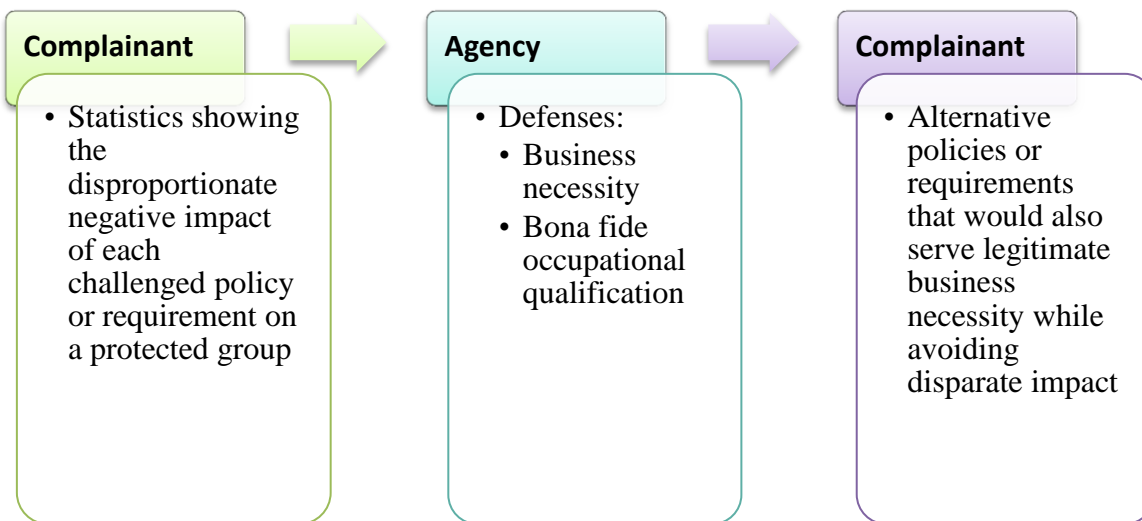
Rebutting the agency’s defense:

- If the agency is able to prove that the challenged practice is consistent with business necessity, the complainant still can prevail if he or she is able to demonstrate that the agency has refused to adopt an alternative employment practice that would satisfy the agency’s legitimate interests, without having a disparate impact on a protected class.

Statistical analysis:

- Proof of disparate impact normally involves a sophisticated statistical analysis that shows the disproportionate impact of the challenged policy.
- The proper statistical comparison is of the racial or gender composition of the qualified persons in the labor market, or the qualified job applicants, against the racial or gender composition of those individuals actually hired.
- Subjective employment selection procedures may also be challenged by statistical evidence showing that an employer's practices have a discriminatory impact on a protected group, even if the employer did not intend to discriminate.
- The employer will certainly present an expert on statistics to contest a complainant’s assertion.

Proving Disparate Impact



C. Failure to Accommodate

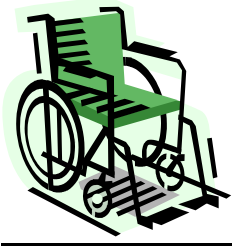
The ADA also requires employers to make reasonable accommodation to the physical or mental limitations of an otherwise qualified employee with a disability, unless the employer can demonstrate that the accommodation would impose undue hardship on the operation of its business. 42 U.S.C. § 12112; 29 C.F.R. § 1630.9.

Remember, a disability is defined as a physical or mental impairment that substantially limits one or more of an individual's major life activities. 42 U.S.C. § 12112; 29 C.F.R. § 1630.2(g). An employee must have a disability to qualify for a reasonable accommodation, not merely be regarded as having a disability.

A reasonable accommodation can be any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunity. Leave for treatment or other reasons related to a disability, flexible and part-time work schedules, changes to the physical work environment, and job modification (e.g., (eliminating non-essential job functions that cannot be performed due to a disability) are examples of reasonable accommodation. A reasonable accommodation request does not need to be written or even state the term 'reasonable accommodation.' The employee need only inform the agency that he needs an adjustment or change at work for a reason related to a medical condition. Scott v. Social Security Administration, EEOC Appeal No. 0120065195 (Aug. 6, 2008).

The Rehabilitation Act of 1973 (Section 501, 29 U.S.C. 791) requires agencies to reasonably accommodate the needs of qualified federal employees and applicants with a known "handicapping condition." This means that the agency may need to change the workplace to enable the disabled individual to perform the essential functions of his or her job. For more information, refer to *WFP's Guidebook on Disability Rights*.





Requirements to Establish a Case of Unlawful Denial of Disability Accommodation

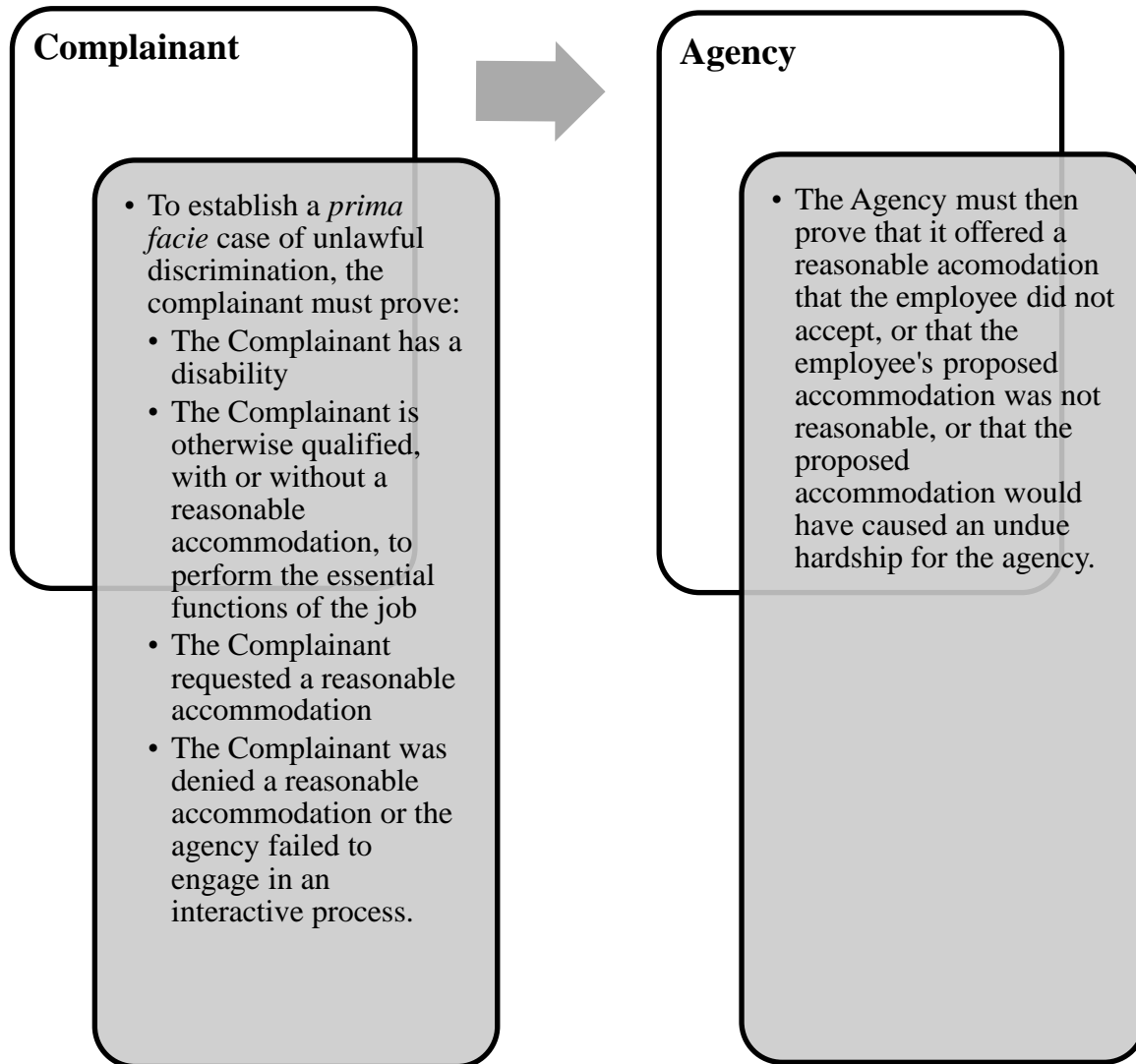
In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of "reasonable accommodations":

1. modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
2. modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
3. modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

To claim that the employer failed to grant a reasonable accommodation to a disabled individual that would have allowed the individual to perform the essential functions of the job, the Complainant must show that:

- The employee had a disability;
- The employer knew of the disability;
- There was a conflict between the disability and existing employment situation; and
- There was a request for Reasonable Accommodation, either written or verbal.
 - Either there was no response from the Agency or the Agency denied the request without demonstrating undue hardship. The Agency will likely attempt to defend its actions by demonstrating that accommodation would impose an "undue hardship on the agency. The Agency cannot argue that hypothetically, there could be a hardship, *i.e.* if we grant it for one employee; we would have to grant it for all.
 - The Agency must engage in the interactive process with the Complainant.
 - The Agency may request additional information, offer alternatives, and provide an accommodation that is different than the one requested, if it addresses the conflict between the disability and the workplace.
 - The Complainant may rely on medical documentation or expert witnesses to establish the disability, identify accommodations, or assess the requested accommodation and its efficiency.

Proving a Reasonable Accommodation Case



D. Reprisal: Another Form of Discrimination

Establishing a *prima-facie* case of reprisal differs somewhat from disparate treatment and impact discrimination cases. The central issue in a reprisal case is to prove that a complainant's protected activity is causally connected to adverse treatment later suffered by the individual.

Elements of a *prima-facie* case of reprisal:

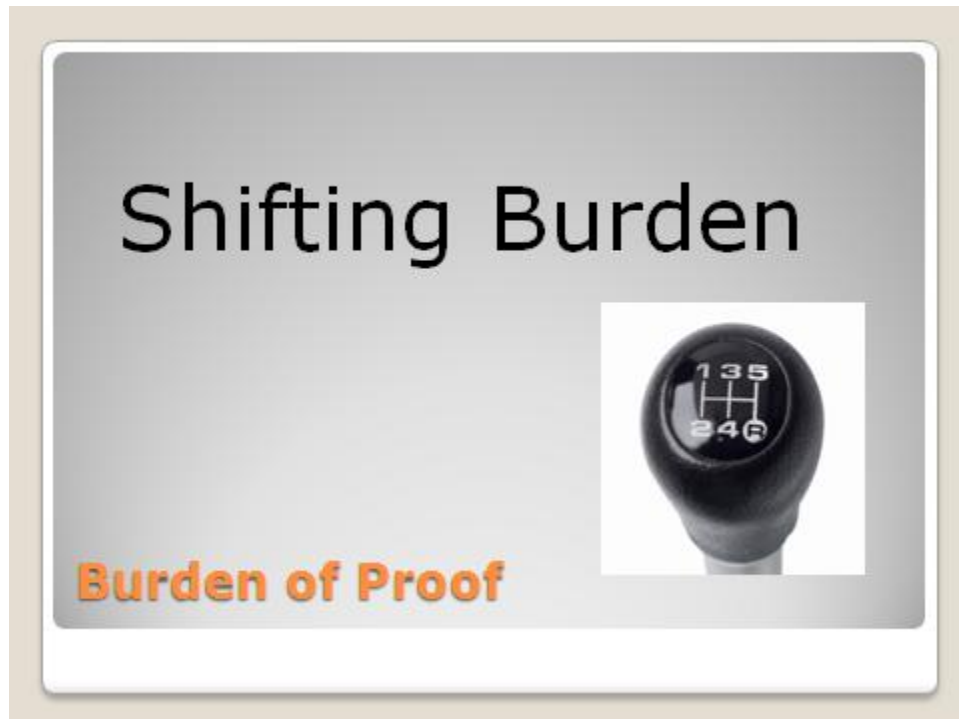
- 1) Complainant engaged in a protected EEO activity: asserted (as a Complainant), helped assert (as a witness or representative) EEO rights, protested discriminatory actions prohibited by Title VII, ADA, and/or ADEA, or closely associated with someone with protected activity;
- 2) The Agency and the Responsible Management Official (RMO) particularly, had specific knowledge of the complainant's protected activity;
- 3) The complainant was subjected to an adverse action or treatment; and
- 4) Demonstrate that the protected activity was the reason for the adverse action,

What kinds of action constitute retaliation?

- Not just employment-related retaliatory actions, but also any employer conduct that is materially adverse and that might have dissuaded a reasonable employee from making or supporting a charge of discrimination against the employer. This is referred to as a "chilling effect."
- Examples of actionable retaliation:
 - Changing the employee's duties to include dirtier, harder, and less prestigious work, even though the duties were still within the employee's job description (Burlington Northern v. White, 126 S.Ct. 2405 (2006))
 - The FBI refusing, contrary to its policy, to investigate a death threat against an FBI agent. (Rochon v. Gonzales, 438 F. 3d 1211 (DC Cir 2006))
 - An employer filing false criminal charges against a former employee. (Berry v. Stevinson Chevrolet, 74 F. 3d 980 (10th Cir 1996))
- The Supreme Court extended the scope of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 (Title VII) to an individual harmed by retaliation, even if that person had not himself filed a charge of discrimination. See Thompson v. North American Stainless, 131 S.Ct. 863 (2011) (finding that the fiancé of a Complainant had suffered retaliation).

How to prove that the protected EEO activity was the reason for the adverse action or treatment:

- Direct evidence:
 - The discriminating official states that an adverse action was imposed on a particular individual because of the individual's past EEO activity.
 - In most cases, there is no direct evidence.
- Indirect evidence:
 - Most reprisal cases rely on a timeline of the relevant actions to allow the AJ or other decision maker to draw an inference of reprisal.
 - The less time elapsed between the past EEO activity (or the date on which the agency and/or Responsible Management Official became aware of such activity) and the date of the adverse action, the stronger the inference of retaliation.
 - The EEOC often dismisses cases when more than six months have elapsed between a complainant's protected activity and the adverse action.



E. Sexual Harassment

Sexual harassment is a form of illegal sex discrimination under Title VII of the Civil Rights Act of 1964. The EEOC defines illegal sexual harassment as "unwelcome conduct of a sexual nature...that is a term or condition of employment." Sexual harassment is not limited to harassment by men against women. Both men and women can be sexual harassers, and both men and women can be sexually harassed.

Types of Sexual Harassment

<u>Quid Pro Quo Sexual Harassment</u>	<u>Hostile Work Environment</u>	<u>Sexual Favoritism</u>
An individual's submission to or rejection of sexual advances or conduct of a sexual nature is used as the basis for employment decisions affecting the individual, or the individual's submission to such conduct is made a term or condition of employment.	An employee is subjected to unwelcome sexual conduct based on sex that is so pervasive or severe that it creates an abusive or hostile work environment.	There is a pervasive workplace pattern of rewarding employees who consensually submit to sexual demands, which then penalizes those who do not submit or were not a target of the demands.



Requirements for Establishing a Sexual Harassment Case

Quid pro quo sexual harassment:

- 1) The harasser is someone with authority over the employee;
- 2) The harasser made unwelcome requests for sexual favors from or unwelcome sexual advances toward the employee;
- 3) The harasser stated or implied that the employee must submit to the demands in order to receive or keep a job benefit;
- 4) The employee did not submit to the sexual demands; and, as a result;
- 5) The employee suffered economic harm or tangible work detriment.

Hostile work environment:

- 1) A supervisor, co-worker, or a non-employee over whom the employer has or could have control
- 2) subjected the employee to unwelcome sexual conduct
- 3) based on the employee's sex
- 4) that was sufficiently pervasive or severe as to create a hostile work environment.

Note: The employee need not suffer economic loss or tangible work detriment to prove a hostile work environment.

Sexual favoritism:

- 1) There is a widespread practice of granting job benefits to employees who engage in consensual sexual activity with supervisors and
- 2) The practice penalizes those employees who do not support, or who are not requested to engage in the sexual conduct.

Note: Both women and men may establish a case of illegal sexual favoritism. Refer to EEOC Guidance on Sex Discrimination, available at www.eeoc.gov.

Employer Liability

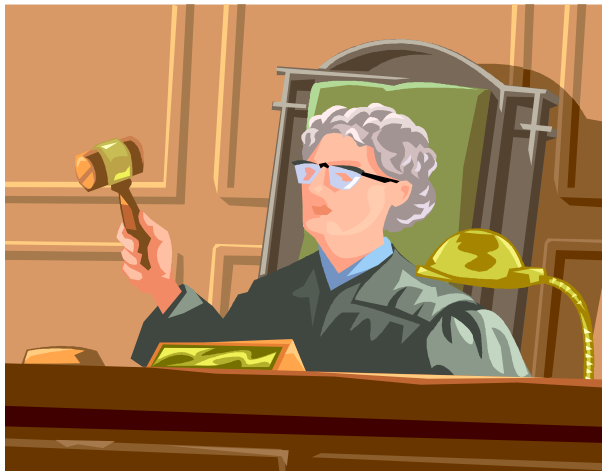
The different types of sexual harassment have different standards for holding the employer liable for the sexual harassment of the harasser.

Quid pro quo sexual harassment:

- Employers are strictly liable to victims who suffered tangible harm as a result of the harassment, if the harasser had actual authority to alter the employee's work conditions, regardless of whether the employer had actual knowledge of the harassment when it occurred.
- If the employee has not suffered tangible harm in a *quid pro quo* case, it is analyzed as a hostile work environment case.
- A tangible employment action is a significant change in employment status, and unfulfilled threats are insufficient.
- Harassment is evaluated from a reasonable person's perspective.

Hostile work environment and sexual favoritism cases:

- Where the harasser is a supervisor:
 - The employer is strictly liable unless:
 - there was no tangible harm
 - the employer took reasonable care and acted promptly to correct the situation, and
 - the employee failed to reasonably take advantage of any corrective opportunity offered by the employer.
- Where the harasser is not a supervisor:
 - The employer can be held liable only when it:
 - Knew or should have known about the harassment, and
 - Failed to take prompt and reasonable remedial action.
 - Therefore, it is important that the victim complain to the agency about these types of sexual harassment.





Employer's Affirmative Defenses

Additionally, in hostile work environment cases not involving a tangible employment action brought under Title VII of the Civil Rights Act of 1964, an employer has an affirmative defense if it can prove:

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and
- The complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998)); EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, available at <http://www.eeoc.gov/policy/docs/harassment.html>.

More Information

For more information on sexual harassment, see AFGE's Women's and Fair Practices Departments booklet Stop Sexual Harassment Before it Stops You: A Guide for AFGE Members.



Class Actions

To bring a class action claim, complainants must prove that the agency has a regular, systematic practice of discriminating against a certain protected group. Although complainants in class actions usually offer evidence of individual discriminatory acts, they are not required to show at the outset that each person for whom they will ultimately seek relief was a victim of discrimination. Once a case is established and a class is certified, the judge will determine which members of the class were actually victimized by the employer's actions and thus are entitled to relief. Class members then claim relief individually.

The use of statistics:

- Statistics are particularly useful in class action suits, to show a pattern of discrimination.
- No minimum sample size is required by federal law or statistical theory.
- The adequacy of numerical comparisons with small sets of data depends on the degree of certainty required by the fact-finder as well as on the type of inference that the statistics are meant to demonstrate.
- As courts have become increasingly sophisticated in their treatment of statistical analysis, expert testimony from consultants specializing in statistics is practically essential for class action claims.

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

- 1) Numerosity: The affected class must be so numerous that a joinder of all of the claims would be impractical (usually when there are more than 50 people).
- 2) Commonality: There must be questions of fact and law common to all of the individuals' complaints.
- 3) Typicality: The claims and defenses of the named complainant ("class representative") are typical of the other un-named class members' claims and defenses.
- 4) Adequacy of representation: The class representative fairly and appropriately represents un-named class members.

Part 1614 specifically allows for class actions and permits a Complainant to move for class action "at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint." Part 1614.204(b). The AJ does not make a final decision, but rather recommends certification to EEOC's Office of Federal Operations.

Class actions before the EEOC are difficult to litigate and have historically been rare. Before filing a class action complaint, the complainant and his or her representative should first consider whether it would be more practical to simply add additional claims of additional complainants by joinder, rather than in a class action.

Damages

Keeping all documentation and taking thorough notes will help a complainant win his or her discrimination claim, and will also support the complainant's request for damages, or "relief". The relief granted depends on whether the individual is an applicant or employee, as well as on the adverse action taken, and the duration and/or impact of the adverse action. EEO damages provisions aim to return the complainant to the position he or she would have occupied had the illegal discrimination not occurred. This means that when the complainant does not suffer any actual damages from the discrimination, the only relief available is "declarative relief," *i.e.*, a written acknowledgment that discrimination occurred.



The following is a discussion of relief that may be granted in EEO cases if a complainant is successful in proving that he or she has been subjected to unlawful discrimination.

A. Back Pay

Back pay generally consists of the complainant's monetary loss due to the discrimination, *i.e.* the difference between what the employee was paid and what the employee would have been paid if no discrimination had occurred. Back pay may be appropriate in cases of failure-to-promote, denial of a within-grade pay raise, suspension, removal, and termination. Back pay may also include overtime salary to complainants who are able to prove that had the agency's discriminatory conduct not occurred, they would have been eligible for overtime. If back pay is awarded, interest is calculated and added to the award.

However, there are limits on how much back pay a complainant may be awarded. In some cases, a complainant has a duty to mitigate his or her damages, by obtaining other employment after being fired, for example. When the agency is able to prove that the complainant failed to mitigate his or her damages, a back pay award may be reduced.

B. Attorney Fees

Reasonable attorney's fees may be awarded for legal expenses incurred by a lawyer on behalf of a complainant in prevailing (winning) cases. However, attorney's fees are not awarded for the work provided by a complainant's union representative, unless the representative is an attorney. Under Part 1614, the EEOC AJ may determine reasonable attorney's fees. Additionally, attorney's fees may be limited if the agency offered a settlement agreement that was rejected by the complainant and the ultimate award was less favorable than the settlement agreement.

C. Injunctive Relief

Injunctions are legal orders requiring agencies to perform or stop performing an action. Although the complainant may benefit financially from an injunction, injunctions are non-monetary relief. Examples of injunctive relief include promotion, hiring, reinstatement, return of benefits, granting a reasonable accommodation to a qualified individual with a disability, and removal of or change to a negative evaluation.

D. Front Pay

“Front pay,” is the amount of compensation and benefits judged necessary to make up for lost pay that the employee would have earned in the future. The amount of front pay depends on how long the court determines it will take the employee to return to the same level of pay that he or she received at termination. Front pay also includes money for all lost future benefits. Front pay is not included in compensatory damages and, therefore, is not subject to any statutory cap on damages.

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

E. Compensatory Damages

Compensatory damages, an award of money for actual losses suffered for intentional discrimination, may be recovered by federal employees at the administrative level and in district court. The deadlines and other requirements for requesting compensatory damages are included in the orders from the AJ. Review these requirements carefully, as complainants typically need to submit their requests for compensatory damages early in the case. Requests for compensatory damages are most often successful when they are reasonable, and/or supported by documentation and relevant case law.

Limitations on the Availability of Compensatory Damages

Section 1981a(b)(3) of the Civil Rights Act of 1991 limits the total amount of compensatory damages that may be awarded to a complainant to a maximum of \$300,000, if the agency has more than 500 employees. This does not include past pecuniary (economic) losses; back pay; attorney fees; and/or front pay (in the rare case that it is awarded).

The Complainant may also be limited in collecting compensatory damages in certain cases. For example, the ADEA does not allow for the collection of compensatory damages. An agency may base an employment decision on several factors, some of which may be discriminatory and some of which may be lawful. If a Complainant proves that unlawful discrimination was one factor in the agency’s action, the Complainant will be able to establish the agency’s wrongdoing. However, if the Agency can prove that it would have made the same decision or taken the same action absent the discriminatory motive, the Complainant is not entitled to recover, because the

discrimination was not a decisive factor. In such cases, the AJ will likely award declaratory relief and attorney's fees and costs only.

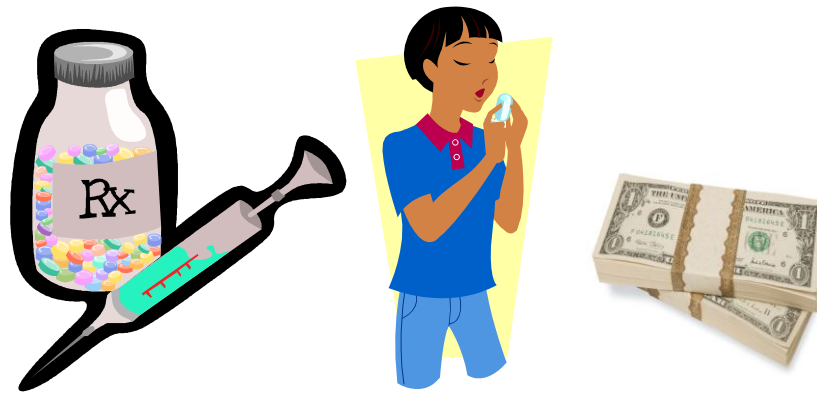
What Must be Proven for Compensatory Damages?

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



WHAT ARE COMPENSATORY DAMAGES?

Includes	Does Not Include
<ul style="list-style-type: none">• Economic damages<ul style="list-style-type: none">○ Lost employment benefits○ Medical costs○ "Out-of-pocket" expenses• Non-economic damages<ul style="list-style-type: none">○ Pain and suffering○ Emotional distress○ Mental anguish <p>(Past as well as future losses)</p>	<ul style="list-style-type: none">• Back pay• Attorney fees



AM I ENTITLED TO COMPENSATORY DAMAGES?

Entitled to Compensatory Damages	NOT Entitled to Compensatory Damages
<p>Intentional discrimination on the basis of:</p> <ul style="list-style-type: none">• Race• Color• Religion• National origin• Sex• Disability, unless the agency makes a good faith effort to provide a reasonable accommodation.	<ul style="list-style-type: none">• Intentional discrimination based solely on age• Disparate impact cases in the absence of proving discriminatory intent as well.

F. Post-Judgment Interest

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

G. Punitive Damages

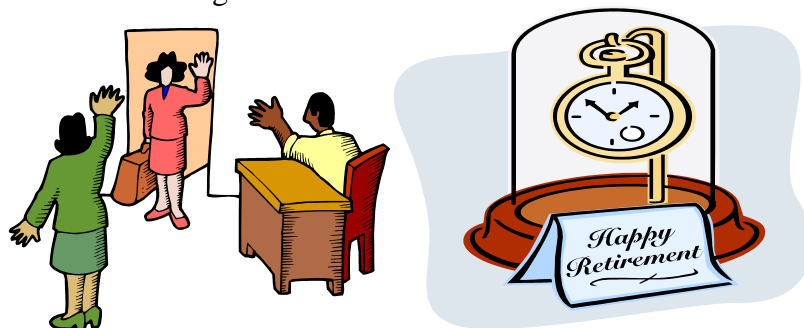
Punitive damages are not available to federal or DC government employees in discrimination cases.

H. Settlements

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

I. Nonmonetary Relief

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



Other Protections

1. The No FEAR Act of 2002

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

2. Management Directive 715

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

3. Executive Orders

i. Sexual Orientation, E.O. 13087

Sexual orientation is currently not protected by Title VII of the 1964 Civil Right Act (or any federal law). However, on May 28, 1998, President Clinton ordered that Executive Order No. 11478 be amended to prohibit discrimination on the basis of sexual orientation in the federal workplace. As a result, discrimination on the basis of sexual orientation is illegal -- but there is no EEO process by which to enforce this protection. Enforcement of one's right to be free from sexual orientation discrimination is most readily available through your union contract.

Congress is currently reviewing ENDA, the Employment Non-Discrimination Act. ENDA would amend Title VII to include a prohibition against discrimination on the basis of sexual orientation. If ENDA were to pass and become law, not only would discrimination on the basis of sexual orientation be illegal, but one would also be able to enforce this through an EEO process and/or court action.

ii. Genetics, E.O. 13145

On February 8, 2000, President Clinton signed Executive Order 13145 that bans genetic discrimination by federal agencies. In other words, agencies cannot discriminate on the basis of one's genetic predisposition to illness.

iii. Parental Status, E.O. 13152

On May 2, 2000, President Clinton ordered that Executive Order No. 11478 be amended to prohibit discrimination in the federal government on the basis of an individual's parental status. An example of discrimination on the basis of parental status is a supervisor who will not promote an employee with a young child because of the supervisor's belief that the employee will not stay late as needed due to the employee's family responsibilities.

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

iv. Facilitate Accommodations for the Disabled, E.O. 13164

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

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

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



MSPB and Adverse Actions

A. Adverse Actions

The Merit Systems Protection Board has jurisdiction to accept appeals from adverse actions. The easiest way to determine if you have suffered an adverse action is to check whether a notice of your right to appeal to the MSPB is attached to any letter of discipline you may have received from the agency. Pursuant to 5 U.S.C. Section 7512, adverse actions include:

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

“Adverse actions” are interpreted very narrowly by the MSPB. For example, a reduction in special or locality pay does not constitute a reduction in basic pay, and therefore is not an adverse action.

Furthermore, pursuant to the Civil Service Reform Act, adverse actions may be taken "against an employee only for such cause as will promote the efficiency of the service." (5 U.S.C. Section 7513). To determine if service efficiency is enhanced by an adverse action, the agency must satisfy its burden of proof that:

- the appellant is at fault for the conduct charged
- the conduct for which the appellant is faulted impairs service efficiency
- the penalty is appropriate

Even if the agency satisfies these three burdens, the Board must overturn an adverse action when the employee demonstrates one of the following affirmative defenses:

- harmful error
- prohibited personnel practice, or
- decision reached not in accordance with law. (5 U.S.C. Section 7701 (c)(2)).

B. Personnel Practices Prohibited by the Civil Service Reform Act

The Civil Service Reform Act (5 U.S.C. §§ 2302(b)(1-11)) states that any person who has the authority to take, to direct others to take, to recommend, or to approve any personnel action shall not:

- discriminate on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation.
- solicit or consider employment recommendations based on factors other than personal knowledge or records of job related abilities or characteristics.
- coerce the political activity of any person.
- deceive or willfully obstruct any person from competing for employment.
- influence any person to withdraw from competition for any position in order to improve or injure the employment prospects of any other person.
- give unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant.
- engage in nepotism (hire or promote relatives or advocate such activity).
- take reprisal against a whistleblower.
- take reprisal for the exercise of any appeal rights granted by any law, rule, or regulation.
- discriminate on the basis of personal conduct which does not adversely affect the job performance of the employee, applicant, or others.
- take or fail to take a personnel action violating any law, rule, or regulation implementing or directly concerning the 5 U.S.C. Section 2301 merit systems principles.

C. Whistleblower Protection

- The appellant may also allege that the adverse action was in retaliation for disclosures made which were protected by the Whistleblower Protection Act (WPA). (5 U.S.C. Section 2303(b)(8)).
- Whistleblowing is defined as "any disclosure of information" by an employee which he "reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to public health or safety..."
- If the appellant proves that such a disclosure was a contributing factor in his removal, the Board will order the agency to take corrective action,
 - Unless the agency can demonstrate by clear and convincing evidence that it would have taken the same personnel action absent the appellant's protected disclosure.
- The appellant may prove that the disclosure was a contributing factor by showing that the officials taking the action:
 - Had actual or constructive knowledge of the disclosure
 - Acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

See McDaid v. Department of Housing and Urban Development, 46 M.S.P.R 416 (1990).

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

A. Definition

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) 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;

(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

Most appealable actions fall into the following six (6) 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.

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.

(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 (Oct. 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).

Appendices

APPENDIX A:

Part 1614 -- Federal Sector Equal Employment Opportunity

(PUBLISHED JULY 12, 1999; EFFECTIVE NOVEMBER 9, 1999)

Subpart A--Agency Program to Promote Equal Employment Opportunity

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1614.102 Agency program.

1614.103 Complaints of discrimination covered by this part.

1614.104 Agency processing.

1614.105 Pre-complaint processing.

1614.106 Individual complaints.

1614.107 Dismissals of complaints.

1614.108 Investigation of complaints.

1614.109 Hearings.

1614.110 Final action by agencies.

Subpart B--Provisions Applicable to Particular Complaints

1614.201 Age Discrimination in Employment Act.

1614.202 Equal Pay Act.

1614.203 Rehabilitation Act.

1614.204 Class complaints.

Subpart C--Related Processes

1614.301 Relationship to negotiated grievance procedure.

1614.302 Mixed case complaints.

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

1614.304 Contents of petition.

1614.305 Consideration procedures.

1614.306 Referral of case to Special Panel.

1614.307 Organization of Special Panel.

1614.308 Practices and procedures of the Special Panel.

1614.309 Enforcement of Special Panel decision.

1614.310 Right to file a civil action.

Subpart D--Appeals and Civil Actions

1614.401 Appeals to the Commission.

1614.402 Time for appeals to the Commission.

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1614.405 Decisions on appeals.

1614.406 Time limits. [Reserved]

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

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Subpart E--Remedies and Enforcement

1614.501 Remedies and relief.

1614.502 Compliance with final Commission decisions.

1614.503 Enforcement of final Commission decisions.

1614.504 Compliance with settlement agreements and final decisions.

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Subpart F--Matters of General Applicability

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1614.602 Reports to the Commission.

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1614.604 Filing and computation of time.

1614.605 Representation and official time.

1614.606 Joint processing and consolidation of complaints.

1614.607 Delegation of authority.

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

Subpart A--Agency Program to Promote Equal Employment Opportunity

1614.101 General policy.

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

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

1614.102 Agency program.

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

(1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation;

- (2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives;
- (3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;
- (4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, age or handicap, and solicit their recruitment assistance on a continuing basis;
- (5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;
- (6) Take appropriate disciplinary action against employees who engage in discriminatory practices;
- (7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;
- (8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program;
- (9) Reassign, in accordance with 1614.203(g), non-probationary employees who develop physical or mental limitations that prevent them from performing the essential functions of their positions even with reasonable accommodation;
- (10) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;
- (11) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;
- (12) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;
- (13) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and
- (14) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

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

- (1) Develop the plans, procedures and regulations necessary to carry out its program;
- (2) Establish or make available an alternative dispute resolution program. Such program must be available for both the pre-complaint process and the formal complaint process.
- (3) Appraise its personnel operations at regular intervals to assure their conformity with its program, this part 1614 and the instructions contained in the Commission's management directives;
- (4) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head.
- (5) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;
- (6) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation;
- (7) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

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

- (1) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in 1614.101 and the agency program;
- (2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

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

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

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

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

1614.103 Complaints of discrimination covered by this part.

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

(b) This part applies to:

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

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

(3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority;

(4) All units of the judicial branch of the Federal government having positions in the competitive service, except for complaints under the Rehabilitation Act;

(5) The National Oceanic and Atmospheric Administration Commissioned Corps;

(6) The Government Printing Office; and

(7) The Smithsonian Institution.

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

(d) This part does not apply to:

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

1614.104 Agency processing.

- (a) Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provisions contained in 1614.105 through 1614.110 and in 1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives.
- (b) The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue decisions that are consistent with acceptable legal standards, to explain the reasons for its decisions, and to give complainants adequate and timely notice of their rights.

1614.105 Pre-complaint processing.

- (a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.
 - (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.
 - (2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.
- (b)(1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with 1614.108(f), election rights pursuant to 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to 1614.201(a) and

a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the claims raised in pre-complaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

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

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

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

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

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

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

1614.106 Individual complaints.

- (a) A complaint must be filed with the agency that allegedly discriminated against the complainant.
- (b) A complaint must be filed within 15 days of receipt of the notice required by 1614.105(d), (e) or (f).
- (c) A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.
- (d) A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a complainant may file a motion with the administrative judge to amend a complaint to include issues or claims like or related to those raised in the complaint.
- (e) The agency shall acknowledge receipt of a complaint or an amendment to a complaint in writing and inform the complainant of the date on which the complaint or amendment was filed. The agency shall advise the complainant in the acknowledgment of the EEOC office and its address where a request for a hearing shall be sent. Such acknowledgment shall also advise the complainant that:
- (1) The complainant has the right to appeal the final action on or dismissal of a complaint; and
 - (2) The agency is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period. When a complaint has been amended, the agency shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, except that the complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint.

1614.107 Dismissals of complaints.

- (a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:
- (1) That fails to state a claim under 1614.103 or 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;
 - (2) That fails to comply with the applicable time limits contained in 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

- (3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;
- (4) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and 1614.301 or 1614.302 indicates that the complainant has elected to pursue the non-EEO process;
- (5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;
- (6) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;
- (7) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available;
- (8) That alleges dissatisfaction with the processing of a previously filed complaint; or
- (9) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination. A clear pattern of misuse of the EEO process requires:
- (i) Evidence of multiple complaint filings; and
 - (ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or
 - (iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system.
- (b) Where the agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in paragraphs (a)(1) through (9) of this section, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated, and shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

1614.108 Investigation of complaints.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1614.109 Hearings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) Take such other actions as appropriate.

(g) *Decisions without hearing.* (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

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

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

(h) *Record of hearing.* The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at

the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the agency representative for reproduction.

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

1614.110 Final action by agencies.

(a) *Final action by an agency following a decision by an administrative judge.* When an administrative judge has issued a decision under 1614.109(b), (g) or (i), the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal in accordance with 1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 573 shall be attached to the final order.

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

Subpart B--Provisions Applicable to Particular Complaints

1614.201 Age Discrimination in Employment Act.

(a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action in a United States district court under the ADEA against the head of an alleged discriminating agency after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, at P.O. Box 19848, Washington, D.C. 20036, or by personal delivery or facsimile within 180 days of the occurrence of the alleged unlawful practice.

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

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

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

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

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

1614.202 Equal Pay Act.

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

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

1614.203 Rehabilitation Act.

(a) *Definitions*--(1) *Individual with handicap(s)* is defined for this section as one who:

(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) Has a record of such an impairment; or

(iii) Is regarded as having such an impairment.

(2) *Physical or mental impairment* means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, respiratory, genitourinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) *Major life activities* means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(4) *Has a record of such an impairment* means has a history of, or has been classified (or misclassified) as having, a mental or physical impairment that substantially limits one or more major life activities.

(5) *Is regarded as having such an impairment* means being treated by an employer as having such an impairment.

(6) *Qualified individual with handicaps* means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(i) Meets the experience or education requirements (which may include passing a written test) of the position in question; or

(ii) Meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.

(b) The Federal Government shall become a model employer of individuals with handicaps. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with mental and physical handicaps. An agency shall not discriminate against a qualified individual with physical or mental handicaps.

(c) *Reasonable accommodation.* (1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.

(2) Reasonable accommodation may include, but shall not be limited to:

- (i) Making facilities readily accessible to and usable by individuals with handicaps; and
- (ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.
- (3) In determining whether, pursuant to paragraph (c)(1) of this section, an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include:
- (i) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;
- (ii) The type of agency operation, including the composition and structure of the agency's work force; and
- (iii) The nature and the cost of the accommodation.
- (d) *Employment criteria.* (1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:
- (i) The agency demonstrates that the test score or other selection criterion is job-related for the position in question and consistent with business necessity; and
- (ii) OPM or other examining authority shows that job-related alternative tests, or the agency shows that job-related alternative criteria, that do not screen out or tend to screen out as many individuals with handicaps are unavailable.
- (2) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skill (except where those skills are the factors that the test purports to measure).
- (e) *Pre-employment inquiries.* (1) Except as provided in paragraphs (e)(2) and (e)(3) of this section, an agency may not conduct a pre-employment medical examination and may not make pre-employment inquiry of an applicant as to whether the applicant is an individual with handicaps or as to the nature or severity of a handicap. An agency may, however, make pre-employment inquiry into an applicant's ability to meet the essential functions of the job, or the medical qualification requirements if applicable, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Office of Personnel Management may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(2) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that: all entering employees are subjected to such an examination regardless of handicap or when the pre-employment medical questionnaire used for positions that do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of pre-employment medical information for the purposes of special appointing authorities for individuals with handicaps.

(3) To enable and evaluate affirmative action to hire, place or advance individuals with handicaps, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if:

(i) The agency states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action; and

(ii) The agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(4) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that:

(i) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that an applicant is eligible under special appointing authority for the disabled;

(ii) Supervisors and managers may be informed regarding necessary accommodations;

(iii) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment;

(iv) Government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for individuals with handicaps shall be provided information upon request; and

(v) Statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

(f) *Physical access to buildings.* (1) An agency shall not discriminate against applicants or employees who are qualified individuals with handicaps due to the inaccessibility of its facility.

(2) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*) and the Americans with Disabilities Act of 1990 (42 U.S.C. 12183 and 12204).

(g) *Reassignment.* When a non-probationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. 8337 or 5 U.S.C. 8451. If the agency has already posted a notice or announcement seeking applications for a specific vacant position at the time the agency has determined that the non-probationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, then the agency does not have an obligation under this section to offer to reassign the individual to that position, but the agency must consider the individual on an equal basis with those who applied for the position. For the purpose of this paragraph, an employee of the United States Postal Service shall not be considered qualified for any offer of reassignment that would be inconsistent with the terms of any applicable collective bargaining agreement.

(h) *Exclusion from definition of "individual(s) with handicap(s)".* (1) The term "individual with handicap(s)" shall not include an individual who is currently engaging in the illegal use of drugs, when an agency acts on the basis of such use. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812). The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, but does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law. This exclusion, however, does not exclude an individual with handicaps who:

(i) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use;
or

(iii) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(2) Except that it shall not violate this section for an agency to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an

individual described in paragraph (h)(1) (i) and (ii) of this section is no longer engaging in the illegal use of drugs.

1614.204 Class Complaints.

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

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

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

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

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

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

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

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

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

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

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

(d) *Acceptance or dismissal.* (1) Within 30 days of an agency's receipt of a complaint, the agency shall: Designate an agency representative who shall not be any of the individuals referenced

in 1614.102(b)(3), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or agency to submit additional information relevant to the complaint.

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

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

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

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

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

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

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

(2) Such notice shall contain:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) *Report of findings and recommendations.* (1) 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 matter that gave rise to the complaint.

(2) If the administrative judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall recommend appropriate relief.

(3) The administrative judge shall notify the agent of the date on which the report of findings and recommendations was forwarded to the agency.

(j) *Agency decision.* (1) Within 60 days of receipt of the report of findings and recommendations issued under 1614.204(i), the agency shall issue a final decision, which shall accept, reject, or modify the findings and recommendations of the administrative judge.

(2) The final decision of the agency shall be in writing and shall be transmitted to the agent by certified mail, return receipt requested, along with a copy of the report of findings and recommendations of the administrative judge.

(3) When the agency's final decision is to reject or modify the findings and recommendations of the administrative judge, the decision shall contain specific reasons for the agency's action.

(4) If the agency has not issued a final decision within 60 days of its receipt of the administrative judge's report of findings and recommendations, those findings and recommendations shall become the final decision. The agency shall transmit the final decision to the agent within five days of the expiration of the 60-day period.

(5) 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.

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

(7) The final decision shall inform the agent of the right to appeal or to file a civil action in accordance with subpart D of this part and of the applicable time limits.

(k) *Notification of decision.* The agency shall notify class members of the final 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 10 days of the transmittal of its final decision to the agent.

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

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

(3) When discrimination is found in the final decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO Director within 30 days of receipt of notification by the agency of its final decision. Administrative judges shall retain jurisdiction over the complaint in order to resolve any disputed claims by class members. The claim must include a specific, detailed showing that the claimant is a class member who was affected by the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the agency found class-wide discrimination in its final decision. Where a finding of discrimination against a class has been made, there shall be a presumption of discrimination as to each member of the class. The agency must show by clear and convincing evidence that any class member is not entitled to relief. The administrative judge may hold a hearing or otherwise supplement the record on a claim filed by a class member. The agency or the Commission may find class-wide discrimination and order remedial action for any policy or practice in existence within 45 days of the agent's initial contact with the Counselor. Relief otherwise consistent with this Part may be ordered for the time the policy or practice was in effect. The agency shall issue a final decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D of this part and the applicable time limits.

Subpart C--Related Processes

1614.301 Relationship to negotiated grievance procedure.

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

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

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

1614.302 Mixed case complaints.

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

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

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

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

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

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint

pursuant to 1614.107(d) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable to the Commission except where it is alleged that 1614.107(d) has been applied to a non-mixed case matter.

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

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

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

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

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

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

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

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

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

(b) *Method of filing.* Filing shall be made by certified mail, return receipt requested, to the Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036.

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

(d) *Service.* The petition for review must be served upon all individuals and parties on the MSPB's service list by certified mail on or before the filing with the Commission, and the Clerk of the MSPB, 1120 Vermont Ave., NW., Washington, DC 20419, and the petitioner must certify as to the date and method of service.

1614.304 Contents of petition.

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

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

(1) The name and address of the petitioner;

(2) The name and address of the petitioner's representative, if any;

(3) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, in whole or in part, only with regard to issues of discrimination based on race, color, religion, sex, national origin, age or handicap;

(4) A copy of the decision issued by the MSPB; and

(5) The signature of the petitioner or representative, if any.

1614.305 Consideration procedures.

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

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

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

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

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

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

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

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

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

1614.306 Referral of case to Special Panel.

If the MSPB reaffirms its decision under 5 CFR 1201.162(a)(2) with or without modification, the matter shall be immediately certified to the Special Panel established pursuant to 5 U.S.C. 7702(d). Upon certification, the Board shall, within five days (excluding Saturdays, Sundays, and Federal holidays), transmit to the Chairman of the Special Panel and to the Chairman of the EEOC the administrative record in the proceeding including--

(a) The factual record compiled under this section, which shall include a transcript of any hearing(s);

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal brief(s) filed, before the Board and the Commission.

1614.307 Organization of Special Panel.

(a) The Special Panel is composed of:

(1) A Chairman appointed by the President with the advice and consent of the Senate, and whose term is 6 years;

(2) One member of the MSPB designated by the Chairman of the Board each time a panel is convened; and

(3) One member of the EEOC designated by the Chairman of the Commission each time a panel is convened.

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

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

1614.308 Practices and procedures of the Special Panel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1614.309 Enforcement of Special Panel decision.

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

1614.310 Right to file a civil action.

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

- (a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or
- (b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or
- (c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or
- (d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or
- (e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or
- (f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or
- (g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or
- (h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or
- (i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

Subpart D--Appeals and Civil Actions**1614.401 Appeals to the Commission.**

- (a) A complainant may appeal an agency's final action or dismissal of a complaint.
- (b) An agency may appeal as provided in 1614.110(a).
- (c) A class agent or an agency may appeal an administrative judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal a final decision on a class

complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and a class member, a class agent or an agency may appeal a final decision on a petition pursuant to 1614.204(g)(4).

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

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

1614.402 Time for appeals to the Commission.

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

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

1614.403 How to appeal.

(a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director,

U.S. Equal Employment Opportunity Commission

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013. The appellant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed.

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

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

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

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

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

1614.404 Appellate procedure.

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

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

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

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

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

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

(4) Take such other actions as appropriate.

1614.405 Decisions on appeals.

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with 1614.107, 1614.403(c) and 1614.410. The decision on an appeal from an agency's final action shall be based on a de novo review, except that the review of the factual findings in a decision by an administrative judge issued pursuant to 1614.109(i) shall be based on a substantial evidence standard of review. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her civil action rights, and be transmitted to the complainant and the agency by first class mail.

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

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

1614.406 Time limits. [Reserved]

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

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

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

1614.408 Civil action: Equal Pay Act.

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

1614.409 Effect of filing a civil action.

Filing a civil action under 1614.408 or 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

Subpart E--Remedies and Enforcement**1614.501 Remedies and relief.**

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

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

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

(b) *Relief for an applicant.* (1)(i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made

in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

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

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

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

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

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

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 C.F.R. 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

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

- (3) Cancellation of an unwarranted personnel action and restoration of the employee.
- (4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.
- (5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).
- (d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.
- (e) *Attorney's fees or costs--(1) Awards of attorney's fees or costs.* The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. In a decision or final action, the agency, administrative judge, or Commission may award the applicant or employee reasonable attorney's fees (including expert witness fees) and other costs incurred in the processing of the complaint.
- (i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.
- (ii) Any award of attorney's fees or costs shall be paid by the agency.
- (iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.
- (iv) Attorney's fees shall be paid for services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the agency, administrative judge or Commission, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Agencies are not required to pay attorney's fees for services performed during the pre-complaint process, except that fees are allowable when the Commission affirms on appeal an administrative judge's decision finding discrimination after an agency takes final action by not implementing an administrative judge's decision. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.
- (2) *Amount of awards.* (i) When the agency, administrative judge or the Commission determines an entitlement to attorney's fees or costs, the complainant's attorney shall submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the agency or administrative judge within 30 days of receipt of the decision and shall submit a copy of the statement to the agency. A statement of attorney's fees and costs shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. The agency may respond to a statement of attorney's fees and costs within 30 days of its receipt. The verified statement, accompanying affidavit and any agency response shall be made a part of the complaint file.

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

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

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

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

1614.502 Compliance with final Commission decisions.

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

(b) Notwithstanding paragraph (a) of this section, when the agency requests reconsideration and the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision orders retroactive restoration, the agency shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified by the Commission, pending the outcome of the agency request for reconsideration.

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

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

(3) The agency shall notify the Commission and the employee in writing at the same time it requests reconsideration that the relief it provides is temporary or conditional and, if applicable,

that it will delay the payment of any amounts owed but will pay interest as specified in paragraph (b)(2) of this section. Failure of the agency to provide notification will result in the dismissal of the agency's request.

(c) When no request for reconsideration is filed or when a request for reconsideration is denied, the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 60 days after receipt of the final decision unless otherwise ordered in the decision.

1614.503 Enforcement of final Commission decisions.

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

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

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

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

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

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

(g) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title

VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

1614.504 Compliance with settlement agreements and final actions.

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

(b) The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

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

1614.505 Interim relief.

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

(2) Service under the temporary or conditional restoration provisions of paragraph (a)(1) of this section shall be credited toward the completion of a probationary or trial period, eligibility for a

within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds the decision on appeal. Such service shall not be credited toward the completion of any applicable probationary or trial period or the completion of the service requirement for career tenure if the Commission reverses the decision on appeal.

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

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

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

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

Subpart F—Matters of General Applicability

1614.601 EEO group statistics.

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

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

unauthorized disclosure. If, thereafter, the employee declines to change the apparently inaccurate self-identification, the agency must accept it.

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

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

(1) Only those categories of race and national origin prescribed by the Commission may be used;

(2) Only the specific procedures for the collection and maintenance of data that are prescribed or approved by the Commission may be used;

(3) The Commission shall review the operation of the agency system to insure adherence to Commission procedures and requirements. An agency may make an exception to the prescribed procedures and requirements only with the advance written approval of the Commission.

(e) The agency may use the data only in studies and analyses which contribute affirmatively to achieving the objectives of the equal employment opportunity program. An agency shall not establish a quota for the employment of persons on the basis of race, color, religion, sex, or national origin.

(f) Data on handicaps shall also be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If an employee who has been appointed pursuant to special appointment authority for hiring individuals with handicaps still refuses to provide the requested information, the agency must identify the employee's handicap based upon the records supporting the appointment. If any other employee still refuses to provide the requested information or provides information which the agency believes to be inaccurate, the agency should report the employee's handicap status as unknown.

(g) An agency shall report to the Commission on employment by race, national origin, sex and handicap in the form and at such times as the Commission may require.

1614.602 Reports to the Commission.

(a) Each agency shall report to the Commission information concerning pre-complaint counseling and the status, processing and disposition of complaints under this part at such times and in such manner as the Commission prescribes.

(b) Each agency shall advise the Commission whenever it is served with a Federal court complaint based upon a complaint that is pending on appeal at the Commission.

(c) Each agency shall submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to:

- (1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;
- (2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and
- (3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

1614.603 Voluntary settlement attempts.

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

1614.604 Filing and computation of time.

- (a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.
- (b) A document shall be deemed timely if it is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period.
- (c) The time limits in this part are subject to waiver, estoppel and equitable tolling.
- (d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

1614.605 Representation and official time.

- (a) At any stage in the processing of a complaint, including the counseling stage under 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.
- (b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a

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

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

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

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

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

1614.606 Joint processing and consolidation of complaints.

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

1614.607 Delegation of authority.

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

APPENDIX B

Sample Discovery

Discovery is a part of the litigation process in which the parties have an opportunity to ask questions of and ask for documents from one another. The purpose of discovery is to narrow the issues that will be heard at the hearing. It is important to review the ROI before filing discovery requests, because the ROI contains a lot of information and parties will want to avoid asking for documents in discovery that already are in their possession.

The following pages contain sample discovery forms for the complainant and/or his or her representative to use in assisting them in creating appropriate discovery requests. Included here are forms for interrogatories, requests for admission, requests to produce documents, and a sample motion to compel discovery.

As mentioned earlier in this workbook, both the complainant and the agency are generally entitled to no more than one (1) set of interrogatories that contain no more than thirty (30) questions, no more than (1) set of requests for admission that contain no more than thirty (30) questions, and also depositions and relevant requests for production of documents. Interrogatories should be used when the complainant wishes the agency to provide answers to questions that generally involve more than a "yes" or "no" answer. Requests for admissions should be used when, on a relatively major issue, the agency can provide either an "admit" or "deny" response. Because there is a limit on the number of requests for admission that may be served, the complainant should try to be fairly certain that the agency will have to "admit" to each particular request. Requests for documents should be used when the complainant wishes to obtain documents. Depositions should be used when the complainant's representative needs to have an oral question and answer session with a witness under oath. Depositions should be used sparingly because of the expense to the complainant. A motion to compel should be filed with the EEOC Administrative Judge and served on the agency in the event that the agency refuses to provide the appropriate discovery responses.

These form discovery requests provided in this workbook are merely sample discovery requests. The complainant and his or her representative should read through the interrogatories, requests for admissions, and requests for production of documents and tailor them to the particulars of each case. The complainant and his or her representative should feel free to deviate from the sample questions, adding additional questions where appropriate, and leaving some out where appropriate (for example, complainant's representative should exclude questions that do not seem relevant to the complainant and even some to which the complainant is certain he or she already knows the answer). In the event that a motion to compel is filed, it should explain why the discovery that was requested 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, is not privileged or restricted information, and is not overly burdensome.

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

(Fill in name of field or district office)

NAME OF COMPLAINANT (Fill in)	:	
	:	
Complainant,	:	
	:	EEOC Case No. (Fill in)
Vs.	:	Agency Case No. (Fill in)
	:	
AGENCY HEAD (Fill in)	:	
Title (Fill in)	:	
AGENCY NAME (Fill in)	:	
	:	
Agency.	:	

COMPLAINANT’S REQUEST FOR INTERROGATORIES

Complainant, by and through (Fill in representative’s name), designated representative, requests that the Agency respond to the following written interrogatories under the provisions of 29 C.F.R. 1614. The Agency is required to answer these interrogatories separately and fully in writing, under oath. All of the following interrogatories shall be continuing in nature until the date of the hearing, and you must supplement the answers as additional information becomes known or available to you.

For each individual identified, please state his or her name, provide race, gender, and whether he or she has a known (Fill in protected bases relevant to the case, for example, if it is a disability discrimination case Fill in disability here), if any, title/position of any employee involved in the interrogatories and requests related to this case. State whether he or she is still employed by the Agency, business address, and business telephone number, or if no longer employed by the federal government, the individual’s forwarding information.

The words “during the relevant time period” as used in these interrogatories, shall mean the five-year period of time prior to and ending on the last date when the alleged discrimination took place as set forth in the complaint. The words “occurrence” or alleged occurrence,” as used in these interrogatories, shall mean the facts alleging liability of the defendant as set forth in the complaint.

Prior to answering these interrogatories, please make a due and diligent search or inquiry of the Agency’s documents, agents, and employees.

1. Identify any and all witnesses who will testify in person and/or via affidavit or deposition on behalf of the Agency at the EEOC administrative hearing and state the relationship of these witnesses to the Agency's case.

2. Identify any and all individuals who witnessed (Fill in the key event or events, if appropriate) or who otherwise have information that is relevant to the issue involved in this hearing, but are not listed in response to interrogatory No. 1, above.
3. With respect to each formal complaint of discrimination filed against the Agency in (Fill in city or state location, unless the agency is relatively small) during the relevant time period, identify the complainant, identify the basis of the discrimination alleged, state the date and charge number, state the recommended decision of the EEOC administrative judge, if any, and the action, if any, taken by the Agency.
4. Describe every lawsuit filed in federal court against the Agency involving charges of discrimination in employment during the relevant time period and indicate the disposition of each.
5. Please state whether (Fill in name of alleged discriminating official) has ever been named the alleged discriminator in a complaint of discrimination. If so, please state the basis of the allegation (discrimination based on disability, gender, race, etc.); date of each complaint; a description of the disability if disability was one of the bases of the complaint; a description of the investigation and resolution of each complaint; the name and title of the person(s) responsible for resolving each complaint; and the current employment status of the person filing the complaint.
6. What is the Agency's alleged legitimate, non-discriminatory reason for the personnel action(s) at issue in this Complaint and on what facts do you rely to support this alleged legitimate, non-discriminatory reason?
7. Please describe what education and continuing education, if any, the Agency requires management to have/take in order to learn of anti-discrimination laws and policies, Agency policies, and new advances in anti-discrimination law. Please state whether the alleged discriminating officials have taken any training classes regarding anti-discrimination laws and policies, Agency policies, and new advances in anti-discrimination law.
8. Identify specifically all documents, records, or other materials used in preparing your answers to or containing information relating to matters raised in the preceding interrogatories setting forth such information separately for each interrogatory and indicating location and custodian of the document.

9. Regarding the Requests for Admission served upon the Agency on (Fill in date), for each denial or partial admission, state with specificity the reason the statement cannot be admitted as true. Identify all evidence that would support the reasoning for each denial or partial admission.
10. Identify and describe any investigations conducted concerning the Complainant during the relevant period of time, including the names, sex, and race of the individual(s) conducting the investigation and the results of the investigation.
11. Identify the individuals who were interviewed as part of the investigation mentioned in paragraph 9, including the names, sex, and race of the individual(s) investigated and the dates of such state interviews.
12. Identify and describe the results of any investigations conducted concerning (Complainant or RMO) as noted in paragraphs 9 and 10.

NON-SELECTION RELATED QUESTIONS

13. State any and all qualifications necessary for the position of (Fill in the name of the position to which you were not hired).
14. Describe all the requirements for the position(s) of (Fill in any job relevant to the complaint), including educational requirements, work experience requirements, recommendations of superiors and/or managers (if so, state the criteria used and indicate the person(s) who made or make such reports), transfer or promotion rights, and other requirements.
15. State whether there have been any changes in the requirements for the position(s) of (Fill in the same jobs you listed in interrogatory no. 13), and describe all such changes.
16. Identify all persons who participated in the decision not to promote the Complainant to the position of (Fill in appropriate position)/select the Complainant for the position of (Fill in appropriate position) and the reason each gave for the denial.
17. Explain the process and related procedures for determining who to promote to (Fill in appropriate position).
18. State the method of recruitment for new employees. If there is no particular method, state any and all ways that new employees are notified of open positions at the Agency.

19. Identify any and all employees whose job duties included preparing, posting, or administering the preparation or posting of available employment opportunities at (Fill in the agency and location) for the period (Fill in applicable time period).
20. Identify the person who Filled the position of (Fill in the name of the position to which you were not promoted or position for which you were not hired) and describe his or her qualifications.
21. Identify all persons who held the position of (Fill in appropriate position) during the period of (Fill in appropriate time period) and state the:
 - date on which employment commenced;
 - qualifications;
 - prior employment record;
 - starting salary
 - job ratings;
 - any special training, including whether each person attended any school or course and if so, when and by whom such training was provided; and
 - whether he or she was promoted or demoted and if so, state in detail the reasons for such promotion or demotion.

NOTE: each request may be counted as a subpart of question and could therefore be argued to exceed your 30 question limit)

22. Identify all persons denied promotion within the Agency at (Fill in location) who were (Fill in protected bases relevant for this case) and for each state position occupied at time of denial and reason for denial.

PERFORMANCE RELATED QUESTIONS

23. State separately for each year, the number of employees and their (Fill in protected bases relevant for this case), whether they were discharged, terminated, or laid off, including temporary lay-offs, with the Agency at (Fill in location) commencing with (Fill in appropriate date) and for each year thereafter.
24. Does the Agency have a policy or procedure for transfer of employees from one department or operational unit? If so, please describe.
25. Until the date Complainant ceased employment/was demoted at the Agency, were there any complaints relating to his/her ability to do his/her work? If so, please identify the person making the complaint.

26. Identify who was present when Complainant was laid off/discharged/demoted and describe in detail any conversation that commenced.
27. Does the Agency have policies and/or guidelines relevant to the writing and dissemination of performance evaluations, (Fill in any policy that you believe has been violated), the prevention of discrimination based on (Fill in protected bases relevant for this case), reasonable accommodation, the facilitation of reasonable accommodation for disability, and the maintenance of medical documents in confidence? If yes, please attach copies (see Document Request No. ___) and state:
 - the name of the person(s) responsible for the oversight and administration of the policies and/or guidelines;
 - the method, if any, the Agency uses to alert management of these policies and guidelines; and
 - the method, if any, the Agency uses to alert employees of these policies and guidelines.

HARASSMENT RELATED QUESTIONS

28. Does the Agency have a harassment policy at this facility?
29. Identify any training that the Agency provided on sexual harassment in the workplace during the relevant time period, including date, and identify those that Complainant attended and/or received.
30. Identify each and every instance where an employee alleged harassment or other EEO allegations that identified NAME as a responsible management official and/or witness, including any grievances, informal EEO counseling, formal EEO complaints, and civil actions, during the time of his federal employment. Redact personal identifying information, and identify the complaints by their relevant EEO categories only.
31. Identify each and every time that NAME was disciplined for harassment or inappropriate conduct during his/her federal employment. Discipline records that are ordinarily subject to the Privacy Act can be waived under the routine use provision- *see* 5 U.S.C. 552a(b)(3).
32. Identify each and every manager in NAME's supervisory chain during the relevant time period.
33. Identify each and every employee NAME supervised during the relevant time period, including their relevant EEO categories.
34. Identify the number, frequency and duration of meetings and/or interactions that would occur between NAME and the Complainant during the relevant time period.

35. Does (Name of Harasser) have any authority to hire, fire, promote, transfer, grant leave requests, and/or discipline over Complainant's position?
36. Has the Agency received previous complaints of harassment involving (Name of Harasser), regardless of whether they resulted in an EEO complaint?
37. Describe specifically and in detail each and every investigation that was conducted by the Agency involving any and all of the incidents of inappropriate relationships and inappropriate behavior of (harasser) involving any employee under her supervision during the past five (5) years, include the name, sex, race, and disability status of all of the employees involved in the investigation(s).

DISABILITY RELATED QUESTIONS

38. Does the Agency allege or contend that Complainant is not a qualified individual with a disability? If yes, please state the factual basis for this belief.
39. Does the Agency allege or contend that it was unable to reasonably accommodate Complainant? If yes, please state the factual basis for this belief; any expert opinion relied upon; efforts made to attempt accommodation; the undue hardship involved; and all communications with complainant relative to efforts to accommodate.
40. Does the Agency allege or contend that Complainant was unable to perform an essential function of the job? If yes, please state the essential function Complainant allegedly was unable to accomplish; what effort was made to communicate this to the Complainant; the names and titles of other employees who can perform the duties; and whether the requirement for these duties has ever been waived in the past, and if so, the name of the employee affected and the circumstances of the waiver.
41. Please describe in as much detail as possible the manner in which the Agency maintains and stores employee records, including, but not limited to employee medical records, state the location of said records, and identify the person responsible for maintaining the records for the Agency.
42. Please identify each individual under the alleged discriminating official's supervision who the Agency considers disabled and state the nature of the individual's disability, any accommodation requested, and the Agency's response to the accommodation request.
43. Please describe the method the Agency used during the relative time period to determine if a disability could be reasonably accommodated, and state the effective date for the use of this method, any expert opinion that supports the use of this method, and whether this method is still used by the Agency and if not, why.

44. Please identify any disabled employee that the Agency was unable to accommodate during the relevant time period and state the name, nature of the disability, and the reason the Agency could not accommodate the disability.
45. On what basis did the Agency determine that Complainant's disability could not be reasonably accommodated?
46. Describe the essential functions of the position of (Fill in the position for which Complainant did not receive appropriate accommodation).
47. Describe the different possible accommodations the Agency considered in making its determination about accommodating Complainant and explain the reason(s) for rejecting each alternative accommodation.
48. At any time between (Fill in time period surrounding decision not to accommodate Complainant's disability), were there any funded, vacant positions within the Agency at (Fill in location)? If so, please name the positions and describe essential functions of each position.
49. At any time before Complainant's termination/demotion was Complainant given a "firm choice" between treatment for his or her alleged alcoholic condition and termination/demotion? If so, by whom, when, and what precisely was the Complainant told?
50. State under what circumstances the Agency decided not to permit, as a reasonable accommodation, leave for Complainant to obtain suitable living arrangements and after-care treatment following his/her hospitalization for alcohol and substance abuse.
51. State what efforts have been made during the past (Fill in applicable years) years by the Agency to accommodate Complainant's alcoholism and substance abuse.
52. Does the Agency have any height or weight requirements in effect for the position of (Fill in appropriate position)? If so, please describe.

RETALIATION RELATED QUESTIONS

53. Name each and every management official with knowledge of Complainant's protected EEO activity, and the date upon which they gained this knowledge.

54. Identify each and every party responsible for the decision to promote/hire/fire/demote, and the date they became involved with that decision.

_____ Date

_____ Complainant's Representative (Fill in)
Address and Phone Number (Fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (Fill in) day of (Fill in) _____, 20__, to the following:

AGENCY REPRESENTATIVE

(Fill in name)

(Fill in address or fax number)

_____ (Fill in name of person who served copy)

6. The Agency terminated Complainant two weeks after she initiated EEO counseling.

Reply:

7. The Agency terminated (INSERT adverse action) Complainant because of his (INSERT protected status).

Reply:

8. (FILL IN FURTHER FACTS SPECIFIC TO YOUR COMPLAINT)

Date

Complainant's Representative (Fill in)
Address and Phone Number (Fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (Fill in) day of (Fill in) _____, 20__, to the following:

AGENCY REPRESENTATIVE

(Fill in name)

(Fill in address or fax number)

(Fill in name of person who served copy)

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

(Fill in name of field or district office)

NAME OF COMPLAINANT (Fill in)

:

Complainant,

:

:

EEOC Case No. (Fill in)

vs.

:

Agency Case No. (Fill in)

:

AGENCY HEAD (Fill in)

:

Title (Fill in)

:

AGENCY NAME (Fill in)

:

:

Agency.

:

COMPLAINANT'S REQUESTS FOR PRODUCTION OF DOCUMENTS

“Document” or “documents” for the purposes of this document request includes but is not limited to any written, typed, printed, recorded or graphic matter, statement, report, facsimile, e-mail, letter, memorandum, policy, contract, note, binder, cover note, minutes, certificate, correspondence, record, table, chart, analysis, graph, schedule, report, test, study memorandum, list, diary, log, calendar, telex, message, questionnaire, bill, purchase order, shipping order, contract, agreement, assignment, acknowledgement, photograph, transcript, log, draft, revisions of drafts, sketches, or preliminary notes in the Agency’s actual or constructive possession, custody or control.

The words “during the relevant time period” as used in these interrogatories, shall mean the five-year period of time prior to and ending on the last date when the alleged discrimination took place as set forth in the Complainant’s complaint.

1. Complete files relating to Complainant, including, but not limited to Complainant’s personnel file, any “desk files” relating to Complainant, and documents pertaining to the Complainant’s duties, salaries, promotions, evaluations, medical condition, leave usage, discipline, and/or benefits.

2. All documents relating to any complaints of discrimination or harassment in which the alleged discriminating official(s) are named as the alleged discriminator.

3. All documents sent to or from the alleged discriminating official(s) regarding Complainant during the relevant time period.

4. All documents that the Agency intends to use at hearing, including, but not limited to documents intended to be introduced into evidence, used as rebuttal, or used to refresh the recollections of witnesses at the hearing.
5. All documents that the Agency contends support the defenses it will assert or that relate to any claims alleged in this complaint.
6. All documents, speeches, articles, or publications of the Agency, management employees, or employees that refer or relate to discrimination and harassment based on (Fill in relevant protected bases).
7. All manuals, handbooks, policies, procedures, notices, directive, or handouts issued by the Agency or alleged discriminating official(s) pertaining to (Fill in policies alleged to have been violated): (NOTE: each request may be counted as a subpart of question and could therefore be argued to exceed your 30 question limit)
 - Falsification of an official agency document,
 - Maintaining records in confidence,
 - Responding to accommodation requests,
 - Medical documents,
 - Discrimination,(including Harassment, Disability),
 - Telecommuting, or
 - Pregnancy.
8. All emails, notes, documents, memoranda, letters, or records of any kind pertaining to
 - Complainant’s job performance during the relevant time,
 - Complainant’s meeting or failure to meet deadlines during the relevant time,
 - Complainant’s cancellation of meetings during the relevant time,
 - The client’s opinion(s) of Complainant’s work,
 - Negative and/or critical comments concerning Complainant or Complainant’s work during the relevant time, or

- Favorable comments concerning Complainant or Complainant's work during the relevant time.
9. All documents that support answers given in the interrogatories.
 10. All documents relating to the Agency's efforts during the relevant time to prevent employment discrimination in the workplace and give reasonable accommodations.
 11. All documents, including emails, pertaining to meetings, discussions, encounters, and/or conversations during the relevant time period, whether in private or public, that the any agent or employee of the Agency had with Complainant, or alleged discriminating official(s) regarding complaint's work, work performance, disability, medical condition, performance evaluation, approved leave, or accommodations.
 12. All documents used to support the performance appraisal at issue in this complaint.
 13. Any and all written communications between management officials and/or colleagues regarding any of the events at issue in the above-captioned complaint.
 14. All written statements made by any individual or documents relevant to the allegations contained in the complaint.
 15. Any and all writings or documents pertaining to the reduction in force instituted during the relevant time period.
 16. Any and all writings or documents pertaining to the selection of the individual for the position of (Fill in applicable position) over the other applicants at the Agency at (Fill in appropriate location).
 17. Any and all employment applications filed at the Agency at (Fill in appropriate location) from (Fill in appropriate date) to the present.
 18. Any and all employment application forms used at the Agency at (Fill in appropriate location) during the relevant period.

19. Any and all manuals, guidelines, written memoranda pertaining to advertisement for, application, selection, and promotion for the position of (Fill in appropriate position) at the Agency.
20. Any and all confidential files kept on each person in the position of (Fill in appropriate position) at the Agency at (Fill in appropriate location).
21. Any and all current agency regulations and orders, instructions, or other directives relating to the treatment and rehabilitation/accommodation of individuals employed by the Agency afflicted with alcoholism.
22. Any and all manager's handbooks and guides issued by the Agency containing guidance on employee discipline.
23. All other documents in the possession of the Agency that pertain to this complaint and that are not described above.

Date

Complainant's Representative (Fill in)
Address and Phone Number (Fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (Fill in) day of (Fill in) _____, 20__, to the following:

AGENCY REPRESENTATIVE

(Fill in name)

(Fill in address or fax number)

(Fill in name of person who served copy)

The information sought by these interrogatories is calculated to produce or lead to the production of material evidence. (Fill in explanation specific to the interrogatories).

The interrogatories are not repetitious of facts or documents already in the complaintfile because (Fill in explanation specific to the interrogatories).

The interrogatories do not seek privileged or restricted information because (Fill in explanation specific to the interrogatories).

The interrogatories are not overly burdensome because (Fill in explanation specific to the interrogatories).

Complainant moves to compel the Agency to fully respond to the foregoing discovery requests and the following requests. The information sought by these Interrogatories and Request for Documents are calculated to produce or lead to the production of material evidence. The written Interrogatories and Request for Documents are not privileged or restricted. The information and documents sought are in the possession of the Agency and/or can be easily ascertained by the Agency.

Date

Complainant's Representative (Fill in)
Address and Phone Number (Fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (Fill in) day of (Fill in) _____, 20__, to the following:

EEOC
(Fill in AJ's name)
(Fill in address or fax number)

AGENCY REPRESENTATIVE
(Fill in name)
(Fill in address or fax number)

(Fill in name of person who served copy)

4. Complainant objects to the Agency's interrogatories to the extent that the inquiry or request seeks to require Complainant to provide information not fully known at this time.
5. Without waiving the above objections, Complainant will provide only relevant, non-privileged information currently available, subject only to requirement for supplementation of responses. Complainant further qualifies each of his/her responses below with the fact that discovery has not yet been completed in this action and additional facts and witnesses may be discovered in the future.
6. The word usage and sentence structure herein may be that of the attorney assisting in preparation of these Answers, and thus they do not necessarily purport to be the precise language of the executing party.
7. The Answers set forth herein are based upon information that has been collected and/or reviewed for the purpose of responding to these Interrogatories. Complainant reserves the right to supplement his Answers in the event that he obtains additional, better, or different information.
8. Complainant objects to each and all of the Interrogatories to the extent they seek information which is protected from disclosure by the attorney-client privilege, work product doctrine, or other applicable privilege. Complainant does not waive any protections or privileges by responding to these Interrogatories.
9. Complainant objects to these Interrogatories to the extent they are unreasonably vague, broad, repetitious, unduly burdensome, or purport to require the disclosure of information beyond the scope of permissible discovery.
10. Complainant objects to these Interrogatories to the extent that they purport to require Complainant to produce documents or information outside Complainant's possession, custody, and control.
11. Many of the Agency's Interrogatories are ambiguous or uncertain. Complainant has responded to such requests to the best of his/her ability but has not attempted to speculate as to the meaning thereof.
12. Specific objections are noted on advice of counsel, and without waiver of the objections reserved as stated above. Complainant incorporates by reference his/her General Objections in each of the specific responses set forth below.

RESPONSE TO INTERROGATORIES

1. TYPE AGENCY'S QUESTION

Answer: Type your response

SAMPLE RESPONSE: Complainant objects to these Interrogatories to the extent they are unreasonably vague, broad, repetitious, unduly burdensome, or purport to require the disclosure of information beyond the scope of permissible discovery. Without waiving these objections, see the affidavits identified in ROI at Tab ___.

2. TYPE AGENCY'S QUESTION

Answer: Type Your Response

SAMPLE RESPONSE: Complainant objects to this Interrogatory as burdensome and overly broad burdensome, and not calculated to lead to discovery of admissible relevant evidence. Without waiving this objection, Complaint offers the following: {Insert relevant and available information}

3. TYPE AGENCY'S QUESTION

Answer: Type your response

SAMPLE RESPONSE: Complainant has not identified what, if any expert witness will be called to testify. If and when Complainant identifies any expert witness to be called to testify, that information will be provided to the Agency.

4. TYPE AGENCY'S QUESTION

Answer: Type your response

SAMPLE RESPONSE: Complainant objects to requesting a witness list, a requirement that is not yet due. At this time, the Complainant relies on the individuals who gave an affidavit in this case. Please see Report of Investigation (ROI). Additionally, Complainant is in the process of identifying any additional persons/witnesses and will supplement this information if and when such individuals are identified.

5. TYPE AGENCY'S QUESTION

Answer: Type your response

RESPONSE TO DOCUMENT REQUESTS

1. TYPE AGENCY'S DOCUMENT REQUEST#

Answer: Type your response

SAMPLE RESPONSE: Complainant is in the process of identifying such documents and will provide this information if and when identified. Additionally, Complainant has requested medical documentation from medical providers and will provide this information once it is received.

2. TYPE AGENCY'S DOCUMENT REQUEST#

Answer: Type your response

SAMPLE RESPONSE: Complainant relies upon the ROI. Complainant is also in the process of identifying any additional documents and will provide the requested information if and when such information is identified.

3. TYPE AGENCY'S DOCUMENT REQUEST#

Answer: Type your response

4. TYPE AGENCY'S DOCUMENT REQUEST#

Answer: Type your response

5. TYPE AGENCY'S DOCUMENT REQUEST#

Answer: Type your response

Representative for the Complainant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (Fill in) day of (Fill in) _____, 20__, to the following:

AGENCY REPRESENTATIVE

(Fill in name)

(Fill in address or fax number)

(Fill in name of person who served copy)

SAMPLE SETTLEMENT AGREEMENT

1. In exchange for the promises made by the **BLANK** (Agency), in paragraph 2 of this agreement, and in full and complete resolution of matters raised in his Equal Employment Opportunity Commission (EEOC) complaint, **BLANK**, Complainant and the Agency, agree to the following conditions:

BLANK agrees to withdraw his formal discrimination case, EEOC Docket Number #X, Agency Docket Number #Y, waives and releases the government, the Agency, its officers, managers, supervisors, and employees, in both their official and individual capacities, from any and all liability, claims, causes of action, etc., resulting from or relating to, in any manner, the subject matter of this settlement, and his employment with the Agency. This agreement constitutes a complete accord and satisfaction of any and all claims, including any and all equitable and legal relief, e.g., attorney fees and costs, compensatory and consequential damages, etc.

This agreement resolves all disputes, all issues, and all disagreements between BLANK and the Agency arising out of or connected with the facts upon which the complaint was based. Complainant agrees not to institute any such complaint, grievance, appeal, claim or lawsuit arising out of or in connection with the complaint, against the Agency, any of the Agency's employees or former employees, under the Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. Sec. 2 et seq., the Handicap Discrimination Act, 29 U.S.C. Sec. 791, *et seq.*, the Civil Rights Act of 1866 and 1871, 42 U.S.C. §§ 1981, 1983, and 1985, the United States Constitution, or any other state, local or federal law relating to the above-captioned matter.

2. In exchange for the promises specified in paragraph 1, the Agency agrees:

a. To pay BLANK the lump sum of BLANK thousand (\$X) dollars by Electronic Fund Transfer (EFT) within twenty (20) business days of the approval date of this agreement. BLANK agrees to provide banking information no later than five days from the date he signs this agreement in order to complete the EFT. BLANK will provide the banking information to the Agency through its representative, Ms. Blank. No representations are made by the Agency as to the tax consequences of this payment.

b. The Agency agrees to restore to BLANK the total sum of # hours of leave. He will have # hours restored in Annual Leave and # hours restored in Sick Leave. The Agency will initiate the restoration of leave by submitting the required documentation to Ms. BLANK within twenty (20) business days of the approval date of this agreement. The Agency cannot make any representations as to when the leave will be restored, since it lacks any control over Ms. BLANK.

c. The Agency will pay attorney fees to NAME in the amount of \$X by Electronic Fund Transfer (EFT) within twenty (20) business days of the approval date of this agreement. BLANK has provided the banking information to the Agency's representative in order to complete the EFT.

Initials _____

3. BLANK also agrees not to institute a lawsuit under the Civil Rights Acts of 1964, Title VII, as amended, which prohibits discrimination in employment based on race, color, national origin, religion or sex, or under the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits age discrimination in employment, or under the United States Constitution, or any other state or federal law prohibiting employment discrimination on any issues arising prior to the agreement or arising out of the subject matter of this settlement.

4. This agreement does not constitute an admission of guilt, fault, or wrongdoing by either party. The settlement agreement will be entered into the record of the Equal Employment Opportunity Commission so that it will retain jurisdiction as to its case for purposes of enforcing compliance with the terms of this agreement. This agreement may be used as evidence in a later proceeding in which either of the parties alleges a breach of the agreement.

5. Other than the fees specified in paragraph 2b, the parties agree to bear their own costs related to all proceedings to date.

6. **(Optional)** This agreement will be kept confidential with only the parties having immediate knowledge of this case or parties having a need to know, in order to effectuate any of the terms of this agreement. BLANK understands that if he divulges the terms of this agreement to anyone (specifically any employee of the Agency) other than his immediate family members, the Agency will rescind the actions agreed upon in paragraph 2 and recoup any funds tendered pursuant to that provision, without reinstatement of the complaint.

8. This agreement is entered into based on the authority provided by Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-16); the Civil Rights Act of 1991; and 29 C.F.R. Subpart 1614.603 and the Alternative Dispute Resolution Act of 1996.

9. This agreement constitutes the complete understanding between BLANK and the Agency.

10. In accordance with 29 C.F.R. Section 1614.504, the parties further agree that, if BLANK believes that the provisions of this negotiated settlement agreement are being violated, he must notify, in writing Mr. BLANK located at Address X within 30 calendar days of becoming aware of the noncompliance. BLANK must exhaust the administrative process under 29 CFR § 1614.504.

11. By signing below, BLANK acknowledges reading this Agreement in its entirety, understanding all terms and conditions of this Agreement, and having done so, knowingly, voluntarily, and freely enters into this Agreement without coercion or duress.

Initials _____

12. The Parties agree and understand that this Agreement, the effective date is noted below, does not become final and binding upon either party unless and until all coordination has been completed and the Agreement is signed by the Agency Settlement Authority. To that end, the coordination sheet shall become a part of this Agreement.

Complainant

Date

Complainant's Counsel/Representative

Date

Agency Representative

Date

Effective Date



U.S. Equal Employment Opportunity Commission

This is a sample Settlement Agreement from the U.S. Equal Employment Opportunity Commission

Available at: <http://www.eeoc.gov/federal/adr/fsms-settlement.cfm>

Settlement Agreement

APPELLANT:

AGENCY:

EEOC APPEAL NUMBER:

AGENCY CASE NO.:

Preliminary Statement

In the interest of closure and in the mutual resolution of their differences, the _____ **[Name of agency]** and _____ **[Name of appellant]** entered into this Settlement Agreement on this _____ day of _____. The parties sign this Agreement in exchange for the good and valuable consideration set forth herein, which, absent this Agreement, neither party is obligated to provide to the other and the adequacy of which is hereby acknowledged.

Terms and Conditions

1. In exchange for the promises made by the agency in this Agreement, the appellant agrees not to institute a law suit under **[Title VII of the Civil Rights Act of 1964, as amended, (Title VII), the Age Discrimination in Employment Act of 1967 as amended, (ADEA), the Rehabilitation Act of 1974, as amended, (Rehab Act)]** based on EEOC Appeal Number _____.
2. Further, the appellant agrees that submission of this Agreement to the Equal Employment Opportunity Commission (Commission) will constitute a request for closure of EEOC Appeal Number _____.
3. It is understood that this agreement does not constitute and shall not be construed as an admission of liability or wrongdoing by the agency under **[Title VII of the Civil Rights Act of 1964, as amended, (Title VII), the Age Discrimination in Employment Act of 1967 as amended, (ADEA), the Rehabilitation Act of 1974, as amended, (Rehab Act)]**, with respect to the appellant's claims set forth in EEOC Appeal Number _____.
4. The agency agrees:

[Insert appropriate provisions]
5. The parties understand the terms of this Agreement and enter into it voluntarily.

6. This document constitutes a final and complete statement of the Agreement between the parties. There shall be no modifications or amendments to this Agreement unless they are in writing, signed by the parties.

7. The parties agree that in the event that the appellant believes that the agency has failed to comply with the terms of this agreement, the procedures set forth at 29 C.F.R. Section 1614.504 shall govern. Appellant shall notify the agency's EEO Director, in writing, of the alleged noncompliance within 30 days of when the appellant knew or should have known of a breach of this agreement. The appellant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased. The agency shall resolve the matter and respond to the appellant in writing. If the agency has not responded to the appellant, in writing, or if the appellant is not satisfied with the agency's attempt to resolve the matter, the appellant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The appellant may file such an appeal 35 days after [he/she] has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of [his/her] receipt of an agency's determination.

8. The appellant knowingly and voluntarily waives all rights under the Age Discrimination in Employment Act of 1967 (ADEA) which pertain to allegations of age discrimination as specified in the appellant's complaint. Federal law provides that the appellant may have 21 days from receipt of the agreement to review and consider this agreement before signing it. The appellant further understands that he/she may use as much of this 21-day period as he/she wishes prior to signing and delivering this agreement. Federal law further provides that the appellant may revoke this agreement within seven (7) days of the appellant's signing and delivering it to the agency. Federal law also requires us to advise the appellant to consult with an attorney before signing this agreement. Having been informed of these rights, and after consultation with his/her counsel, appellant waives these rights. **[ADEA Clause]**

9. This Agreement shall be effective as of the last date on which the parties sign on the lines provided below.

[Name of Appellant]

[Name of Agency]

Dated: _____

Dated: _____

Attorney's Fees

To pay the appellant in the amount of [\$_____] for attorney's fees and costs within thirty (30) calendar days of the date of this Agreement.

Compensatory Damages

To pay compensatory damages in the amount of [**Amount**] to the appellant within 30 calendar days of the date of this Agreement. The appellant acknowledges that this settlement payment is taxable, and agrees to pay all applicable taxes.

Backpay

To award appellant backpay with interest and other benefits, including subsequent within grade salary increases within 30 calendar days of the date of this Agreement.

Reinstatement/Promotion

To reinstate/promote appellant into the position of [**Title**], [**GS Level**], at its [**City, State**] facility, [**or another facility, if mutually agreed to by both the agency and appellant, retroactive to (Date)**], within 30 calendar days of the date of this Agreement.

Neutral Reference

To provide a neutral reference regarding appellant, that is, the agency will confirm his/her dates of employment, his/her last job title, his resignation for personal reasons, and his/her annual salary at termination. Within 15 days of the date of this Agreement, the agency will provide appellant with a letter of reference on its letterhead.

Unemployment Compensation

Not to oppose a claim of unemployment compensation by the appellant.

Resignation with File Expungement

To issue, within 30 calendar days of the date of this Agreement, an SF-50 and other appropriate personnel forms, certifying that the appellant voluntarily resigned for personal reasons, effective [**Date**]. The agency also agrees to provide the appellant with a clean record by expunging all references to the [**Adverse Action**] from [**his/her**] official personnel file.

Outplacement Service

To pay a reasonable fee (not to exceed **Amount**) to an outplacement service that the appellant retains in order for [**him/her**] to secure a new job. The fee will be paid upon the appellant providing to the agency the appropriate documentation for the outplacement service.

Apology

To provide the appellant with a written apology letter, which shall be kept strictly confidential, within 30 calendar days of this Agreement.

Retaliation

That there shall be no discrimination or retaliation of any kind against the appellant as a result of filing this charge or against any person because of opposition to any practice deemed illegal under [**the Rehabilitation Act, the ADEA, or Title VII**], as a result of filing this complaint, or

for giving testimony, assistance or participating in any manner in an investigation, proceeding or a hearing under the aforementioned Acts.

Confidentiality

Except as may be required under compulsion of law, the parties agree that they shall keep the terms, amount, and fact of settlement strictly confidential and promise that neither they nor their representatives will disclose, either directly or indirectly, any information concerning this settlement (or the fact of settlement) to anyone, including but not limited to past, present, or future employees of the agency who do not have a need to know about the settlement. Employees who have a need to know about the settlement include [Names].

Non-Disparagement

The parties agree that neither they nor their representatives will disparage the other party. Disparage as used herein shall mean any communication, or written, of false information or the communication of information with reckless disregard to its truth or falsity. The agency also agrees that it shall not make any statements, either internally or externally, that reflect adversely on appellant's job performance. In the event of a request for employment references, the agency will confirm appellant's dates of employment, [his/her] last job position, and [his/her] annual salary at termination.

The following Sample Motion for Sanctions can be filed with an administrative judge (AJ) when an agency did not investigate the complaint as required by regulation or the agency’s investigation was terribly insufficient. If filing such a motion, it should be filed soon after the AJ is assigned the case and before discovery ends.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

_____,)	
Complainant,)	
)	EEOC Case No. _____
v.)	Agency Case No. _____
)	
_____,)	
Respondent Agency)	

MOTION FOR IMPOSITION OF SANCTIONS

_____, Complainant, through his representative, hereby moves the EEOC to impose sanctions pursuant for the Respondent Agency’s failure to produce an impartial and appropriate Report of Investigation. In support thereof, Complainant states as follows:

1. Complainant filed a formal complaint on _____.
2. Pursuant to 29 CFR § 1614.108, the Respondent Agency has 180 days from the filing of the formal complaint to “develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint.”
3. The Respondent Agency failed to develop an impartial and appropriate factual record within the requisite 180 days. In fact, (check what applies)
 - The Respondent Agency did not investigate the formal complaint.
 - The Respondent Agency investigated the formal complaint but did not issue any report of investigation.
 - The Respondent Agency issued a report of investigation, but it was not insufficient because it was not ___ impartial and/or ___ appropriate factually. Specifically, it was lacking because it:

WHEREFORE, the Complainant asks the EEOC to

- A. FIND that the Respondent Agency violated its duties pursuant to 29 CFR § 1614.108;
- B. ORDER the Respondent Agency to pay for Complainant’s discovery costs; and
- C. ORDER other sanctions as appropriate.

Respectfully submitted,

Complainant’s Representative

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (Fill in) day of (Fill in) _____, 20__, to the following:

EEOC

(Fill in AJ’s name)

(Fill in address or fax number)

AGENCY REPRESENTATIVE

(Fill in name)

(Fill in address or fax number)

(Fill in name of person who served copy)

UNITED STATES OF AMERICA
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

_____)	
)	
	Complainant,)	EEOC Case No.
)	
v.)	Agency Case No.
)	
	Agency.)	_____, 20____
)	
_____)	

COMPLAINANT’S OPPOSITION TO AGENCY’S MOTION FOR SUMMARY JUDGMENT

I. STATEMENT UNDISPUTED MATERIAL FACTS

- A. Complainant is an African-American female. ROI, Vol. 1, Tab F1, pg 100.
- B. INSERT FACTS.

II. MATERIAL FACTS IN DISPUTE

- A. Whether the interviews were an important factor in the selection process is a material fact in dispute.
- B. Whether X’s credibility is at issue because he has conflicting testimony in his affidavits. In his November 13, 2006, affidavit he states that he was unaware of Complainant’s race.
- C. Whether the Agency knew of the Complainant’s disabilities.
- D. INSERT DISPUTED FACTS.

III. ARGUMENT

Pursuant to 29 C.F.R. § 1614.109(g), a party is entitled to a decision without a hearing or summary judgment if there are no genuine issues of material facts in dispute. The moving party must demonstrate that there are no genuine issues of material fact in dispute. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A genuine dispute of material fact exists if the evidence is such that a reasonable fact-finder could find in favor of the non-moving party. Oliver v. Digital Equipment Corp., 846 F.2d 103, 105 (1st Cir. 1988).

The non-moving party must demonstrate that factual disputes exist that require a fact-finder to resolve the parties’ different versions of the truth at trial. Anderson v. Liberty Lobby Inc., 477

U.S. 248–249. In opposing summary judgment, the non-moving party must identify specific evidence that raises a genuine issue of material fact. Hanley v. Postmaster General, 01960603 (1998). A fact is “material” if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, a decision without a hearing is not appropriate. In the context of an administrative proceeding, an Administrative Judge may properly consider issuing a decision without a hearing only upon a determination that the record has been adequately developed for summary disposition. Petty v. Department of Defense, EEOC Appeal No 01824206 (Jul. 11, 2003). Additionally, it may also be inappropriate to issue a summary judgment where the veracity of witnesses is crucial or issues of motive or intent are involved. Schwapp v. Town of Avon, 118 F.3d 106 (2d Cir. 1997) (Court is “particularly cautious” in granting summary judgment when a defendant’s intent is at issue).

The EEOC has concluded that summary judgment cannot be granted when there is a genuine issue as to credibility. 29 C.F.R. § 109(g). Credibility issues are not ripe for summary judgment in Commission cases because an Administrative Judge is charged as a fact-finder at a hearing, which is an extension of the investigative process. Sampson v. Department of Justice, EEOC No. 01942844 (1996). Likewise an Administrative Judge may not rely solely on the representation of Agency counsel in finding that there is no genuine issue of material fact. Daley v. Secretary of Treasury, EEOC No. 01960094 (1997). The Administrative Judge should pay attention to questions in the factual record and Complainant’s contrary representation. Id. See also, Pederson v. Department of Justice, Federal Bureau of Prisons, EEOC No. 05940339 (1995).

“Summary judgment is appropriate when the judge determines that there is no genuine issue as to any material fact, as governed by the applicable substantive law.” Bridgeforth v. Secretary of Transportation, EEOC No. 01934222 (1994) citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). However, as the substantive law surrounding the issue of discrimination in this case will show the record as developed reveals genuine issues of material fact that requires the attention of a factual hearing as they are determinative of Complainant’s prima facie case and evidence of pretext. Without a hearing to further clarify the factual record and permit the Administrative Judge to determine issues of credibility, these disputed issues will be unjustly swept aside.

IV. COMPLAINANT IS ABLE TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION BASED ON RACE

In order to establish a prima facie case of race discrimination with respect to non-selection for promotion the complainant must show that (1) he is a member of a protected group; 2) he applied and was deemed qualified for the subject position; and (3) he was non-selected in favor of a candidate not in his protected group. Froome v. Department of Transportation, EEOC Appeal No. 01911220 (Aug. 13, 1991) citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

The Complainant establishes a prima facie case of race discrimination by virtue of the fact that: First, she is a member of a protected group (black);

V. THE AGENCY’S REASON FOR TERMINATION IS PRETEXT FOR DISCRIMINATION

Inconsistent and shifting reasons for a decision supports a finding that the articulated reasons are pretext for discrimination.

INSERT contradictory reasons offered by Agency.

VI. CONCLUSION

As a result it may be inappropriate to issue a summary judgment where the veracity of witnesses is crucial or issues of motive or intent are involved. Schwapp v. Town of Avon, 118 F.3d 106 (2d. Cir. 1997) (Court is “particularly cautious” in granting summary judgment when a defendant’s intent is at issue). As stated above, the EEOC has concluded that summary judgment cannot be granted when there is a genuine issue as to credibility. 29 C.F.R. § 109(g). Credibility issues are not ripe for summary judgment in Commission cases because an Administrative Judge is charged as a fact-finder at a hearing, which is an extension of the investigative process. Sampson v. Department of Justice, EEOC No. 01942844 (1996).

For all the reasons above the Agency’s Motions for Summary Judgment should be denied.

Respectfully Submitted,

Representative for the Complainant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) _____, 20__, to the following:

EEOC

(fill in AJ’s name)

(fill in address or fax number)

AGENCY REPRESENTATIVE

(fill in name)

(fill in address or fax number)

(Fill in name of person who served copy)