



Employment
Civil Rights Training
for Supervisors and Managers

Training Manual
(Training materials prepared by EEOC)



Purpose and Objectives

The purpose of the next two days of training is to provide a basic understanding of EEO laws and regulations as well as an understanding of management officials' general EEO responsibilities.

At the completion of this course, participants will be able to:

1. Understand the basics of EEO law and theories of discrimination;
2. Understand the 1614 regulations and federal sector EEO process;
3. Recognize ways to avoid decision-making which will lead to the filing of a discrimination complaint;
4. Get a better understanding of the benefits of ADR;
5. Become aware of their obligations under the Rehabilitation Act;
6. Understand their obligations with respect to eliminating and preventing workplace harassment and retaliation;

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**Employment Civil Rights Training
for Supervisors and Managers**

AGENDA: Day One

9:00 - 9:45 a.m.	Welcome, Introduction, Logistics and Quiz
9:45 - 10:30 a.m.	History and Overview of EEO Laws
10:30 - 10:45 a.m.	Break
10:45 - 12:00 p.m.	History and Overview of EEO Laws cont.
12:00 - 1:00 p.m.	Lunch
1:00 - 1:30 p.m.	Discrimination Based on Sexual Orientation
1:30 - 2:30 p.m.	Overview of the Federal EEO Complaint Process
2:30 - 2:45 p.m.	Break
2:45 - 3:30 p.m.	Overview of the Federal EEO Complaint Process cont.
3:30 - 4:15 p.m.	Alternative Dispute Resolution in the Federal EEO Complaint Process
4:15 - 4:45 p.m.	Mediation Video
4:45 - 5:00 p.m.	Wrap-up and Review

**Employment Civil Rights Training
for Supervisors and Managers**

AGENDA: Day Two

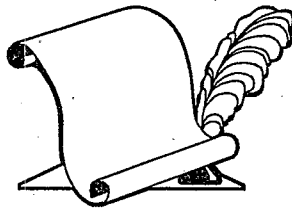
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| 9:00 - 9:15 a.m. | Welcome and Recap of Day One |
| 9:15 - 10:30 a.m. | EPA's General EEO Program Responsibilities |
| 10:30 - 10:45 a.m. | Break |
| 10:45 - 12:15 p.m. | Management's Responsibilities: Under the Rehabilitation Act of 1973 |
| 12:15 - 1:15 p.m. | Lunch |
| 1:15 - 2:45 p.m. | Management's Responsibilities: Identifying, Preventing and Eliminating Workplace Harassment |
| 2:45 - 3:00 p.m. | Break |
| 3:00 - 4:00 p.m. | Management's Responsibilities: Preventing Retaliation |
| 4:00 - 5:00 p.m. | Wrap-up, Evaluations, Quiz |

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OVERVIEW OF THE HISTORY OF EMPLOYMENT CIVIL RIGHTS IN THE FEDERAL SECTOR



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DESK REFERENCE GUIDE

History of Employment Civil Rights Legislation

XII. Title VII of the Civil Rights Act of 1964

- By far, the most well known civil rights legislation regulating employment discrimination is the Civil Rights Act of 1964, as amended. This legislation also provided the framework for subsequent civil rights legislation, including the Rehabilitation Act and the Age Discrimination in Employment Act.
- The Civil Rights Act has several sections, one of which is Title VII. Title VII prohibits employment discrimination because of race, sex, color, religion and national origin in recruitment, hiring, wages, assignment, promotions, benefits, discipline, discharge, layoffs and almost every aspect of employment.
- On June 19, 1964, after the longest debate in its nearly 180 year history (83 days/534 hours), the Senate passed the Civil Rights Act of 1964. Thirteen days later, the U.S. House of Representatives passed the bill with all the Senate's amendments and it was signed into law. The law excluded the federal government from the definition of "employer," however, it contained a proviso that all employment actions were to be free of discrimination and authorized the President to issue appropriate Executive Orders.
- In 1965, Executive Order 11246 gave the U.S. Civil Service Commission authority to issue regulations dealing with charges of discrimination. The regulations issued in 1966 gave federal employees for the first time, formal procedures for filing complaints of discrimination. The regulations also required agencies to both correct discriminatory practices and to develop affirmative action programs.

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- In 1972, Congress amended Title VII to add Section 717 which, for the first time, included employees of the federal executive agencies within the coverage of the statute. Jurisdiction for the implementation of Section 717 was originally placed with the Civil Service Commission, which was given certain powers to require agency compliance with its regulations and directives, including the power to award back pay as well as all other relief necessary to make claimants whole. A clear right to judicial remedy was also established by Section 717(c).
- In 1979, the Reorganization Plan Number 1 of 1978, transferred jurisdiction of Section 717 from the Civil Service Commission to the Equal Employment Opportunity Commission (EEOC).
- Simultaneously, the Civil Service Reform Act of 1978 abolished the Civil Service Commission and separated its functions between two new agencies, the Office of Personnel Management (OPM) to carry out the management functions and the Merit Systems Protection Board (MSPB) was given the adjudicatory functions.
- The Civil Service Reform Act gave EEOC sole jurisdiction over "pure" EEO cases, in other words, cases in which only discrimination issues were raised or where no appeal rights to the MSPB existed by law. MSPB was given concurrent authority over all adverse action and appeals of "pure" EEO cases as well as the exclusive jurisdiction of procedural violations or other issues under the civil service regulations, where it would have had jurisdiction in the absence of the discrimination claim. EEOC review of MSPB decisions is limited to the EEO claims. The Act preserved the right to a judicial *de novo* review over all EEO claims regardless of the administrative body that issued it.
- The U.S. Supreme Court continues to interpret and define Title VII. A few of the more notable decisions include:

History Of Employment Civil Rights Legislation

- ◆ *McDonnell Douglas v. Green* - Supreme Court defined and explained the order and proof necessary for an employment discrimination case.
- ◆ *New York Gaslight Club, Inc. v. Carey* - Supreme Court held that federal employees and applicants could recover attorney's fees for time spent in the administrative process.
- ◆ *Meritor Savings Bank v. Vinson* - Supreme Court held that unwelcome sexual conduct that constitutes sexual harassment constitutes a violations of Title VII.
- Discrimination because of sex has been specifically prohibited since the passage of the Civil Rights Act. However, early case law found that *pregnancy* classifications were not based on sex. In *General Electric Co. v. Gilbert*, the Supreme Court found that an employer sponsored disability insurance plan that excluded pregnancy from coverage was not discrimination because of sex because the program divided individuals into two groups - pregnant individuals and non-pregnant individuals. However, in 1978, Congress amended Title VII with the Pregnancy Discrimination Act when it specifically stated that the term "because of sex" included pregnancy, childbirth or related medical conditions.
- In 1991, Congress passed the Civil Rights Act of 1991, which, among other things, amended Title VII to provide successful plaintiffs the ability to recover compensatory damages.

II The Equal Pay Act of 1963

- The Equal Pay Act was the first significant national civil rights legislation that focused on employment discrimination. The legislation protects men and women who perform substantially similar work in the same establishment from sex-based wage discrimination.

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- As more and more women went to work during World War II, a gap between pay scales of men versus women became clearly evident. Women in unions, churches and other women's organizations all joined forces to pressure Congress to enact pay equity legislation during the post war period.
- Between 1950 and 1960, women with full time jobs earned on average between 59-64 cents for every dollar their male counterparts earned for working in the same job. In fact, until the early 1960's newspapers published separate job listings for men and women. In some cases, ads ran identical jobs under male and female listings - but with separate pay scales. Women were often paid less than men on the theory that women did not have to support a household and that their work was somehow less valuable than that of men.
- In June 1963, Congress passed the Equal Pay Act, as an amendment to the Fair Labor Standards Act. With the passage of the Equal Pay Act, it became illegal to pay women lower rates for the same job strictly on the basis of their sex. As with Title VII, courts further defined and strengthened the statute.
- After the Equal Pay Act was passed, women's labor force participation rate increased, while growing numbers of women sought to expand their education.
- Between June 11, 1964 (the effective date of the Equal Pay Act), and January 1971, a total of back wages amounting to over \$26 million were found by the Department of Labor compliance officers to be due to nearly 71, 000 workers, mostly women. Four years later, that amount grew to over \$125 million due to over 220,000 workers.
- In 1972, the protections of the Equal Pay Act were extended to executive, administrative, professional and outside sales employees. In 1974, it was extended to public sector workers in the states, as well as their political subdivisions.

- Although the wage gap has narrowed since the Equal Pay Act, women's pay has not changed substantially.

III The Rehabilitation Act of 1973

- Section 501 of the Rehabilitation Act of 1973 prohibits the federal government as an employer from discriminating against qualified individuals with disabilities. The Act also requires that the federal government be a "model employer," and that it take affirmative steps to hire qualified individuals with disabilities.
- The federal government's involvement with issues relating to the disabled largely began after World War I, in response to the number of individuals returning from the war with disabilities.
- Individuals with disabilities have been excluded from the mainstream in society and denied the same opportunities given to individuals without disabilities. Exclusion from employment results from society judging individuals based upon their *inabilities* rather than their *capabilities*.
- Prior to the enactment of the Rehabilitation Act in 1973, Congress recognized that only 800,000 of the approximately 22 million physically disabled individuals were employed in the United States. However, Congress also determined that 14 million of these individuals would work if provided with the opportunity. In that regard, Congress found that discrimination, not a lack of training or incentive, prevented individuals with disabilities from finding and maintaining employment.
- Until Congress amended Section 501 to include a private right of action, most courts held that Section 501 could not be enforced through the courts. However, in 1978, Congress amended Section 501 to include the same remedies as the Civil Right Act of 1964.

IV Age Discrimination in Employment Act

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- The Age Discrimination in Employment Act prohibits job discrimination against private sector workers between the ages of 40-70 years, and all workers over age 40 in the federal workforce. Specific discrimination prohibited covers hiring, discharging, training and classifying.
- The drafters of the ADEA legislation focused on the enforcement scheme of Title VII, as well as the remedial sections of the Fair Labor Standards Act. The final legislation that passed in 1967 and was signed into law by President Lyndon Johnson prohibited discrimination on the basis of age against private sector employees within the protected age group of 40-65 years.
- In 1974, the ADEA was amended to extend coverage for federal and state employees. Subsequent amendments raised the ceiling to 70 years for private sector employees, and removed the upper age limit for federal employees.

V Conclusion

- Equal employment opportunity is the law in this country. History shows that without it many individuals would be deprived of a fair chance at earning a salary due to prejudice and discrimination. Management officials, must ensure that they, as well as those they supervise, comply with the law. Learning the history behind why these laws were passed helps to understand these duties. The following training will discuss the specific responsibilities and duties of management officials.



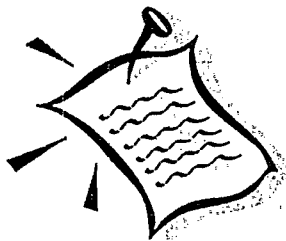
**Notes: History of Employment Civil
Rights Legislation**

Overview of EEO Laws

Identifying Discrimination

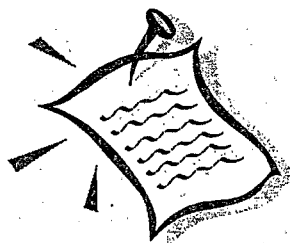
Laws Enforced by the EEOC

- **Title VII of the Civil Rights Act of 1964**
- **Age Discrimination in Employment Act of 1967 (ADEA)**
- **The Rehabilitation Act of 1973**
- **The Equal Pay Act of 1963**



TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- **Race & Color**
- **National Origin**
- **Religion**
- **Sex**



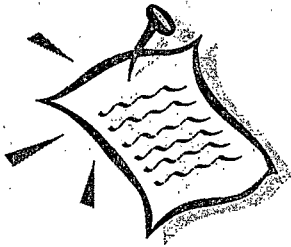
ADEA

- **Prohibits discrimination on the basis of age against individuals forty and over.**



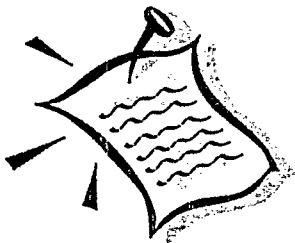
The Rehabilitation Act

- Prohibits discrimination on the basis of disability.
- Prohibits discrimination on the basis of being associated with someone with a disability.



Equal Pay Act

- Focuses on **sex discrimination** in wages.
- Violation established if it is shown that **unequal wages** are paid to individuals of different genders doing **substantially equal work** under **similar conditions** for the **same agency**.



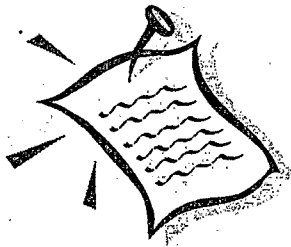
Elements of a Case

Three *basic* elements of a complaint of discrimination are:

BASIS

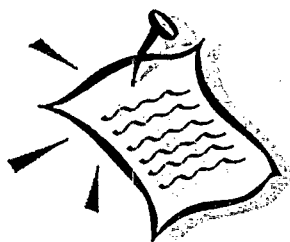
ADVERSE ACTION

INJURY



Scenario #1

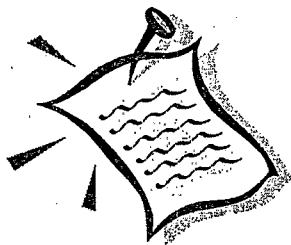
John, a 43-year-old office employee receives a “satisfactory” rating from his supervisor, Paul, who is 25. John learns from Sam, who is even younger than Paul, that Sam received an “outstanding” evaluation. John thinks that Paul doesn’t like him because he is much older than Sam.



What is the basis of John’s complaint?

Scenario #2

Sarah is Robert's supervisor. Every morning, Sarah would walk through the room where Robert worked and would say "hi" to Robert's co-workers, Jane, Janet, and Jennifer, but not to Robert. There have been many times when Robert went to Sarah's office to ask a question and found her deep in conversation with Jane, Janet and Jennifer. Robert files a complaint, alleging that Sarah discriminated against him on the basis of sex because she does not communicate with him as much as with his female co-workers.



Has Robert been subjected to an adverse action?

Has Robert been injured?

Disparate Impact

The complainant alleges that an **agency's neutral policy or practice** adversely affects a protected class.

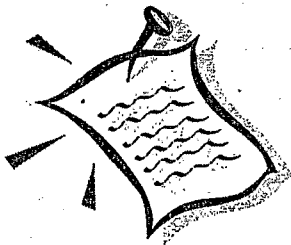
The **burden shifts to the agency** to show **business necessity**.

The complainant may **rebut business necessity** by showing **other means available to achieve the same objective with less discriminatory impact**.



Scenario #4

As the area around the facility became increasingly populated with recent immigrants, the manager decided to implement a grammar test for applicants to all positions. Nguyen applied for a custodial position, took and failed the grammar test, and was denied a position.



On what basis might Nguyen allege discrimination?

How would he go about proving it?

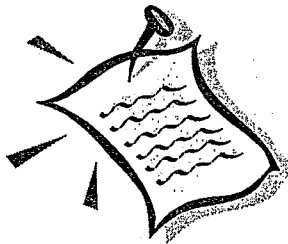
Religion and Reasonable Accommodation

- Under Title VII, an agency has a duty of reasonable accommodation for sincerely held religious beliefs and practices unless to do so would cause an undue hardship.
- In terms of religious accommodation, undue hardship can mean a significant cost or other non-cost factors, such as office disruption.



Scenario #5

Elaine, who is Roman Catholic, requested Good Friday off so that she could go to church. Andrew, also a Roman Catholic, denied her request, telling her that the church did not require that Catholics refrain from work on Good Friday.

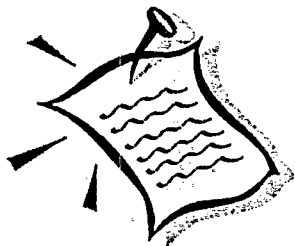


If Andrew also denied a request from Rhonda, who wanted to leave early to attend a social function, would his denial of Elaine's request be okay?

The Rehabilitation Act

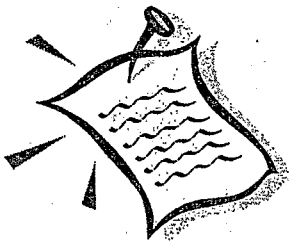
■ **An individual with a disability is someone who:**

- ✓ has a physical or mental impairment that substantially limits one or more of that individual's major life activities; or
- ✓ has a history of such impairment; or
- ✓ is regarded as having such an impairment.



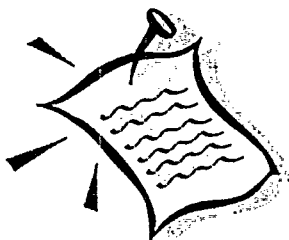
Qualified Individual

- A “**qualified individual with a disability**” refers to a disabled individual who meets the job-related skill, experience and education requirements and who with or without reasonable accommodation, can perform the **essential functions** of the position held or desired.
- The term “**essential functions**” means the fundamental job duties of the employment position that the individual with a disability holds or desires.



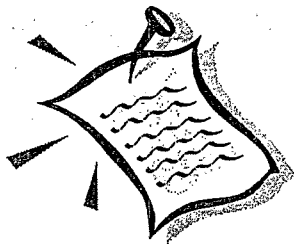
Exception and Limitations of Coverage

- Does not cover individuals engaged in current illegal use of drugs.
- Excludes pedophilia; exhibitionism; voyeurism; gender identity disorders not resulting from physical impairments; transvestism; transexualism; certain other sexual behavior disorders; compulsive gambling; kleptomania; pyromania; or psychoactive substance use disorders resulting from current illegal drug use.



Scenario #6

When Bob was 16, he developed a rare form of bone cancer that led to the amputation of both legs. Bob had been an all-American state basketball player. Several weeks after the amputation, Bob began playing wheelchair basketball. Several years later, still an accomplished wheelchair basketball player and now an agency employee, Bob seeks, and is denied, a promotion to an on-site inspection position that would have required substantial walking.



Is Bob an individual with a disability under the Rehabilitation Act?

Reasonable Accommodation

Agency Requirements

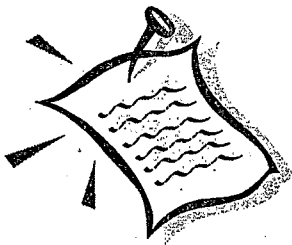
An agency is **required** to make a **reasonable accommodation** of a **known** mental or physical limitation of an otherwise **qualified individual with a disability** unless to do so would cause undue hardship.



Reasonable Accommodation

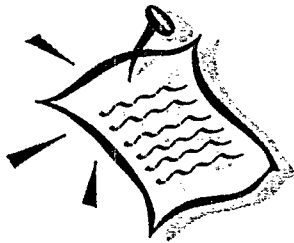
■ Reasonable Accommodation encompasses three aspects of the employment relationship:

- ✓ the application process
- ✓ job performance
- ✓ benefits and privileges



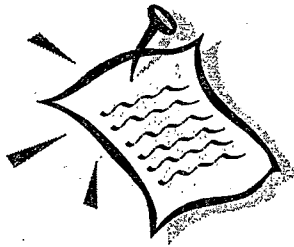
Common Types of Accommodation

- Making facilities accessible and acquiring assistive devices.
- Modifying work schedules.
- Restructuring of job.
- Permitting use of accrued leave and unpaid leave.
- Modifying of exam or training materials.
- Providing readers or interpreters.
- Reassigning to another vacant position.



Scenario #7

Tony has been out of work for several weeks. He had surgery to correct a problem with two spinal discs. Len calls Tony's house to get a progress report and speaks with Tony's wife, May. May tells Len that Tony will be back in a week, that his back is much improved, and that Tony will need a better chair.

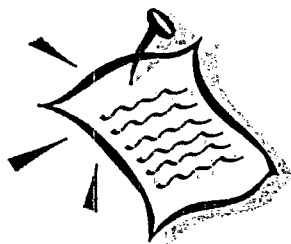


Does it matter that May, rather than Tony, asked for the chair or that she did not tell Len that Tony was seeking a reasonable accommodation?

Does the cost of the chair matter?

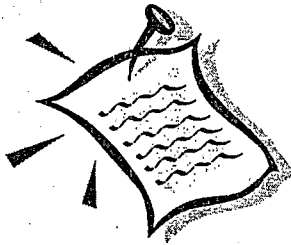
Reasonable Accommodation Process

- Reasonable accommodation requested
- Consult with the individual to determine what accommodations s/he believes would enable her/him to do the job.
- If necessary:
 - ✓ determine what the essential functions of the employee's job are.
 - ✓ request documentation of the disability and the limitations to be accommodated
- Assess the effectiveness of various accommodations.
- Select the accommodation that is most appropriate in view of the individual's and agency's needs.



Undue Hardship

- Would impose “significant difficulty or expense.”
- Agency has the burden of establishing undue hardship.
- Proof that one specific accommodation would impose an undue hardship does not absolve an agency from considering other proposed or potential reasonable accommodations.



Medical Confidentiality

- Agencies must keep medical information about employees confidential.
- Employees do not have a right to know about a co-worker's medical condition and disability, even when reasonable accommodations that affect them are involved.



DESK REFERENCE GUIDE

Section One: Understanding EEO Laws: An Overview

A. FEDERAL EQUAL EMPLOYMENT LAWS APPLICABLE TO FEDERAL AGENCIES AND ENFORCED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

I *Title VII* of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e.

- Prohibits employment discrimination on the bases of race, color, national origin, religion, and sex.
- Prohibited discrimination includes harassment on all bases. (See the Chapter in this training on "Harassment" for more detailed information.)
- Agencies may be required to reasonably accommodate an individual based on the needs of that individual's religion.
- There is a limited "bona fide occupational qualification" (BFOQ) exception applicable to religion, national origin, and sex.
- Prohibits retaliation for participating in the EEO process and for opposing employment discrimination. (See the Chapter in this training on "Preventing Retaliation" for more detailed information.)

II *Age Discrimination in Employment Act* of 1967, as amended, 29 U.S.C. § 633a (ADEA).

- The ADEA prohibits discrimination on the basis of age against individuals forty and over.
- It abolished mandatory retirement at any age in the federal sector. (There are limited statutory exceptions applying generally to law enforcement positions.)

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- The ADEA also prohibits harassment based on age. (See the Chapter in this training on "Harassment" for more detailed information.)
- The only exception to the prohibition of the consideration of an individual's age in employment is where the agency can show that age is a bona fide occupational qualification (BFOQ) for the position in question.
- The ADEA also bars retaliation actions. (See the Chapter in this training on "Preventing Retaliation" for more detailed information.)

III *The Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791.*

- Prohibits discrimination on the basis of disability.
- Agencies are required by the Act to provide reasonable accommodation to qualified individuals with disabilities.
- Harassment based on disability is prohibited. (See the Chapter in this training on "Harassment" for more detailed information.)
- The Rehabilitation Act also prohibits retaliation actions. (See the Chapter in this training on "Preventing Retaliation" for more detailed information.)
- The Rehabilitation Act was amended in 1992 to incorporate the standards set forth under Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111, et seq.

IV *The Equal Pay Act, 29 U.S.C. § 206(d).*

- Although the Equal Pay Act focuses on sex discrimination in wages, it is part of the Fair Labor Standards Act and not part of Title VII.

- To establish a violation of the Equal Pay Act complainant must show that unequal wages are paid to individuals of different genders doing substantially equal work under similar conditions in the same agency.
- The determination of whether work is “substantially equal” requires a comparison of the skill, effort and responsibility needed to perform each of the jobs in question, as well as the working conditions under which they are performed.
- Pay differentials do not violate the Equal Pay Act where they are the result of: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) is based on any factor other than sex.
- Compliance with the Equal Pay Act must be achieved by raising the wages of the underpaid employees, not lowering or freezing the wages of the higher paid. The underpaid employees are also entitled to an award of lost earnings and benefits.
- Liquidated damages are also available for willful Equal Pay Act violations.
- Where the jurisdictional prerequisites of both statutes are satisfied, a violation of the Equal Pay Act is also a violation of Title VII's prohibition against sex discrimination.

B. DEFINING DISCRIMINATION

I Discrimination vs. Illegal Discrimination.

- **Making choices**—deciding between or among options

Only those choices that involve the use of a **protected basis** are illegal under federal discrimination laws. **Not all negative things that happen in the work place violate these laws.**

V Retaliation

- ◆ Retaliation is **taking an employment action** against someone **because** s/he has **asserted rights** under Title VII.
- ◆ Retaliation may occur when an agency takes an employment action against someone who **opposes** a practice because s/he reasonably believes the practice violates Title VII or other non-discrimination laws.
- ◆ Retaliation also may occur where the agency takes an employment action against someone who has **participated** or is participating in the EEO process.

For a more detailed discussion see the Chapter in this training on "Preventing Retaliation."

B. THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

I General

- The ADEA prohibits discrimination on the basis of age against individuals **forty and over**.
- It **abolished mandatory retirement** at any age in the federal sector. (There are limited statutory exceptions applying generally to law enforcement positions.)
- The ADEA prohibits discrimination against anyone in the protected age group.
- The "favored" individual also may belong to the protected group. For example, the agency may have selected a 50-year-old employee for the position over a 60-year-old individual. The older employee may allege age discrimination even though both candidates are in the protected class.

II Attorney's Fees and Compensatory Damages

- Attorney's fees and compensatory damages are **not available** under the ADEA.

C. THE REHABILITATION ACT

I Important Definitions

- **Individual with a disability:** Under the Rehabilitation Act, an individual with a disability is someone who:
 - ◆ has a physical or mental **impairment** that **substantially limits** one or more of that individual's **major life activities**; or
 - ◆ has a **record** of such impairment; or
 - ◆ **is regarded as** having such an impairment.
- Within this definition are other terms needing definition:
 - ◆ **Impairment**
 - ✓ a **physiological disorder or condition**, cosmetic disfigurement, or anatomical loss affecting a body system; or
 - ✓ a **mental or psychological disorder**, such as emotional or mental illness, or a specific learning disabilities.
 - ◆ **Major life activity**
 - ✓ A major life activity is a **basic activity** that the average individual in the general population can **perform with little or no difficulty**.

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- ✓ **Major life activities include** caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- ✓ The list is not exhaustive. Other major life activities have been noted in the regulation and by the courts. For example, reproduction, eating, sleeping and interacting with others have been deemed major life activities.

◆ **Substantially limits**

- ✓ To be substantially limited, an individual should be either **unable to perform** the major life activity or **significantly restricted** as to the condition, manner, or duration under which the individual can perform a particular major life activity when compared with individuals in the general population.
- ✓ In determining whether an impairment is substantially limiting, an agency should **consider the nature and severity** of the impairment; the **duration** or expected duration of the impairment (more than just temporary, short-term and chronic in nature); and the **long term impact or expected long term impact** of the impairment. When assessing whether an individual is substantially limited, the effects of any mitigating measure (*e.g.* medicine, prosthesis limb, hearing aid, *etc.*) that the individual uses can be considered. The adverse side effect of any such measure must also be taken into account. For example some medications cause impotence or severe sleep problems, and some prosthesis devices may cause severe pain or skin problems if used for more than a few hours.

Example: An individual who, because of an impairment, does not sleep more than 2 to 3 hours a night even with prescription medication has sleep problems that are significantly more severe than the average individual.

Therefore, this individual is substantially limited in the major life activity of sleeping.

- ✓ **Temporary impairments**, such as a broken bone, are usually not considered substantially limiting because of the likelihood that the impairment will not be of long duration and will not have a permanent impact.
- ✓ An individual may be substantially limited in his/her **ability to work**. When the individual's impairment does not substantially limit any other major life activity, examine whether it substantially limits working by considering the following:
 - ▶ whether the impairment affects the individual's ability to perform only a limited number of specific jobs or whether it affects the individual's ability to perform a **class of jobs** (jobs that use similar training, knowledge, skills and abilities) **or a broad range of jobs in various classes** (jobs that do not use similar training, knowledge, skills and abilities); and
 - ▶ the **geographical area** to which the individual has reasonable access.

- **Record of a disability**

- ◆ The Rehabilitation Act also protects an individual with a record of a disability from discrimination.
- ◆ This provision protects from discrimination an individual who may have had a physical or mental impairment that substantially limited a major life activity in the past but no longer does. An agency may shy away, for example, from hiring an individual with a record of a mental disability regardless of the individual's current status.

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- ◆ Please note that it is not necessary that the discrimination be on the basis of the physical "record." In addition, note that this provision protects those who have a physical record of a disability, but never had a disability, e.g. someone wrongly diagnosed with a learning disability.
- **Regarded as disabled**
 - ◆ This provision **provides protection** from discrimination to individuals who are **not disabled but may be regarded as disabled**.
 - ◆ **For example**, an individual who walks with a slight limp may be regarded as physically unable to walk but actually not be substantially limited in either that major life activity or in the major life activity of working. An individual may have no impairment at all but would be deemed protected by the Rehabilitation Act if an agency wrongly perceives him/her as having a substantially limiting impairment.
- **Associated with someone with a disability**
 - ◆ The Rehabilitation Act prohibits discrimination against an individual because of that individual's relationship or association with someone with a disability.
 - ◆ For example, an agency could not discriminate against the spouse of an individual who has a disability such as AIDS because of the individual's disability.
- **Qualified individual with a disability**
 - ◆ A qualified individual with a disability is a disabled individual who meets the skill, experience, education and other job-related requirements, and who **with or without reasonable**

accommodation, can perform the essential functions of the position in question.

◆ The term **“essential functions”** means the fundamental job duties of the employment position that the individual with a disability holds or desires.

◆ To determine whether the function is an essential function, ask:

✓ Does the position exist to perform that function?

Example: Reading text directly may be an essential function for a proofreader position, but not for a maintenance position.

✓ Are there a limited number of other employees available to whom the performance of the job function can be distributed?

✓ Does the function require a particular skill or expertise and is the individual who will fill the slot being sought for special expertise or ability to perform this function?

◆ Assessments are made on **case-by-case basis**. Positions bearing the same job title may still have different essential functions because the positions serve different purposes within the organizational structure.

II Exemptions and Limitations of Coverage

- The Rehabilitation Act exempts from coverage **“an individual who is currently engaged in the illegal use of drugs,”** when an agency acts on the basis of the use.
- The term **“current”** refers to drug use of sufficiently recent occurrence as to indicate that the individual **“is actively engaged in such conduct.”**

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- The Rehabilitation Act however, **may protect individuals with drug addictions who have completed a drug rehabilitation program or otherwise stopped using drugs**; individuals who are enrolled in a rehabilitation program and no longer use drugs; or someone erroneously considered to be an addict who is currently using illegal drugs.
- The Act excludes from coverage the following: pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments; transvestism; transexualism; certain other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; and psychoactive substance use disorders resulting from current illegal use of drugs.
- Homosexuality and bisexuality are not impairments and, therefore, are not disabilities.

III Reasonable Accommodation

- An agency is **required to make a reasonable accommodation** of a known physical and mental limitations of an otherwise qualified individual with a disability **unless** the agency can show that accommodation **would cause an undue hardship**.
- An accommodation is any **change in the work environment or in the way things are customarily done** that would enable an individual with a disability to enjoy equal employment opportunities.
- Reasonable accommodation must be made to address **workplace or employment barriers** that stand in the way of providing the qualified individual with a disability an equal employment opportunity. However, agencies are not required to accommodate barriers that exist outside the workplace.

- ◆ Employment barriers may include:
 - ✓ barriers that prevent or inhibit access to work facilities or equipment (e.g., stairs);
 - ✓ rigid work schedules, policies or procedures; or
 - ✓ the way individuals in the workplace typically communicate with one another.
- An agency's **reasonable accommodation duty encompasses three aspects** of the employment relationship:
 - ◆ **The application process:** An agency has to make the employment process accessible to an individual with a disability;
 - ◆ **Job performance:** An agency must provide an accommodation that enables the individual to perform the essential functions of the position; and
 - ◆ **Benefits and privileges:** An agency must ensure that all benefits and privileges of employment available to employees generally also are available to individuals with disabilities.
- Types of reasonable accommodation include:
 - ◆ making existing facilities used by employees accessible to individual with disabilities;
 - ◆ part-time or modified work schedules, or telecommuting;
 - ◆ job restructuring (through the elimination of nonessential functions);
 - ◆ permitting use of accrued leave or unpaid leave for treatment, therapy or training related to disability;

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- ◆ modification of exams or training materials or policies (including providing alternative formats);
 - ◆ acquiring assistive devices or modifying existing equipment;
 - ◆ providing readers or interpreters; or
 - ◆ reassignment to another vacant position.
- Reassignment
 - ◆ Should be considered when an accommodation is not possible in the employee's present job or when accommodation in the present job would cause an undue hardship.
 - ◆ This type of accommodation is only available for employees, not applicants.
 - ◆ Reassignment may not be used to limit, segregate or otherwise discriminate against an employee with a disability or as a means of retaliating against an employee for requesting an accommodation.
 - ◆ Reassignment should be made to a position equivalent to the one presently held in terms of pay and other status, as long as the individual is qualified (but need not be best qualified) for the position, could perform the essential functions of the position with or without reasonable accommodation and the position is vacant or will be vacant within a reasonable period of time.
 - ◆ ~~An agency may reassign an individual to a lower graded position if there are no equivalent positions vacant, or soon to be vacant, for which the employee is qualified.~~
 - ◆ An agency need not create a new job, bump another employee, or promote an employee in order to provide a reassignment.

IV The Reasonable Accommodation Process

- As a general rule, **the individual with the disability is responsible for informing the agency that an accommodation is needed.** Notice need not take a specific form, but the individual must let the agency know that s/he has a disability requiring some sort of change in the workplace.
- It is important that managers as well as all agency employees know the agency's written internal reasonable accommodation process and procedures.
- The reasonable accommodation process ideally should be **"an interactive process"** between the individual and the agency.
- The accommodation selected need not be the most expensive or the "best" one available. Rather, it need only be "effective" in the sense that it will enable the individual to perform the essential functions of the job, or gain equal access to the application process or a benefit/privilege of employment.
- For a more detailed discussion see the Chapter in this training on "Management's Responsibilities under the Rehabilitation Act of 1973."

V Undue Hardship – An Affirmative Defense

- As noted above, the term "reasonable" in reasonable accommodation refers to whether the accommodation would be effective, and not whether it would be too costly or disruptive to the agency.
- The agency's defense where it contends that the suggested accommodation would be costly or disruptive is "undue hardship." The agency has the burden of proving that a suggested accommodation would impose an undue hardship, that is, impose on an agency "significant difficulty or expense."

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- Factors to consider in evaluating a claim of undue hardship:
 - 1) nature of the accommodation;
 - 2) net cost of the accommodation;
 - 3) overall financial and other resources of the agency; and
 - 4) impact of the accommodation on the operation of agency.
- Comparison of the cost of an accommodation to the employee's salary is **not** a factor in determining undue hardship.
- An agency's proof that one specific accommodation would cause it undue hardship does not absolve it from considering other proposed or potential reasonable accommodations.

VI Medical Examinations

- **Applicants**
 - ◆ **Pre-offer**
 - ✓ An agency may describe the essential functions of the job and ask all applicants how s/he would perform them with or without a reasonable accommodation or demonstrate how s/he would perform them.
 - ✓ The agency cannot ask about the existence of a disability or about the nature and severity of any disability, and cannot ask questions likely to elicit information disability.
 - ◆ **Post-offer**
 - ✓ An agency may conduct a post-offer, pre-employment medical examination as long as "all entering employees in

the same job category are subjected to such an examination (and/or inquiry) regardless of disability.”

- ✓ A medical examination does not have to be job-related; but an agency cannot withdraw a job offer based on information obtained during the medical examination unless “the exclusionary criteria [are] job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation.”

- **Current employees**

- ◆ Agencies may conduct medical examinations or make disability-related inquiries of current employees that are job-related and consistent with business necessity and further may provide other medical services to employees for their use on a voluntary basis.

VII Medical Confidentially

- Agencies must keep medical information about employees confidential
- Employees (co-workers) do not have a right to know about a co-worker’s medical condition and disability, even when reasonable accommodations that affect them are involved.

SECTION THREE: PROVING DISCRIMINATION

A. Disparate Treatment

- The complainant alleges that the agency treated him/her differently.
- The complainant further contends that the reason that the agency treated him/her differently is because of his/her membership in a protected group. For example:

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- ✓ The complainant may allege that the agency did not select her for a promotion and selected a male co-worker specifically because the agency wanted a male in that job.
- ✓ The complainant may allege that a supervisor gave him a bad performance appraisal because of his national origin.
- Discrimination may be proved through the use of direct or circumstantial evidence.

I Direct Evidence

- “Smoking gun” evidence; or evidence which **on its face proves bias** against a group or an individual.
- Note, however, that general evidence of an individual’s bias against a protected group may not be “direct evidence” of discrimination against a specific member of that group with respect to a specific incident.

II Circumstantial Evidence

- This is evidence that is **suggestive of discrimination**.
- The likelihood of finding direct evidence of discrimination usually is quite remote. Most cases involve allegations of discrimination based on circumstantial evidence.
- Where there is no direct evidence, a complainant may use evidence through which one may infer that discrimination motivated the agency to act as it did.

III Proof of Discrimination Through Use of Circumstantial Evidence

- Proving discrimination through the use of circumstantial evidence in a disparate treatment case typically involves a three-part analysis (often referred to as the *McDonnell Douglas* analysis):

- ◆ Complainant must initially establish a *prima facie* case of discrimination by showing:
 - ✓ that s/he belongs to a statutorily protected group;
 - ✓ that an adverse employment action occurred; and
 - ✓ some connection between the two (*i.e.*, in a selection case, that although complainant was qualified for the position an individual of another protected group was selected).

Establishing these elements, if un rebutted, creates an inference that the agency's actions resulted from discrimination.

- ◆ The agency may then rebut the initial inference of discrimination by **providing a legitimate, nondiscriminatory reason** for its actions.
- ◆ After the agency has offered an explanation for its actions, the complainant must prove that the agency's explanation is **not true and is a pretext for discrimination**.

B. DISPARATE IMPACT

I Definition of Disparate Impact

- Disparate impact analysis is used whenever there is an **identifiable neutral policy or practice that is evenly applied but which tends to screen out individuals of a particular protected group**.
- Under this theory, the complainant alleges that an agency's policy, even though it is neutral on its face and applies to everyone, has a disparate or adverse impact on the complainant's protected group.
- For example, in the leading case on this theory, an employer adopted a high school diploma requirement that effectively barred a substantial percentage of blacks living in the area of the employer from working in

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custodial positions – a percentage of blacks that was much higher than the percentage of whites.

II Burden of Proof

- Once the complainant establishes disparate impact, usually through a statistical analysis, the agency has the burden of proving that the challenged policy or practice is **job-related for the position in question and consistent with business necessity**.

III Business Necessity

- Proof of business necessity includes a showing that no acceptable policies or practices are available that would serve the agency's interests without such a disproportionate effect upon a particular group.
- The complainant may prove that there are alternatives with less of a disparate impact that would achieve the same result as the challenged policy or practice.

C. OTHER FORMS OF DISCRIMINATION

I Failing to Provide Reasonable Accommodation

- In two areas, religion and disability, an agency also may be liable for failing to provide a reasonable accommodation for the employee due to their religion or disability. The reasonable accommodation requirement under religion and disability differs and will be discussed in more detail below. Therefore, the **failure to provide a reasonable accommodation**, discussed in the Rehabilitation Act section of this Chapter of the Desk Reference, is another form of prohibited discrimination.

II Harassment

- Unlawful **harassment**, also discussed in another chapter of this training, is another form of prohibited discrimination.

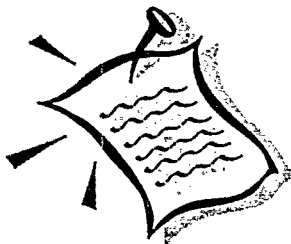


Notes: Overview of EEO Laws

**Overview of the Prohibition of
Discrimination Based on
Sexual Orientation in the
Federal Work Place**

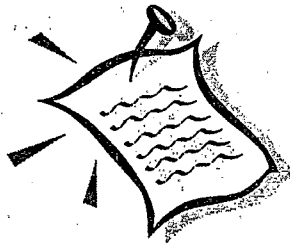
**Discrimination Based On Sexual
Orientation Is Prohibited By The**

- 1. Civil Service Reform Act of 1978
(CSRA), as interpreted by OPM**
- 2. Executive Order 11478, as amended**
- 3. EPA's Equal Employment
Opportunity Policy Statement**



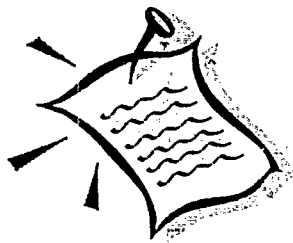
Civil Service Reform Act of 1978 (CSRA)

- Enacted to strengthen and protect the federal government's merit system and employees and applicants covered by the system.
- Describes certain prohibited personnel practices.



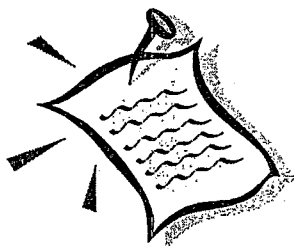
Prohibited Personnel Practices (PPPs)

- One of the PPPs, found at 5 U.S.C. § 2302(b)(10) prohibits any employee who has authority to take certain personnel actions from discriminating against employees or applicants on the basis of conduct that does not adversely affect employee performance.
- OPM has interpreted this section to prohibit discrimination based on sexual orientation.



Executive Order 11478, as amended

“It is the policy of the Government to provide equal opportunity in Federal employment for all individuals, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, sexual orientation, or status as a parent, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.”



EPA's EEO Policy Statement

- Provides EEO regardless of sexual orientation
- Prohibits discrimination or harassment
- Requires all management officials to protect the civil rights of employees and to achieve EEO



Interim EPA Order 1000.31

- Provides information on the avenues of redress available to applicants and employees:
 - ✓ Formal Redress - administrative grievance process or the CBA grievance process
 - ✓ Informal Redress - EEO Counselor in OCR
 - ✓ External Redress - Merit Systems Protection Board or the Office of Special Counsel



DESK REFERENCE GUIDE

Discrimination Based on Sexual Orientation

I. Introduction

- OPM defines sexual orientation as homosexuality, bisexuality or heterosexuality.
- Title VII does not protect against discrimination based on sexual orientation.
- The Civil Service Reform Act of 1978 requires that agency heads and officials with delegated personnel management authority prevent prohibited personnel practices, which OPM has interpreted to include discrimination based on sexual orientation.
- Executive Order 11478, as amended prohibits discrimination based on sexual orientation within the federal government.
- EPA's Equal Employment Opportunity Policy Statement includes the basis of sexual orientation in its prohibition against discrimination.

II The Civil Service Reform Act of 1978 (CSRA)

- The CSRA was enacted to strengthen and protect the federal government's merit system and employees and applicants covered by the system through consistent application of the merit system principles and free from prohibited personnel practices. The Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) have enforcement authority of this statute. The CSRA requires that agency heads, and officials with personnel management authority, be responsible for preventing prohibited personnel practices.

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- The CSRA also defines 12 prohibited personnel practices, the commission of which undermines the federal merit system and the rights of covered employees and applicants.
- Prohibited Personnel Practices are violations of law, usually occurring when “covered personnel actions” are taken by someone with “personnel authority” in relation to current or former federal employees in “covered positions” (or applicants for such positions) in “covered agencies.”
- Covered Personnel Actions include:
 - ◆ an appointment, selection or promotion
 - ◆ a detail, transfer, reassignment, reinstatement, restoration, or re-employment
 - ◆ an adverse action under Chapter 75 of Title 5, or other corrective or disciplinary action
 - ◆ a performance evaluation under chapter 43 of Title 5
 - ◆ a decision concerning pay, benefits, awards, training or education
 - ◆ a decision to order psychiatric testing or examination
 - ◆ any other significant change in duties or responsibilities or working conditions which is inconsistent with the employee’s salary or grade-level.
- Personnel Authority is defined as the authority to take, direct others to take, recommend, or approve any personnel action.
- Covered Positions include:
 - ◆ competitive service positions
 - ◆ career SES positions, and

Discrimination Based on Sexual Orientation

- ◆ excepted service positions
- The EPA is a covered agency.
- One of the 12 Prohibited Personnel Practices, 5 U.S.C. §§ 2302(b)(10) prohibits any employee who has the authority to take certain personnel actions from:
 - ◆ Discriminating based on personal conduct which is not adverse to the on-the-job performance of an employee, applicant, or others.
 - ✓ In 1980, the Office of Personnel Management (OPM) interpreted this section to prohibit discrimination based on sexual orientation. See OPM guide at www.opm.gov/er/address2/guide01.htm
 - ✓ **Example:** Manager Sandy fires employee Max because she saw him at a local Gay Pride event.
- Allegations of actions taken in violation of any of the CSRA's prohibited personnel practices may be:
 - ◆ grieved through the CBA if the employee is covered by the collective bargaining agreement, or
 - ◆ appealed to the MSPB if challenging an otherwise appealable personnel action, or
 - ◆ filed in a Form OSC-11 complaint to the OSC.

III Executive Order 11478, as amended

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

EPA Employment Civil Rights Training

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

- On May 28, 1998, Executive Order 13087 amended Executive Order 11478 to provide a uniform policy for the federal government to prohibit discrimination based on sexual orientation.
- Executive Order 13087 did not create any new rights. However it did set the stage for positive and constructive action by all units of the federal government to make certain that the workplace is one free from harassment and discrimination.

IV EPA's Equal Employment Opportunity Policy Statement

- In 1994, EPA added sexual orientation to its list of factors upon which equal employment opportunity would be provided and upon which discrimination and harassment would not be tolerated.
- In January 2000, the EPA issued Interim EPA Order 1000.31 which provides information regarding the avenues of redress available to applicants and employees who believe they have been discriminated against because of their sexual orientation.
- The Order requires the Assistant Administrator for Administration and Resource Management to provide applicants and employees information regarding their rights and remedies available under civil service law and

Discrimination Based on Sexual Orientation

to ensure compliance with and enforcement of all civil service laws, rules and regulations at EPA.

- The Order requires the Director of Civil Rights to provide information about the rights and remedies available under federal EEO law and to provide informal pre-complaint counseling to applicants or employees who believe they have been discriminated against because of their sexual orientation.
- The Order provides three distinct avenues of redress:
 - ◆ Informal Redress - pre-complaint counseling through OCR. Note - there is no right to file a formal complaint with OCR, appeal to EEOC, or to sue the agency under federal EEO law.
 - ◆ Formal Redress - members of the CBA unit may grieve the matter through the grievance procedures set forth in the CBA - non-CBA members may grieve the matter through the Administrative Grievance System, pursuant to EPA Order 3110.8A.
 - ◆ External Redress - those personnel actions listed in 5 C.F.R. § 1201.3 may be appealed to the MSPB - those actions not listed may be filed in a complaint with the OSC.
- Interim EPA Order 1000.31 remains in effect until January 31, 2002, unless extended or superseded by a subsequent directive.

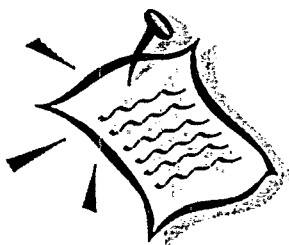
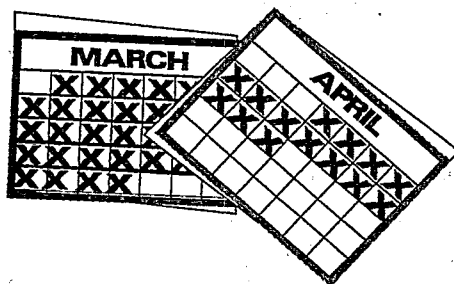


Notes: Discrimination Based on Sexual Orientation

Overview of the Federal EEO Complaint Process

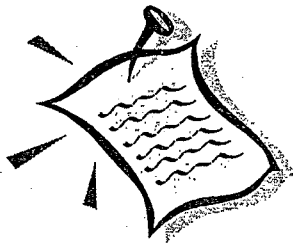
EEO Counseling

- An individual has 45 days from date of alleged discriminatory event to contact an EEO counselor.



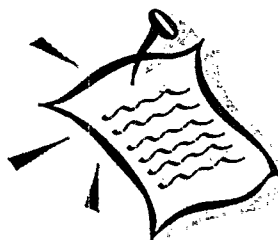
Traditional EEO Counseling

- 30 days to complete.
- Information on rights and responsibilities is provided.
- The complaint process is explained.
- The legal claim(s) and the basis(es) of discrimination are determined.
- A limited inquiry is conducted.
- Resolution is sought.



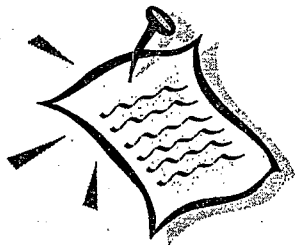
Alternative Dispute Resolution

- Agencies are required to have in place an Alternative Dispute Resolution (ADR) program during pre-complaint and formal complaint process.



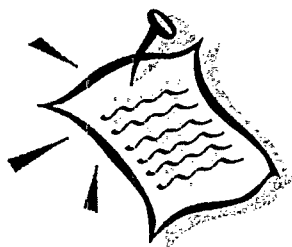
ADR Program

- Agencies are free to determine when to offer the ADR program.
- Agencies may not preclude from ADR entire bases (*e.g.*, race, sex...)



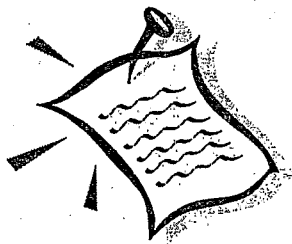
Formal Complaint

- Must be filed within 15 days of Notice of Final Interview.
- Must be signed by complainant or his/her attorney.
- 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 agency must acknowledge in writing receipt of the complaint.



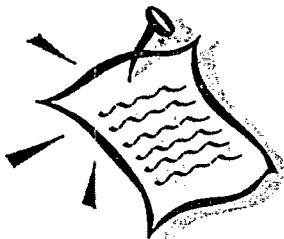
Investigations

- An impartial, appropriate factual record upon which to make findings on the claim(s) raised is developed.
- “Appropriate” factual record allows fact finder to determine whether discrimination occurred.
- Must be completed within 180 days from when complaint was filed.
- The agency must provide complainant with copy of investigative report.



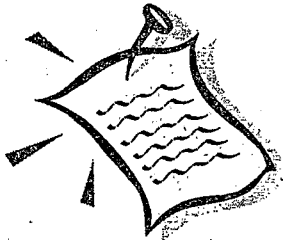
Investigations and Management Officials

- Management officials **MUST** produce documentary and testimonial evidence.
- Neither complainants nor management officials may fail to cooperate during an investigation without good cause.



If Cooperation is Withheld

- If cooperation is not given, the decision maker or the Commission may:
 - ✓ draw an adverse inference against the party failing to cooperate
 - ✓ exclude other evidence offered by party failing to cooperate
 - ✓ issue a decision fully or partially in favor of opposing party



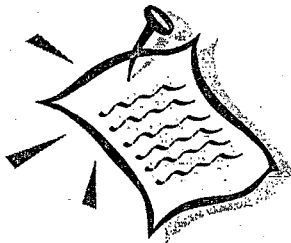
Responsibilities of the AJ

- AJ assumes full responsibility for complaint.
- AJ presides over any supplementation of complaint file.



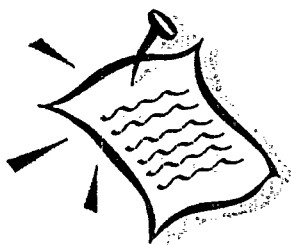
During The Hearing Process

- An AJ may dismiss complaints on his/her own initiative, after notice, or upon agency's motion to dismiss.
- The agency authority to dismiss complaint ends once hearing requested.



AJ Decisions

- AJ will issue decision after hearing or on summary judgment.
- Agency has 40 days to issue final order, which either:
 - ✓ implements the AJ decision; or
 - ✓ does not implement the AJ decision and appeal to EEOC.
- AJ decision becomes agency final action if agency does not issue final order within 40 days.



Types of Relief

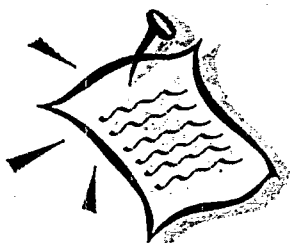
- Equitable Relief
 - ✓ Monetary
 - ✓ Non-Monetary
- Compensatory Damages
- Attorney's Fees
- Reasonable Accommodation



Appeals

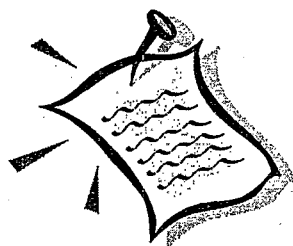
If either party opts to appeal:

- The complainant must appeal within 30 days of receipt of either agency dismissal or final action.
- The agency must appeal within 40 days of receipt of decision if not fully implementing AJ decision.



Civil Actions

- Within 90 days of receipt of final decision of agency or on appeal decision from EEOC.
- After 180 days from the filing of formal complaint if no decision has been issued.
- After 180 days from the filing of an appeal with EEOC if no decision has been issued.



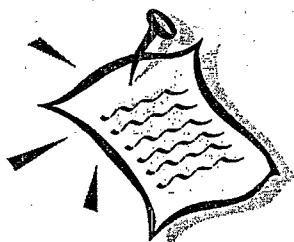
Official Time

- Agency must provide a reasonable amount of official time to prepare a complaint and to respond to agency and EEOC requests for information when:
 - ✓ Complainant is an agency employee,
 - ✓ Complainant's representative is an agency employee.
- Official time shall also be granted for presence at the investigation of or at a hearing on the complaint.



Settlement Agreements

- Disputes may be settled at any time during the complaint process with a written settlement agreement signed by both parties.
- If complainant alleges a breach of the settlement agreement, s/he may request specific enforcement of the agreement or a reopening of the EEO complaint.

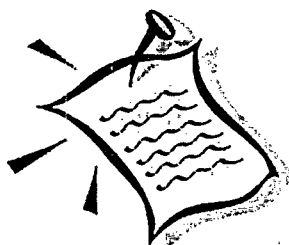


Compliance with EEOC/Agency Orders

■ Agency is bound by:

- ✓ Its order in a final decision finding discrimination
- ✓ Its order in a final decision on breach of settlement agreement
- ✓ An order contained in a decision issued by EEOC on an appeal.

■ Complainant or agency may petition EEOC to enforce or clarify a decision.



DESK REFERENCE GUIDE:

An Overview of the Federal Sector Process 29 C.F.R. Part 1614 and EEOC Management Directive 110

A. INITIATING THE EEO COMPLAINT PROCESS

I Timeliness of Complaint

- A potential federal sector complainant must begin the EEO process within 45 days of the date of the event or incident giving rise to their claims.

II EEO Counseling

- The complainant begins the process by contacting an EEO counselor.
- Agencies are required to have an alternative dispute resolution program (ADR) that covers both the pre-complaint and post-complaint process. Agencies may develop ADR programs which best suit their needs and may decide on a case-by-case basis whether it is appropriate to offer ADR to individuals in lieu of traditional EEO counseling.
- If the agency offers ADR to an individual during counseling, the EEO counselor will advise the individual of the right to elect between participation in the ADR program or traditional counseling activities.
- **Traditional counseling.** If traditional counseling is chosen, the EEO counselor has 30 days within which to complete counseling activities. These activities include:
 - ◆ Advising the individual of his/her rights and responsibilities in the process and the procedures for filing a complaint;
 - ◆ Determining the legal claim (bases and issues) being raised in the potential complaint;

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- ◆ Conducting a limited inquiry for settlement and jurisdiction purposes;
 - ◆ Seeking resolution of the matter at the lowest possible level;
 - ◆ Documenting the resolution or advising the complainant of his/her right to file a formal EEO complaint; and
 - ◆ Preparing a report that indicates that the EEO counselor properly engaged in and completed the counseling process.
- At the conclusion of the 30-day EEO counseling process (which may be extended to no more than 90 days with the complainant's agreement), the EEO counselor issues a notice of final interview.
 - ◆ The notice advises the complainant that s/he has 15 days from receipt of the notice to file a formal EEO complaint.
 - ◆ The notice also advises the complainant as to where to file the complaint.
 - EPA provides complainants with an agency-designed formal EEO complaint form, which the complainant should use, but may not be compelled to do so.
 - **Alternative Dispute Resolution During the Counseling Process.** If the individual accepts the agency's offer to proceed through the ADR program, resolution through traditional counseling will not be attempted.
 - ◆ Agencies have 90 days to conduct ADR during the pre-complaint process.
 - ◆ If the ADR attempt succeeds in resolving the claim, the agency must notify the EEO counselor that the claim was resolved.
 - ◆ If the ADR process does not result in resolution of the dispute, the EEO counselor will issue a notice of final interview advising

the individual of the right to file a formal complaint. The EEO counselor will also write the counseling report, describing the initial counseling session, framing the claim being raised, and reporting only that ADR was unsuccessful.

B. THE FORMAL COMPLAINT

I Filing the Formal Complaint

- Within fifteen days following receipt of the notice of final interview, the complainant may file a formal EEO complaint.
- The complaint must be signed by the complainant or his/her attorney. The complaint further must be sufficiently precise to identify the individual, the agency, the basis (or bases) of discrimination, and the actions or practices deemed discriminatory.
- The agency must acknowledge its receipt of the EEO complaint in writing and further advise the complainant as to what it deems the complaint's official filing date.
- The agency further should inform the complainant that s/he has the right to appeal any agency dismissal or final decision on the merits of the complaint.

II Dismissal

- The agency has the right to dismiss a complaint in its entirety for the following reasons:
 - ◆ the complaint fails to state a claim;
 - ◆ the complaint states the same claim that is pending at or has been decided by the agency, or is the basis for a matter pending in court.

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- ◆ issuing a decision fully or partially in favor of the opposing party;
or
- ◆ taking such other action as it deems necessary.
- Unless the complaint has been amended, the agency has 180 days from the date that the complaint has been filed (not accepted) to complete the investigation. The complainant may agree to an extension of time for not more than 90 days.
- The agency unilaterally may extend the time to complete the investigation by 30 days in order to sanitize a file that contains classified information.

IV Post-investigation

- Once the investigation is completed, the agency must provide complainant with a copy of the investigative file and notify the complainant that s/he has the right to elect whether to have the agency issue a final decision on the merits of the complaint or to request a hearing before an EEOC Administrative Judge (AJ).
- The agency must give the complainant 30 days to make the election.
- The complainant may request a hearing by submitting a written request directly to the EEOC District office indicated in the agency's notice, with a copy served on the agency.
- If the complainant does not respond to the agency's notice regarding the election, ~~the agency must issue a final decision on the merits of the~~ complaint within 60 days of the end of the 30-day period.
- Even if the investigation has not been completed, the complainant may request a hearing after the expiration of the 180-day period.

C. HEARINGS AND AGENCY FINAL ACTIONS

I Hearings

- The complainant may request a hearing by submitting a written request directly to the EEOC District office indicated in the agency's notice, with a copy served on the agency.
- An EEOC Administrative Judge (AJ) will preside at the hearing.
- As a part of the hearing process, the AJ may permit the parties to engage in discovery.
- At the hearing, the parties may be entitled to present testimonial evidence in support of their respective positions. The AJ has the authority to determine who may be permitted to testify and the subjects to be covered by their testimony. If a hearing is held, it must be recorded and the agency will be required to pay for a transcript of the proceedings.
- Where either the AJ on his/her own motion or a party believes that some or all material facts are not in dispute and there is no issue as to credibility, the AJ can decide to issue a decision without holding a hearing.
- The AJ has the authority to dismiss a complaint for any of the reasons contained in the regulation's dismissal provisions.
- At the conclusion of the hearing process, the AJ will issue a decision to both parties.

II Agency Final Actions

- Upon receipt of an AJ's decision on a complaint, the agency has 40 days to take final action by issuing a final order on the complaint. The final order will notify the complainant whether or not the agency will fully

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implement the decision of the AJ and will contain notice of the complainant's appeal and civil action rights.

- If an agency does not take final action within 40 days of receipt of an AJ's decision, the decision automatically becomes the final action of the agency.
- When the agency dismisses a complaint in its entirety, receives a request for a final decision without a hearing, or where complainant fails to elect a hearing, the agency takes 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. Where discrimination is found, the final decision shall include appropriate remedies.
 - ◆ When issuing a final decision, the agency has: (1) 60 days from the receipt of complainant's request for an immediate final decision, or (2) where the complainant has not requested either a hearing or a decision, 60 days from the end of the 30-day period for the complainant to make the election.
 - ◆ All final actions of the agency must inform the complainant that s/he has the right to appeal the decision to the EEOC or file a civil action in federal district court. The agency must include a copy of EEOC Form 573, Notice of Appeal/Petition.

D. REMEDIES

I General Principle: Provide "make-whole relief"

- One of the central purposes of the federal discrimination laws is to make individuals whole for injuries suffered because of unlawful discrimination. This requires that the complainant be restored to the position s/he would have been in had it not been for the unlawful discrimination.

II Types of Remedies

● Equitable Relief

- ◆ Place the victim of discrimination in the position s/he would have occupied had there been no discrimination (e.g., placement in the position with back pay; rescission of adverse personnel action; restore leave taken due to discrimination; removal of adverse references in official personnel file).
- ◆ Offer of placement in the disputed position (e.g., in a non-selection case or a termination) with back pay.
 - ✓ If the position is no longer available, the agency may offer a substantially equivalent position (e.g., equivalent duties, responsibilities, location, promotion potential).
 - ✓ Back pay is awarded from the date the individual would have entered on duty, assumed the duties of the position at issue or not been removed. Back pay continues until the date the complainant accepts the offer of placement. Even if the offer is declined, back pay is due from the date of the discriminatory non-selection to the date the offer is rejected. Back pay is awarded with interest.
 - ✓ Back pay liability under Title VII and the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.
 - ✓ Retroactive non-competitive promotions may be appropriate and would need to be calculated in the back pay award.
 - ✓ Complainant has duty to "mitigate" his/her losses during pendency of complaint by seeking alternative employment. Salary received from this alternative employment should be

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subtracted from the back pay award. Failure to mitigate may result in no award of back pay. Agency has burden of proving complainant failed to mitigate by showing: (1) complainant didn't seek work; and (2) work was available.

- ◆ Complainant is entitled to the cancellation of an unwarranted personnel action and the removal from the agency's records of any adverse materials related to the discriminatory employment practice.
- ◆ Complainant is entitled to a full opportunity to participate in the employment benefits denied as a result of the discrimination, such as training, overtime scheduling, preferential work assignments, retroactive seniority, restoration of leave, *etc.*

● Notification to All Employees

- ◆ Upon a finding of discrimination, the agency is obligated to provide notification to all employees in the affected facility of their right to be free of unlawful discrimination/retaliation and an assurance that the discrimination found will not recur.

● Compensatory Damages

- ◆ Compensation for loss or harm resulting from **intentional** unlawful discrimination (*e.g.*, dollar award for emotional distress resulting from discrimination; medical expenses resulting from discrimination; other out-of-pocket losses due to discrimination).
- ◆ Compensatory damages are not available in ADEA cases.
- ◆ For agencies of 500 or more employees (most federal agencies), there is a \$300,000 cap on compensatory damages.
- ◆ The cap applies only to non-pecuniary damages, such as emotional distress, and future pecuniary losses (like future medical expenses). Other damages, such as past pecuniary

Overview of Complaint Process

expenses (e.g., past medical expenses, moving expenses) are not capped. Back pay is not counted towards the cap amount.

- ◆ In reasonable accommodation claims under the Rehabilitation Act, the agency may establish a “good faith” defense that it attempted to provide a reasonable accommodation. Such a showing precludes a compensatory damages award if a failure to accommodate claim is established.
- ◆ Punitive damages are **not** available against the federal government.

● **Providing a Reasonable Accommodation to a Qualified Individual with a Disability.**

- ◆ Types of reasonable accommodation are listed in a previous section of this chapter.

● **Attorney’s Fees and Costs**

- ◆ Attorney’s fees are available for prevailing complainant who is represented by an attorney. They are not available to a complainant represented by a non-attorney, such as a union steward.
- ◆ Formula: (reasonable hours expended on the case by the attorney) x (reasonable hourly rate) = attorney’s fees.
- ◆ Costs are available to the prevailing complainant, whether represented by an attorney or not. Costs could include printing fees, witness fees, parking, transportation, postage, phone calls, etc.
- ◆ Attorney’s fees are not available in ADEA or Equal Pay Act cases.

E. APPEALS AND CIVIL ACTIONS

I Appeals

- Complainants may file appeals to EEOC from agency final actions within 30 days of receipt. The complainant must provide a copy of its notice of appeal to the agency.
- A complainant has 30 days from the date that s/he filed the appeal to submit a brief or statement in support of the appeal. A copy must be provided to the agency.
- If an agency's final order does not fully implement the decision of an EEOC AJ, the agency must simultaneously file an appeal with EEOC.
- An agency has 20 days from the date of filing its appeal to submit a brief or statement in support of its appeal. A copy must be provided to the complainant.
- A statement or brief in opposition to an appeal must be served on the opposing party within 30 days of receipt of the brief in support of the appeal, or, if no brief supporting the appeal is filed, within 60 days of receipt of the appeal.
- The agency must provide the EEOC with a copy of the complaint file within 30 days of being notified that the complainant has filed an appeal, or within 30 days of submission of an appeal by the agency.
- Agencies must provide the complainant with interim relief during the pendency of an agency appeal in limited circumstances. The agency must temporarily or conditionally restore the complainant to his/her former position pending the outcome of the appeal when:
 - ◆ The agency issues a final order notifying the complainant that it will not fully implement the AJ's decision finding in favor of the complainant;

Overview of Complaint Process

- ◆ The case involves separation, removal or suspension continuing beyond the date of the final order;
- ◆ The AJ's decision provided for retroactive restoration of the employee to his/her former position; and
- ◆ The agency has not determined that the return or presence of the complainant will be unduly disruptive to the work environment.

● EEOC may impose sanctions on a party who fails, without good cause shown, to comply with appellate procedures or to respond fully and timely to a Commission request for information. Possible sanctions include:

- ◆ Drawing an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide it;
- ◆ Considering the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
- ◆ Issuing a decision fully or partially in favor of the opposing party; or
- ◆ Taking other appropriate action.

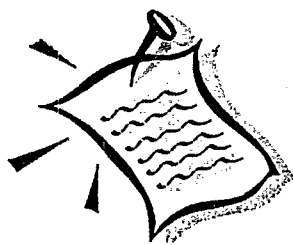
● EEOC will issue decisions on appeals. Either party may request reconsideration of an initial appellate decision. The EEOC will grant reconsideration only where it determines one of the following:

- ◆ the initial appellate decision involved a clearly erroneous interpretation of material fact or law; or
- ◆ the initial appellate decision will have a substantial impact on the policies, practices or operations of the agency.

Overview of Alternative Dispute Resolution (ADR)

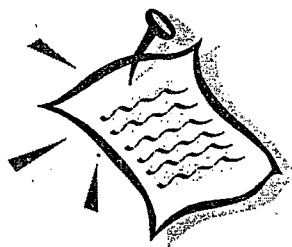
ADR: An Essential Management Tool

- Improves Communication
- Provides Control



Alternative Dispute Resolution (ADR)

- EEOC's regulations require agencies to establish or make available an ADR program for both:
 - ✓ the pre-complaint process; and
 - ✓ the formal complaint process.



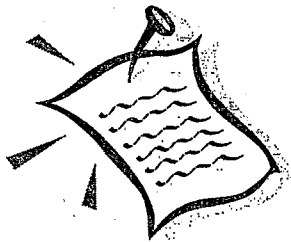
Alternative Dispute Resolution (ADR)

- ADR uses a variety of voluntary techniques to resolve disputes rather than traditional adversarial methods, like litigation.



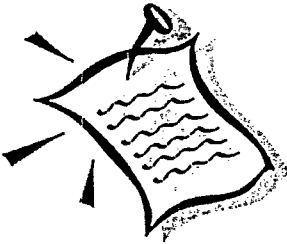
Benefits of ADR

- Early and mutually satisfactory resolution of workplace disputes.
- Parties to the dispute have control over resolution.
- Settlement agreements are more durable than decisions issued by a court.
- Settlement agreements do not require admissions of liability.
- ADR saves time and resources.
- ADR improves morale.



Core Principles of ADR

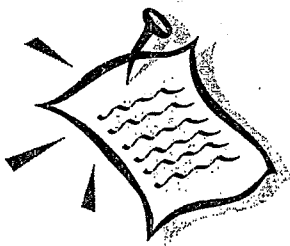
- Voluntary
- Neutral
- Confidential
- Enforceable



Core Principles of ADR

■ Voluntary

- ✓ Both parties must agree to participate in ADR.
- ✓ A settlement agreement must be acceptable to both parties.
- ✓ The parties may end ADR at any time.



Core Principles of ADR

■ Neutral

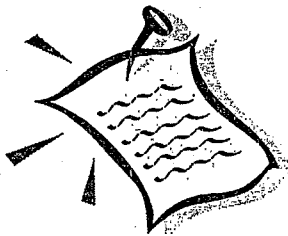
- ✓ An objective, impartial third party who has been trained in ADR techniques and EEO law.
- ✓ The neutral has no power to decide the dispute.



Core Principles of ADR

■ Confidential

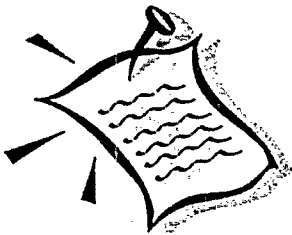
- ✓ Confidentiality in any ADR proceeding must be maintained by the parties and the neutral.
- ✓ The terms of the settlement agreement will not be confidential unless the agreement contains a confidentiality provision.



Core Principles of ADR

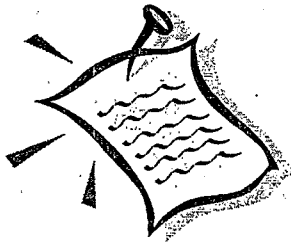
■ Enforceable

- ✓ The settlement agreement must be in writing and signed by both parties.
- ✓ Settlement agreements are enforceable by the EEOC.



When ADR is Offered and Elected

- Once the agency has determined that a dispute is appropriate for ADR, management officials have a duty to cooperate in the ADR process.
- Management officials may bring a representative to the ADR session.
- Nothing said or done during the ADR process can be made the subject of an EEO complaint.



EPA's ADR Program

- EPA utilizes Mediation as the ADR technique.
- What is mediation?
- Contact the Conflict Prevention and Resolution Center for more information.



Preparing for ADR

- Think about what caused the dispute without assessing blame.
- Write down any questions for the other party.
- Prioritize the agency's concerns that must be addressed for a satisfactory resolution.
- List the concerns of the other party.
- Develop settlement options, focusing on the present and future contact with the other party.



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contact CPRC, the phone number is (202) 564-2922, and the email address is adr@epa.gov.

- The mediations are conducted by two qualified mediators. The mediators are obtained from the Shared Neutrals Program; however, an internal cadre of mediators will eventually be trained.
- The goal is to complete each mediation within 45 days of accepting the case.

III. Benefits of ADR

A. Environmental Protection Agency EEO Statistics for FY 2000

- 17,778 employees
- 112 employees sought EEO counseling
- Only 5 cases were mediated
- 3 settled and 2 did not settle
- 75 employees filed formal EEO complaints
- Only 4 cases were mediated
- 2 settled and 2 did not settle

B. Benefits of ADR

- ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually satisfactory fashion.
- Parties maintain control over the resolution of their dispute.
- Settlement agreements are more durable than decisions issued by a court or other third party.
- Settlement agreements do not contain admissions of liability.

- ADR will save the agency time and resources. The success rate for mediations averages between 60 - 70 percent. The typical mediation takes one day; whereas, the EEO process includes 180 days for the investigation and at least 60 days for either a hearing or a final agency decision. In terms of cost, an ADR session will typically be under \$1,000; however, the EEO process is significantly more expensive. Several agencies (Department of Justice, Veterans Administration, and the U.S. Air Force) have estimated that the average cost of the EEO administrative process ranges from \$10,000 (DOJ) to \$15,000 (VA) to over \$40,000 (USAF). Cost factors to consider during the administrative process include (1) time spent by the EEO staff, management officials, aggrieved individuals, witnesses, and Office of General Counsel; (2) attorneys' fees; and (3) decreased productivity in the affected office.
- By improving communication between the aggrieved individual and the management officials, ADR may improve office morale and avoid a disruption within the office due to an investigation or hearing.

IV ADR Core Principles

There are certain core principles that are necessary for the successful development of an ADR program. First and foremost, is the principle that all ADR programs must be fair to the participants, both in perception and reality. Management Directive (MD)-110 (Nov. 9, 1999), Ch. 3(VII)(A). Federal Sector ADR programs must also ensure voluntariness, neutrality, confidentiality, and enforceability.

- **Voluntariness**

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All parties must agree to participate in the ADR proceedings. It is important that parties understand that this is their attempt at resolution.

The parties should be assured that a resolution cannot be forced upon them and that they can end ADR at any time. MD-110, Ch. 3(VII)(A)(1).

- **Neutrality**

To be effective, an ADR proceeding must be impartial. MD-110, Ch. 3(VII)(A)(2). The proceeding cannot be controlled by either party. That is why the EEOC requires that agencies use neutrals to conduct their ADR proceedings. A "neutral" is defined by the Administrative Dispute Resolution Act (ADRA) as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy." 5 U.S.C. § 571. Any individual who serves as a neutral in an agency's ADR program must have professional training in whatever dispute resolution technique(s) the agency utilizes in its program and a thorough knowledge of EEO law. MD-110, Ch. 3(IV)(B).

- **Confidentiality**

Confidentiality is important to a successful ADR proceeding. Parties should be comfortable making statements without fear that these statements will later be used against them. Pursuant to ADRA, statements made during ADR are confidential and exempt from disclosure under the Freedom of Information Act. Certain exemptions exist, however, which may require the disclosure of confidential information: (1) all parties and the neutral consent in writing; (2) the communication has already been made public; (3) the communication is required by statute to be made public but a neutral should make such communication public only if no other individual is reasonably available to disclose the communication; or (4) a court determines that the testimony is necessary to prevent a manifest injustice, help establish a

violation of law, or prevent harm to the public health or safety. 5 U.S.C. § 574.

The EEOC encourages agencies to issue clear, written policies protecting the confidentiality of an ADR proceeding. It is also important to note that a settlement agreement is not confidential, unless the parties expressly agree to make it confidential. MD-110, Ch. 3(VII)(A)(3).

● **Enforceability**

Enforceability of an agreement is key for a successful ADR program. The regulations provide that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding. In order for the individual and the agency to have the same understanding, the terms of the resolution must be reduced to writing and signed by both parties. In addition, the EEOC has the authority to ensure that the parties comply with the terms of their settlement agreement. 29 C.F.R. § 1614.504.

V When ADR is Offered and Elected

- As in most legal proceedings, the “party” is the individual or entity which is the plaintiff or the defendant in the respective matter. In the federal sector EEO process, the parties are the aggrieved individual and the agency. Management officials are witnesses in the [rocess, not a named party to the proceeding. As such, the core principle of voluntariness is satisfied when the agency voluntarily offers ADR to the aggrieved individual and that individual elects to participate in the ADR process. Once the agency has determined that a case is appropriate for ADR, management officials have a duty to cooperate in the ADR process. MD-110, Ch. 3(II)(A).
- Both parties have a right to representation at any time. MD-110, Ch. 3(II)(A)(3). If management officials seek to have an attorney from

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their Office of General Counsel present, they should be aware that the OGC attorney cannot represent them on a personal basis; rather, the attorney is acting on behalf of the agency.

- Nothing said or done during ADR can be made the subject of an EEO complaint. MD-110, Ch. 3(A)(4). One exception is that the ADR program must provide reasonable accommodations to the participants during the ADR process, and its failure to do so could result in a viable EEO complaint. *Kelly v. U.S. Postal Service*, EEOC Appeal No. 01A10579 (Apr. 24, 2001).

VI Preparing for ADR

ADR is a very flexible and informal process, geared to dispute resolution rather than compliance with a complicated set of legal or procedural requirements as in adversarial (litigation) based resolutions. Here is a checklist to consider before starting an ADR session:

- Management officials may wish to prepare a few notes or outline their thoughts to make the mediation process as productive as possible.
- Think about what caused the dispute without assessing blame for the dispute. Try to objectively analyze the events which lead to the dispute.
- Write down any unanswered questions, which are directed to either the other party or the mediator, for discussion during the mediation session.
- Consider the agency's interests that must be met for a satisfactory resolution. For example, is the agency interested in keeping the aggrieved individual in the same office? Does the agency want to improve the aggrieved individual's skills in a certain area? Has the aggrieved individual been disruptive in the office? Also try to prioritize the degree of importance for each of the interests.

Alternative Dispute Resolution

- Next, try to list the interests and concerns of the aggrieved individual. Speculate freely and list reasons that the aggrieved individual might have to settle the case.
- Develop as many different settlement options as possible, even if a settlement option only resolves part of the dispute. These potential settlements will be added to those of the aggrieved individual to create the framework for settlement discussions. Think about the agency's interests, rather than the merits of the case.
- Finally, consider the expectation of future contacts with the aggrieved individual after the negotiations. If there will be continued contact with the aggrieved individual, the nature of the agency's negotiation strategy may be different than if there is no significant future contact.

VII Role of Agency Representative

- If the agency offers ADR to the complainant, it must provide a representative who has settlement authority. In addition, the parties should negotiate in good faith.
- If a management official refuses to participate in ADR, the agency should select another official to act as its representative during the ADR session.

VIII Conclusion of ADR

- An agreed upon resolution would resolve all issues of the dispute, and result in a written settlement agreement with the signatures of both parties.
- If no resolution is reached in the ADR session during the informal stage, the aggrieved individual will receive a final interview and the right to file a formal complaint. The EEO Counselor's Report may not provide any information concerning the ADR attempt, other than to indicate that

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the aggrieved individual elected the ADR program and the dispute was not resolved through that procedure. In no case will the individual be referred back to EEO counseling where ADR fails to resolve the dispute.

- If a resolution is not reached in the ADR session during the formal stage, the case processing must be completed within the extended time period (270 days).



Notes: Video - The Mediation Process

Management's Responsibilities

Overview of General Program Responsibilities

DESK REFERENCE GUIDE

Management's General EEO Program Responsibilities

I Introduction

- In addition to management's obligations to accomplish the agency's mandated mission, federal sector management officials are also responsible for ensuring that the spirit and intent of Equal Employment Opportunity (EEO) permeates every facet of the agency's internal and external policies, practices, and procedures. In the most broad terms, the EEO Program is a management program that is established by management and administered by a headquarters EEO office.
- The basic federal requirements for an agency EEO program are established in federal legislation and Executive Orders. These requirements are further explained by regulations and in interpretive policies, many of which are accumulated in compliance manuals, management directives, and policy and enforcement guidance notices issued by the EEOC and the EPA.
- The key to the success of an agency EEO Program depends largely on management's full participation in the planning, development and implementation of the EEO Program and commitment to practicing good people management.
- Employee disputes in all arenas (*i.e.*, discrimination and harassment complaints, and grievances), can be avoided by management officials who practice good people management.
- **Be Uniform.** Uniformity in decision making and treatment of employees is a key to avoiding workplace disputes and eliminating violations of EEO laws.

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- **Follow Policy.** Be consistent in following agency policy as this helps to convince employees that management is treating them fairly, even if they disagree with the policy.
- **Communicate What Has To Be Done.** Make a habit of explaining what is done and why it is done as a sound part of good management.
- **Use Job-Related Criteria.** Good explanations are based on job/mission-related criteria. To help avoid any inferences that unlawful discriminatory motives were involved in any management decision or action, management officials should use job/mission-related criteria as the rationale for all personnel actions or decisions.
- **Be Fair.** Unfairness, in and of itself, is not illegal. However, an unfair decision or action by a management official can be found to be discriminatory if it can be linked or associated with a discriminatory basis.
- **Resolve Problems.** Handle problems and disagreements when they arise. If management waits, a problem usually becomes worse. This does not mean that the disputing employee gets what s/he wants, but creates an opportunity to open communication.

II Responsibilities of Management Officials

- **Agency Head**

The agency head for the EPA has ultimate responsibility for maintaining a continuing affirmative program to promote the full realization of equal employment opportunity and to identify and eliminate discriminatory policies and practices. Every management official of the EPA acts on behalf of the agency head to ensure that the EEO/AE Programs and policies permeate every aspect of the agency's employment practices.

The agency is responsible for maintaining continuing EEO/AE Programs to promote equal opportunity and to identify and eliminate

Management's Responsibilities: General Program Duties

discriminatory practices and policies. The agency head is responsible for providing sufficient resources to administer the EEO/AE Programs to ensure efficient and successful operation. The agency head must designate an EEO Director who will come under his/her immediate supervision. It is essential that the agency head designate EEO/AE Program officials to see to the day-to-day operation of the EEO/AE Programs and to serve as key resources for management officials to seek and receive advice on EEO/AE Program requirements and the possible impact of certain management decisions/actions to the overall success of the EPA's EEO/AE Programs.

- **Associate/Regional Administrators**

Associate/Regional Administrators have primary responsibility for implementing the EEO/AE Programs throughout their respective regions. Regional Administrators are responsible for ensuring that adequate resources are available to carry out the objectives of the EEO/AE Programs and that all regional policies, practices and decisions are free of intentional and/or systemic discrimination.

- **Management Officials (Managers, Supervisors and/or Team Leaders)**

Management officials are responsible for exercising personal leadership in establishing, maintaining, and promoting EEO for all employees and applicants for employment. As members of the agency's management team, they should identify and eradicate barriers to EEO within their workforce. This includes their full cooperation with EEO/AE Program officials in the implementation of the EEO/AE Programs and active, good-faith participation in the early resolution of EEO discrimination complaints.

● The Director of Personnel/Human Resources

The Director of Personnel/Human Resources is responsible for cooperating with the EEO Director in the development, evaluation, and implementation of the agency-wide EEO/AE Programs, and assists in the resolution of EEO complaints. The Director of Personnel/Human Resources is also responsible for developing programs, methods, and techniques for carrying out the spirit and intent of the EEO Program in all phases of personnel management.

Within the EPA organizational structure, the Director of Personnel/Human Resources is located in the Office of Administration and Resources Management, Human Resources and Organizational Services.

III Agency Program to Promote Equal Employment Opportunity

● Overall Federal Program

In the federal government, the overall EEO Program is mandated by government-wide regulations that are promulgated by the U.S. Equal Employment Opportunity Commission (EEOC). EPA's EEO/AE Programs are developed in accordance with federal statutes, government-wide policies, Executive Orders, EEOC regulations, and EPA's policies.

- ◆ Government-wide EEO policy is established in EEOC regulations at 29 C.F.R. § 1614.102 as follows: "It is the policy of the Government of the United States to provide equal opportunity in employment for all individuals, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or disability and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency."

Management's Responsibilities: General Program Duties

- ◆ In addition to the procedural regulations, the EEOC provides guidance and instruction to federal agencies on how to develop, implement, monitor and report progress for the various EEO/AE Program components through the issuance of Management Directives, Management Bulletins and Notices, Policy and Enforcement Guidances. Please note that all EEOC Policy and Enforcement guidance apply equally to federal and private employers. The regulations, directives, bulletins, notices, guidances and other pertinent material can be found at the Commission's website: www.eeoc.gov.
- ◆ EEOC issuances to federal agencies and EEO Directors include:
 1. Management Directive - 712: *Comprehensive Affirmative Action Programs for Hiring Placement, and Advancement of Individuals with Handicaps.*
 2. Management Directive - 713: *Affirmative Action for Hiring, Placement and Advancement of Individuals with Handicaps.*
 3. Management Directive - 714: *Instructions for the Development and Submission of Federal Affirmative Employment Multi-Year Program Plans, Annual Accomplishment Reports, and Annual Plan Updates.*
 4. Management Directive - 110: *Federal Sector Complaints Processing Manual.*
 5. Enforcement Guidance: *Vicarious Liability for Unlawful Harassment by Supervisors*: June 18, 1999;
 6. Policy Guidance on Executive Order 13164: *Establishing Procedures to Facilitate the Provision of Reasonable Accommodation*: October 20, 2000;

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7. For a more complete list of EEOC issuances, please visit the Commission website (www.eeoc.gov).

IV Major Components of an Agency EEO Program

- A federal agency EEO Program consists of some major program components that include affirmative employment planning, planning for provision of reasonable accommodation, discrimination complaint processing, and plans for the prevention of harassment.
- Some highlights of an agency's responsibilities to support its overall EEO Program include:
 - ◆ Providing sufficient resources to ensure efficient and successful operation. Hence, the requirement that the agency head designate an EEO Director and sufficient staff to effectively operate an agency-wide program.
 - ◆ Reviewing, evaluating and controlling managerial and supervisory performance to insure a continuing affirmative application and vigorous enforcement of EEO, and providing orientation, training and advice to management officials to assist in their understanding and implementation of the EEO policy and program.
 - ◆ Take appropriate disciplinary action against employees who engage in discriminatory practices. Engaging in discriminatory practices or conduct is also considered misconduct. This becomes particularly important in discrimination complaint procedures involving all forms of discriminatory or sexual harassment. In one of the upcoming chapters, harassment issues will be explained, as well as how and why management officials are held to a higher standard than employees.

Management's Responsibilities: General Program Duties

● **Affirmative Employment and Special Emphasis Programs**

Affirmative employment and special emphasis programs are discussed in detail in a subsequent chapter of this training manual.

● **Discrimination Complaint Processing**

Federal agencies must also provide a Discrimination Complaint Program through which employees and applicants for employment will have access to a prompt, fair, and an impartial avenue of redress for complaints of employment discrimination.

- ◆ Within the discrimination complaint program, agencies must make available an Alternative Dispute Resolution (ADR) Program at both the informal and formal complaint processing stages.
- ◆ EEOC guidance for the complaint processing program is contained in EEOC Management Directive 110. The directive provides specific guidance concerning specific sections of the regulations.
- ◆ Management officials have a responsibility to cooperate with EEO Program officials, (*i.e.*, EEO Counselors, EEO Investigators, EEO Managers, EEOC Administrative Judges) in all stages of the EEO complaint process; for obtaining a clear understanding of EEO claims that are raised by complainants; for providing an "articulation of management's legitimate non-discriminatory reason for actions and/or decisions"; and, for participating in good faith for the early resolution of EEO complaints.

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● **Plan for the Prevention of Harassment**

Agencies are also responsible for establishing plans for the prevention of harassment in accordance with EEOC Enforcement Guidance, *Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999. The Guidance advises agencies that they are responsible for the conduct of its agents and supervisory employees and that prevention is the best tool for the elimination of harassment.

It is important to note here that an effective harassment prevention plan helps to insulate the agency from liability. An effective plan should include:

- ✓ A clear policy statement issued by the agency head which is distributed to all employees;
- ✓ Notice to all employees of the appropriate reporting mechanisms; and
- ✓ Annual training and/or retraining of all management officials.

Please refer to the chapter on "Harassment" for more detailed description of the agency's obligations.

● **Plan for the Provision of Reasonable Accommodations**

In accordance with Executive Order 13164, issued on July 26, 2000, federal agencies are also required to establish written procedures on how they will process requests for reasonable accommodation for individuals with disabilities. The appendix of this manual provides EPA's internal reasonable accommodation policy and procedures. Managers should consult the internal policy and/or the appropriate EPA official for assistance in responding to a reasonable accommodation request.

Management's Responsibilities: General Program Duties

V EEO Program Officials - EEO Technical Experts and Resources

- EPA, like all other federal executive agencies, is responsible for developing and implementing EEO/AE Programs that are consistent with the policy and procedures promulgated by the EEOC.
- To accomplish this EEO mandate, management officials are encouraged to seek guidance and assistance from the EEO Program officials, as well as Human Resources officials, who possess the technical information and expertise to ensure that management is fully aware of the impact of a particular decision or action.
- **The Equal Employment Opportunity (EEO) Director.** At the EPA the EEO Director, is responsible for the management and oversight of the day-to-day operation of the EEO Program. The Director advises the agency head with respect to the preparation of national and regional EEO/AE Program plans, procedures, reports and other matters pertaining to the agency EEO/AE Programs and is responsible for evaluating, on a regular basis, the sufficiency of the total agency EEO/AE Programs. When authorized by the agency head, the Director is responsible for recommending changes in programs and procedures to eliminate discriminatory practices, and to improve the agency EEO Program. The Director also serves as a liaison to the EEOC and other federal agencies on EEO matters.
- **Regional EEO Officers** are responsible for the day-to-day operation and maintenance of the regional/local EEO/AE Programs. These responsibilities include the coordination and development of local/regional AE Program Plans and Accomplishment Report, and submission of the AE Program Plan to the Headquarters EEO Office for review and approval. Regional EEO Officers conduct periodic evaluations of the EEO Program throughout their respective regions and provide feedback to management officials on progress made toward meeting EEO/AE Program objectives and goals. Further, Regional EEO Officers monitor regional training to ensure that minorities, women and individuals with disabilities receive an equitable amount of the training

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available. Regional EEO Officers are responsible for administering the discrimination complaint program in the region by providing an avenue for early resolution of discrimination complaints. Regional EEO Officers have responsibility for training and assisting EEO Counselors and Special Emphasis Program Managers in carrying out their EEO-related duties.

- **Equal Employment Opportunity Counselors** are responsible for establishing and maintaining open channels through which employees may receive information about the informal and formal EEO complaint program, raise questions (confidentially, if so desired), discuss concerns, get answers, and obtain informal resolutions of issues related to EEO. If issues are not resolved during informal complaint processing, EEO Counselors are responsible for issuing the Notice of Right to File a Discrimination Complaint and writing the EEO Counselor's Report.
- **Special Emphasis Program Managers and Selective Placement Managers** advise the EEO Director and/or the Regional EEO Officer on matters affecting the recruitment, employment, and placement of minorities, women, and individuals with disabilities. They also provide direction and guidance to Regional Management officials and serve as contact persons for communication with the EEOC, the Office of Personnel Management and other agencies.

References and Resources

Contacts: U.S. Environmental Protection Agency
Office of Civil Rights (1201)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 564-7272
Fax: (202) 501-1836

Management's Responsibilities: General Program Duties

Notes: Management's Responsibilities: General Program Duties



Management's Responsibilities:

Affirmative Employment and Special Emphasis Programs

DESK REFERENCE GUIDE

Affirmative Employment and Special Emphasis Programs

I Introduction

- Section 717(b) of Title VII of the Civil Rights Act of 1964, as amended, requires federal agencies to develop affirmative employment plans, including programs to open employment opportunities to all qualified people and provide training to enable employees to advance according to their potential. Similar affirmative employment obligations are imposed by Section 501 of the Rehabilitation Act of 1973, as amended, with respect to employees and applicants with disabilities.
- In enacting Section 717 of Title VII, and similar provisions in the Rehabilitation Act, Congress recognized the federal government's leadership role as a model employer.
- EEOC has oversight responsibility for the operation of equal employment opportunity and affirmative employment programs of the federal agencies, including the duty to review, evaluate and approve agencies' affirmative employment plans and the annual progress reports on those plans. Detailed instructions to federal agencies for planning and reporting affirmative employment efforts are contained in EEOC's Management Directives (MD) 712, 713 and 714.
- EEOC is also responsible for submitting to the President and Congress an annual report describing the employment status of minorities, women and individuals with disabilities in the federal government. EPA's progress on eliminating under-representation is included in this report.

II Purpose of Federal Affirmative Employment Programs

- In requiring federal agencies to have affirmative employment programs, Congress expected agencies to do more than simply respond when

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evidence of discrimination is brought to their attention. Rather, federal agencies are expected to take lawful proactive steps to promote equal employment opportunity, and to diagnose and respond to potential problems of exclusion before those problems develop into discrimination as a legal matter.

- Many of the actions taken to open opportunities also improve the quality of the federal workforce and the functioning of the federal government.

III Major Components of An Affirmative Employment Program

- To develop a strong and meaningful affirmative employment program in a federal agency, management must be firmly committed to the principles of equal employment opportunity.
 - ◆ Top management must clearly and consistently communicate its support of the agency's equal employment opportunity/affirmative employment programs to both its supervisory and line staff.
 - ◆ Agencies must commit sufficient resources to maintaining these programs and ensuring that their personnel are adequately trained.
 - ◆ Efforts in the area of equal employment opportunity should be an important element of the measure of managerial performance.
- On an ongoing basis, agencies must systematically review the participation of minorities, women and individuals with disabilities in their workforce.
- Guided by the results of these analyses, agencies must review relevant policies and practices to assess whether they arbitrarily limit employment opportunities for any workforce group.
- Agencies must then take appropriate and effective action to eliminate or modify any artificial barriers they find. In doing so, agencies may

Management's Responsibilities: Affirmative Employment Programs

utilize a wide array of corrective steps, as determined by the barriers identified, including, but not limited to:

- ◆ engaging in outreach and recruitment to reach the broadest possible pool of qualified applicants;
- ◆ consistent with the needs of the agency define job and selection criteria to allow individuals with diverse skills and abilities to be considered;
- ◆ utilize the broadest possible area of consideration for vacancy announcements to cast a wide net for potential qualified applicants;
- ◆ ensure diverse representation on selection panels;
- ◆ maximize employee development and training opportunities for all employees, including employees at the lower grade levels; and
- ◆ implement alternative dispute resolution mechanisms to promote a climate of trust and openness.

IV The Affirmative Employment Program Plan (AEP)

The AEP Plan for the EPA has been developed in accordance with guidance that is set forth in 29 C.F.R. § 1614.102 and instructions contained in EEOC MD-714. Under the statutes and EEOC guidance, the EPA must prepare and implement an AEP Plan for Minorities and Women which includes the issuance, publication and adherence to an EEO Policy to ensure that affirmative employment efforts permeate the organization.

The first step in developing the AEP Plan is to conduct a comprehensive EEO program analysis. All key managers (personnel, budget, program managers, and office heads) should participate in the program analysis and the identification of problems and barriers. The program analysis is the foundation on which the entire AEP plan will be based.

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● **Element 6 - Promotions**

The logical step to follow in determining whether employees are being developed would be to monitor internal promotions and analyze promotion data with attention to whether promotions, both competitive and non-competitive/career ladder, are equitable. Where disparities are noted, have the internal merit promotion processes been validated and/or reviewed for any barriers? Is information about promotional opportunities made available to employees regardless of minority status or gender?

- ✓ Did the complaint trend analysis reveal promotions as a frequently raised complaint issue? If so, did an examination of the complaint data assist in identifying any barriers in the merit promotion processes?

● **Element 7 - Separations**

Analysis should be conducted concerning reviews of separation policy and procedures. The analysis should be focused on any surveys and studies regarding the impact of separations occurring during a reduction-in-force, downsizing, rightsizing, or reorganization on protected groups.

● **Element 8 - Program Evaluation**

This last element describes the agency's system for providing periodic status reports on affirmative employment efforts to top management officials. This portion of the AEP Plan should explain the mechanism in place for monitoring AEP accomplishments and have in place the flexibility to make adjustments to the AEP Plan when the need arises.

V Comprehensive Affirmative Action Programs for Hiring, Placement, and Advancement of Individuals with Disabilities

Instructions, procedures, and guidance for continuing comprehensive programs to facilitate equal employment opportunities for individuals with disabilities is found in

Management's Responsibilities: Affirmative Employment Programs

EEOC Management Directive (MD) 712, issued March 29, 1983. This guidance was supplemented by MD 713, issued October 6, 1987, prescribing instructions, procedures, guidance, and formats for annual affirmative employment program plans and accomplishment reports. Agencies are to examine policies, programs, facilities, and other aspects of the work environment to identify barriers to equal participation by people with disabilities. The agencies must then establish a plan and time table for removal of the identified barriers.

The basic program elements for a comprehensive affirmative employment program for individuals with disabilities are:

- **Element 1 - Targeted Disabilities**

Agencies are to emphasize the employment of individuals with severe disabilities: deafness, blindness, missing extremities, partial paralysis, complete paralysis, convulsive disorders, mental retardation, mental illness, and distortion of limbs or spine.

- **Element 2 - Quantitative Goals**

Agencies with 501 or more employees are to establish numerical objectives for employment of persons with targeted disabilities. Goals may address hiring, placement, and/or advancement of these individuals and must conform with current EEOC guidance.

- **Element 3 - Special Recruitment Programs**

Agencies are to establish programs specifically to recruit and to track applications from people with targeted disabilities. Recruitment programs should focus on internal and external sources of candidates.

- **Element 4 - Goals and Timetables for Facility Accessibility**

Agencies are to identify and remove architectural, communication, and transportation barriers. All facilities are to be surveyed annually. As

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barriers are identified, agencies must set priorities and timetables for removal.

● **Element 5 - Reasonable Accommodation**

Agencies are to establish and publicize specific procedures for prompt and efficient processing of requests for reasonable accommodation from applicants and employees with disabilities. Agencies are to design procedures that eliminate any delay or obstruction by general limitations or fiscal constraints.

● **Element 6 - Alternative Selection Procedures**

Agencies are to analyze selection procedures to identify those that impede hiring, placement, and advancement of individuals with disabilities. As selection barriers are identified, alternatives are to be instituted.

● **Element 7 - Excepted Appointing Authorities**

Agencies are to inform managers about the availability and flexibility of excepted appointing authorities for employment of individuals with disabilities. Agencies are to establish mechanisms for recruiting and forwarding to selection officials applications from persons eligible for these excepted appointing authorities.

● **Element 8 - Merit Promotion**

Agencies are to assure that employees with disabilities, especially those with targeted disabilities, have equitable opportunities to advance via merit promotion programs. These programs should be used enhance promotion opportunities for individuals with disabilities employed under the excepted appointing authorities and those in the competitive service.

Management's Responsibilities: Affirmative Employment Programs

● **Element 9 - Other Promotional Opportunities**

Agencies should make efforts to advance employees with disabilities, especially those with targeted disabilities, as rapidly as is justified by job performance and individual potential. Options include reclassification of positions to reflect accretion of duties.

● **Element 10 - Upward Mobility**

Agencies are to include employees with disabilities, especially those with targeted disabilities, in the target populations for upward mobility programs and to assure that these individuals have equitable opportunities to participate in these programs.

● **Element 11 - Trades and Crafts**

Agencies are to assure that employees with disabilities, especially those with targeted disabilities, have equitable opportunities to participate in blue-collar career development and advancement programs. In determining whether applicants with disabilities meet physical and mental qualification requirements for these programs, agencies should apply standards in accordance with current guidance concerning job-relatedness and reasonable accommodation.

● **Element 12 - Training and Career Development**

Agencies are to assure that employees with disabilities, especially those with targeted disabilities, have equitable opportunities to be trained. Agencies should systematically evaluate the career development needs of individual employees with disabilities and should provide details, lateral reassignments, and other developmental opportunities that will qualify selected individuals for promotion.

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● **Element 13 - Special Employment Programs**

Agencies are to assure that individuals with disabilities, especially those with targeted disabilities, are included in executive development, management intern, cooperative education, stay-in-school, summer employment, summer aide, summer intern, and other special employment programs.

● **Element 14 - RIFs and Other Adverse Employment Situations**

Reorganizations, contracting out, reduced personnel ceilings, and budget cuts may lead to reductions-in-force (RIFs), furloughs, and involuntary reassignments. In these and similar situations, agencies are to analyze the anticipated and actual effects on employees with disabilities, particularly those with targeted disabilities. Within the limits imposed by law and regulation, agencies should make every effort to minimize effects on employees whose disabilities make it impossible or unreasonably difficult for them to be reassigned within the agency or transferred to another agency.

● **Element 15 - Alternatives to Disability Retirement**

Each agency has a special obligation to provide reasonable accommodation for employees who become disabled and to identify positions within the agency or in other agencies in which these individuals can perform well in spite of their disabilities. Special efforts should be taken whether the disability resulted from injury on the job or from a medical condition or other situation that is not job-related.

● **Element 16 - Affirmative Attitudes**

Agencies are to plan and conduct training programs and special events that foster affirmative attitudes toward individuals with disabilities, their potential to be employed in a broad range of grade levels and occupational series, and their ability to function effectively in Federal work places.

Management's Responsibilities: Affirmative Employment Programs

● **Element 17 - Awards**

Agencies are to assure that employees with disabilities who are performing outstanding work have equitable opportunities to win incentive and other performance awards, especially quality step increases and bonuses. Supervisors should be encouraged to identify and nominate deserving individuals, especially those with targeted disabilities.

Program Administration and Management:

● **Element 1 - Staffing Commitments**

Each agency with 3,000 or more employees should have a full-time disability program manager at headquarters and in each organizational unit and field installation with 3,000 or more employees. Appropriate staff assignments should be made in all organizational units and at all installations with 101 or more employees. Agencies are to consider employees with disabilities, especially those with targeted disabilities, for these positions.

● **Element 2 - Internal Guidance**

Each agency is to issue periodic (at least annual) internal guidance to disability program managers, selective placement coordinators, and other personnel who have responsibilities regarding the comprehensive affirmative employment program for individuals with disabilities. The guidance should cover current issues as well as general policies and procedures.

● **Element 3 - Delegation of Authority**

Agencies are to delegate appropriate authority and assign specific duties and responsibilities to personnel throughout the agency in order to assure efficient and thorough implementation of the comprehensive affirmative employment program for individuals with disabilities.

EPA Employment Civil Rights Training

● **Element 4 - Management Mechanisms**

Affirmative employment for individuals with disabilities should be addressed by line items or other separately identifiable elements in agency management plans, financial plans, budget requests, and associated reports, briefing papers, and testimony.

● **Element 5 - Program Evaluation**

Agencies are to establish systems for evaluating program status and achievement. These systems should enable ongoing adjustment and improvement of the comprehensive affirmative employment program as well as production of reports for internal use and reports for the EEOC.

● **Element 6 - Data Collection**

Agencies are to establish data collection systems that convey accurate information to the Central Personnel Data File maintained by the Office of Personnel Management. Particularly important are the SF 256 disability information and data on hiring, placement, and advancement patterns for applicants and employees with disabilities, especially those with targeted disabilities.

● **Element 7 - Management Accountability**

Achievements and deficiencies regarding affirmative employment for individuals with disabilities are to be reflected as a separate element in the individual performance appraisals of agency personnel responsible for management and implementation of the program. This includes executives who have general responsibility as well as individuals with specific assignments.

● **Element 8 - Training and Technical Assistance**

Agencies are to provide or obtain training and technical assistance adequate to develop and maintain a high level of management,

Management's Responsibilities: Affirmative Employment Programs

supervisory, and employee awareness of issues, policies, regulations, and procedures concerning affirmative employment for individuals with disabilities.

● **Element 9 - Employees with Disabilities Advisory Committee**

Agencies are to provide leadership, guidance, and resources for establishment of Employees with Disabilities Advisory Committees to provide input concerning disability issues and the impact of agency employment practices. Membership on these committees is to include and may be limited to agency employees who have disabilities.

● **Element 10 - Cooperation with Unions**

Collective bargaining agreements often require agencies to consult employee unions when affirmative employment program plans, plan updates, and reports are prepared, or when reasonable accommodations are provided. Agencies are to review current and proposed collective bargaining agreements to identify provisions that may cause problems for employees and applicants with disabilities, and seek union cooperation in providing affirmative employment for individuals with disabilities.

● **Element 11 - Outside Liaison**

Agencies should maintain liaison with national and local agencies and organizations concerned with education, information, rehabilitation and/or employment of individuals with disabilities. These contacts can be sources of future employees, identification of appropriate reasonable accommodation, and retention of employees who become disabled.

VI Special Emphasis Programs

- Special Emphasis Programs (SEPs) focus on specific groups and the agency's efforts to expand the pool of applicants through outreach and recruitment. These programs are designed to increase opportunities for

EPA Employment Civil Rights Training

minorities, women, individuals with disabilities and veterans by identifying barriers and implementing creative strategies for elimination of barriers.

- ◆ Special Emphasis Program Managers (SEPMs) serve as valuable resources to management officials for providing advice on how to ensure that existing personnel office outreach and recruitment efforts reach minorities, women, and individuals with disabilities at all levels. A SEPM is an EEO official who is responsible for identifying the unique and/or special concerns of a group of applicants or employees and then briefing agency management with suggestions and strategies for the elimination of barriers.
- ◆ Government-wide Special Emphasis Programs include:
 - ✓ Federal Women's Program - established 1963
 - ✓ Hispanic Employment Program (HEP) - established 1970
 - ✓ Disability Emphasis Program - established in Section 501 of the Rehabilitation Act of 1973, and Section 403 of the Vietnam Era Veterans Readjustment Act
 - ✓ Veterans Employment Program - See Title 5 U.S.C. Subpart B, Chapter 31; 5 CFR 720, Subpart C; and Executive Order 11521, 1990.
 - ✓ The White House Initiative for Historically Black Colleges and Universities (HBCU)
- SEPs focus on certain and specific groups that have been identified in an agency's efforts to expand the pool of available applicants for hiring or candidates for promotion through recruitment and outreach. The programs are designed to increase opportunities for the various groups by identifying barriers and implementing creative strategies for barrier elimination.

Management's Responsibilities: Affirmative Employment Programs

- At the EPA, the Work Force Diversity and Analysis Team in the Office Of Civil Rights is responsible for ensuring the implementation of the agency's six special emphasis programs and for monitoring the overall AEP. National and collateral-duty SEPMs are a valuable resource for management officials as they serve as first line contacts with colleges and universities and coordinate program and public relations activities.
- The SEPMs can provide management officials with technical assistance, enlist their participation in recruitment trips, training conferences, speaking engagements, and in establishing ties with community based organizations and learning institutions.



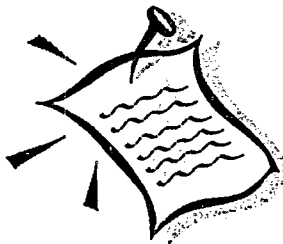
**Notes: Management's Responsibilities:
Affirmative Employment Programs**

Management's Responsibilities Under the Rehabilitation Act of 1973

Facility Accessibility

■ All federal management officials have a responsibility to report any barriers. Watch for:

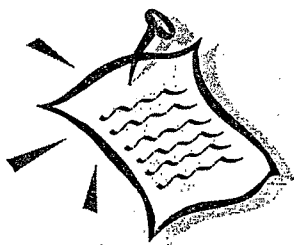
- ✓ Doors that are too narrow or too heavy.
- ✓ Entrances that have steps and no ramps.
- ✓ Rest room facilities that are too small.
- ✓ Thresholds that are too high.
- ✓ Furniture that intrudes on passageways.
- ✓ Lights that are burned out or too dim.
- ✓ Loose railings or pavers.
- ✓ HC parking spaces in distant locations or constantly occupied by cars without HC tags.



What other barriers may exist?

Scenario #2

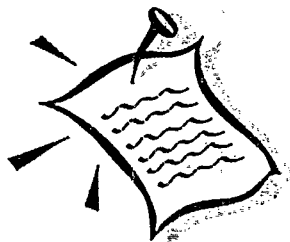
Sally is a Supervisory Computer Specialist who uses a scooter because of her disability. Her agency holds monthly IT meetings in its historic headquarters building. Sally has reported that the restrooms in this building are inaccessible and requests that they be renovated. How should the agency respond?



Would it make a difference if Sally was a guest from another agency?

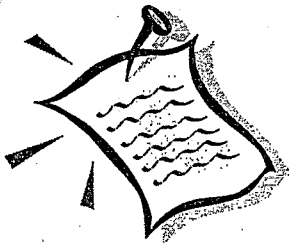
**Management's Responsibilities:
Employment of Individuals With Disabilities**

- Strive to meet EPA goals for hiring, placing, and advancing individuals with disabilities.
- Ensure an active recruitment program which includes individuals with disabilities.
- When hiring consider the employee's qualifications. Keep the disability and need for accommodation out of the selection process.
- Work with personnel to ensure that qualification requirements are job-related.



Scenario #3

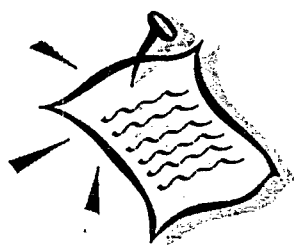
Susan supervises a staff of twenty research scientists. She advertised an entry level position and included in the criteria the ability to give oral presentations to large audiences. One applicant, Henry, is deaf and a recent college graduate. During the interview, he explained that he uses the assistance of a sign language interpreter when he gives presentations. Is Henry qualified?



What questions could be asked of this candidate during the interview?

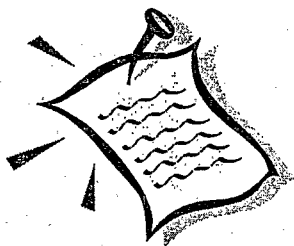
Making Individuals With Disabilities Part of the Team

- Major barriers to employment reported by individuals with disabilities are:
 - ✓ Negative attitude of hiring officials, supervisors, and/or co-workers.
 - ✓ Management's lack of knowledge about appropriate hiring and conversion authorities.
 - ✓ Agency unwillingness to provide reasonable accommodation or physical accessibility.
- Treat individuals with disabilities, just like other employees, with respect.



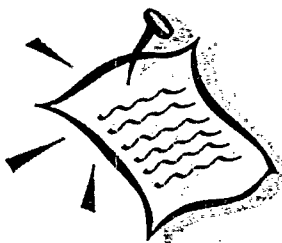
Scenario #4

Dave is Branch Chief for a lively staff. They work hard, but like to tease and play practical jokes. One employee, Tom, has multiple sclerosis, and two of his co-workers make fun of the way he walks. Should Dave say anything, and if so what? What information would you need to decide if Dave should say anything?



Interviewing Individuals With Disabilities

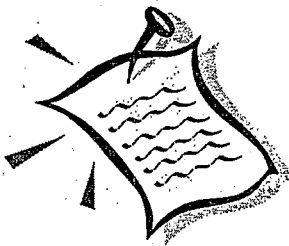
- Ask each applicant the same questions about their qualifications, skills, and experience.
- Follow the lead of the individual with a disability. If s/he does not mention the disability, do not mention it.
- Focus on the functions of the position and the knowledge, skills and abilities the individual would bring to the job.
- Applicants may request reasonable accommodation for the interview. Agencies should generically invite applicants to ask for reasonable accommodations on the job application or when setting up the interview.



Can management officials focus on the functional requirements of the job when interviewing an applicant who has an obvious disability?

Scenario #5

Ron is interviewing a candidate who had an outstanding application and credentials. The woman is limping slightly but has not mentioned a disability. Ron is concerned. Because considerable walking to various buildings is required for the job, he considers asking her questions about his concerns. How should Ron approach the subject?



Appointing Authorities and Special Employment Programs

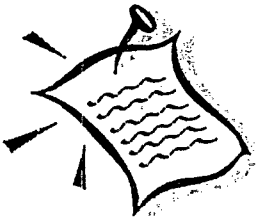
Individuals with disabilities can be hired competitively or non-competitively.

- Excepted appointing authorities provide an opportunity for individuals with disabilities to be hired non-competitively so they can demonstrate their ability to do the job. The two major options are:

- ✓ Schedule A appointments
- ✓ Veterans with a 30% or more disability

- Individuals with disabilities should be equally recruited for vacancies announced through the merit promotion program.

- Individuals with disabilities should also be equally recruited for upward mobility and other special employment programs.



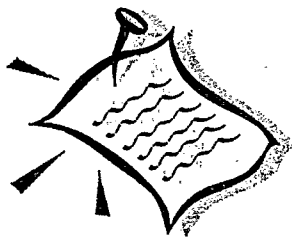
Scenario #6

The job announcement closed a month ago, and Alice is reviewing the applications of the candidates forwarded by the personnel office. In addition, they give Alice an application from a qualified individual who applied last week for a Schedule A position. May Alice consider hiring this candidate?



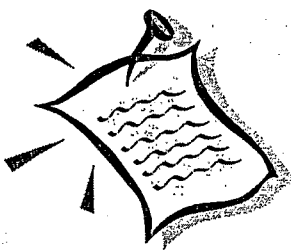
Reasonable Accommodations

- Applicants and employees with disabilities have a right to request a change or adjustment to an element in the application process and work situation that presents a barrier.
- Management officials should know their agency's procedures and should process requests for reasonable accommodations quickly.
- Failure to respond promptly can be a violation of the employee's rights under the Rehabilitation Act of 1973.



Types of Reasonable Accommodations

- Assistive devices or technology
- Working from home
- Readers, interpreters, and personal assistants
- Modification of work duties
- Flexible work schedule
- Adjustments to work station/office
- A change in work style of management officials & co-workers
- Leave, including LWOP
- Reassignment to a vacant position



EPA Employment Civil Rights Training

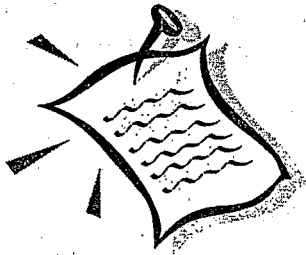
- ◆ distortion of limbs or spine,
 - ◆ mental illness,
 - ◆ mental retardation, and
 - ◆ convulsive disorders.
- Agency management sets the goals for new hiring of individuals with targeted disabilities, but they rely on hiring officials to make decisions in support of the goals.
 - EEOC reports annually to Congress on the progress of each agency, including a breakdown for each of the targeted disabilities.
 - Agencies are responsible for ensuring that management officials are aware of issues, policies, regulations, and procedures concerning the recruitment and employment of individuals with disabilities.
 - Agencies are also responsible for ensuring that all of their programs, training, and other activities are fully accessible to all employees with disabilities.
 - Agencies should conduct an annual review of policies, procedures, programs, activities, and facilities to identify and target for removal any barriers to participation by individuals with disabilities.

III Management Role in Affirmative Employment for Individuals with Disabilities

- Management officials are responsible for meeting their agency's EEO objectives for hiring, placing, and advancing individuals with disabilities.
- Hiring officials should work with their personnel offices to assure that qualification requirements are job-related and to ensure that an active recruitment program which includes individuals with disabilities is in place.

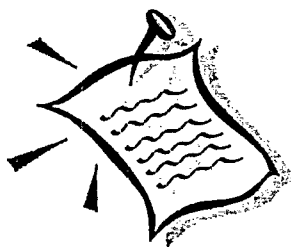
Scenario #6

The job announcement closed a month ago, and Alice is reviewing the applications of the candidates forwarded by the personnel office. In addition, they give Alice an application from a qualified individual who applied last week for a Schedule A position. May Alice consider hiring this candidate?



Reasonable Accommodations

- Applicants and employees with disabilities have a right to request a change or adjustment to an element in the application process and work situation that presents a barrier.
- Management officials should know their agency's procedures and should process requests for reasonable accommodations quickly.
- Failure to respond promptly can be a violation of the employee's rights under the Rehabilitation Act of 1973.



Management's Responsibilities Under the Rehabilitation Act of 1973

- Qualified individuals with disabilities should be considered for vacancies on the basis of their skills and abilities.
- To be hired, individuals with disabilities must be qualified for the position and able to perform the essential functions, with reasonable accommodation if requested or without reasonable accommodation if not requested.
- Management officials should assure that individuals with disabilities have equal opportunities to demonstrate that they can perform the job successfully, to obtain promotions and awards, and to participate in training and career development programs.
- Management officials are responsible for making reasonable accommodation to the known disabilities of applicants and employees. The only exception is when the agency can demonstrate that the accommodation would cause an undue hardship, which means a "significant difficulty or expense."
- Management officials should be held accountable in their performance appraisals for meeting EEO responsibilities and should be recognized for their achievements in helping the agency fulfill its AEP obligations.

IV Making Individuals with Disabilities a Part of the Team

- The individual who is best qualified for the position should be hired. Focus on the individual and not the disability.
- Major barriers to employment reported by individuals with disabilities are:
 - ◆ Negative attitude of hiring officials, supervisors, and/or co-workers;
 - ◆ Management's lack of knowledge about appropriate hiring and conversion authorities;

VII Supervising Individuals with Disabilities

- Treat individuals with disabilities with respect, the same as those who do not have a disability. Praise in public and criticize in private.
- Employees with disabilities should feel that they are a part of the overall staff. Management officials should not allow mistreatment or exclusion of an employee with a disability.
- Management officials and co-workers should report any communication, architectural, attitudinal, or other barriers that may exist during the formal and informal periods of the work day.
- Language can reflect the attitudes of the speaker. The way a supervisor speaks of an employee will be picked up by co-workers. Management officials should set a positive example.

VIII Reasonable Accommodation

- Agencies are required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified applicant or employee with a disability unless the agency can show that providing the accommodation would result in undue hardship. Reasonable accommodation can be any change:
 - ◆ in the work environment (including events and training) or
 - ◆ in the way duties are customarily performed.
- Management officials must respond promptly to requests for reasonable accommodation. A delay in providing reasonable accommodation can be a violation of the applicant or employee's rights under the Rehabilitation Act of 1973, as amended.

Management's Responsibilities Under the Rehabilitation Act of 1973

- In most agencies, only the Disability Manager or the EEO Officer is qualified to deny a request. The denial must be in writing and must specify a reason for the denial.
- Accommodations can only be determined on a case-by-case basis, usually through an interactive process. Accommodations are individualized. While the individual with the disability is generally the best judge of what accommodation is most appropriate, it is the agency who chooses among effective accommodations.
- If an applicant or employee does not reveal his/her disability or request accommodation, management is not required to provide reasonable accommodation. However, once management officials know an employee needs a specific accommodation, the employee should not be required to make a separate request each time the need arises.
- Once the job offer is made, the applicant might request reasonable accommodations related to the work duties or environment. The agency should have the requested accommodations ready and available when the employee begins work. If this is not possible, interim accommodations should be provided.
- The employee should be consulted before purchasing or contracting for assistive technology or devices. Agencies that fail to secure employee agreement risk the possibility of procuring unsuitable accommodations.
- Types of Accommodations (generic overview):
 - ◆ Restructuring the job so that the employee can perform the essential functions.
 - ◆ Adjusting the employee's work schedule.
 - ◆ Granting flexible leave - excused absence, sick leave, annual leave, or leave without pay.

EPA Employment Civil Rights Training

- ◆ Flexiplace - eliminating the physical strain of the daily commute can greatly improve an employee's productivity.
- ◆ Modifying the employee's work site to allow better access and mobility. Furniture, carpet, equipment, files, and lighting may need to be adjusted or moved.
- ◆ Specialized equipment and assistive devices.
- ◆ Readers, interpreters, and personal assistants. These can be hired non-competitively through the Schedule A authority.
- ◆ For employees only, reassignment to a vacant position
- Management officials should be familiar with their agency's policies and procedures related to the purchase or acquisition of reasonable accommodations.
- It is the responsibility of each management official to ensure that all his/her employees have equal access to agency functions - staff meetings, training, *etc.*
- When in doubt about appropriate accommodations, ask the employee. To explore the options available, contact the agency Disability Program Manager.
- The applicant or employee with a disability who requests accommodation should be treated with respect at all times. Remember that requests can stem from a desire to improve work performance or participation.
- Management officials should comply with their agency's policies concerning requests for medical documentation. However, if an employee's disability is obvious or is already documented and on file, the agency may not request medical documentation.

Management's Responsibilities Under the Rehabilitation Act of 1973

- All aspects of the employee's disability and the request for accommodation must be kept confidential. Attention should not be directed to the accommodation provided. This includes readers, interpreters, and personal assistants. They should not be introduced or drawn into the meeting or event as participants unless requested by the employee.
- Management officials are cautioned not to retaliate against an employee for requesting reasonable accommodations, whether or not the request was approved.

IX Job Performance and Recognition

All employees, including those with disabilities, should be held accountable for their work performance. Management officials are responsible for communicating performance expectations to their employees and for monitoring and appraising their work.

- Individuals with disabilities should be made to feel that they are on an equal basis with employees who do not have disabilities.
 - ◆ Employees with disabilities should have equal opportunities to win incentive and other performance awards.
 - ◆ Employees with disabilities should be provided with performance standards and elements that are fair and appropriate for the position.
 - ◆ Employees with disabilities should be given equal opportunities to obtain training and participate in other growth opportunities that will allow them to advance in their careers.
 - ◆ Employees with disabilities should be encouraged to participate in supervisory, executive, and/or management training.

EPA Employment Civil Rights Training

- When evaluating an individual with a disability, ensure that aspects of their physical or mental disability are not held against them.
- Management officials should consider that what appears to be a performance or conduct problem may result from a lack of appropriate accommodations.
- Any performance problems and/or misconduct should be addressed at the earliest possible stage. The management official should provide feedback to the employee and ensure that it is fully understood.
- Management officials must be careful to distinguish between performance problems and difficulties caused by a physical or mental disability. Before taking disciplinary actions, management officials should ensure that, if previously requested, all necessary reasonable accommodation has been explored.

Management's Responsibilities Under the Rehabilitation Act of 1973



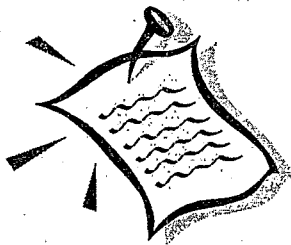
**Notes: Management's Responsibilities Under the
Rehabilitation Act of 1973**

**Management's
Responsibilities:**

**Identifying, Eliminating
and Preventing
Harassment**

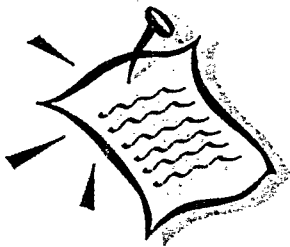
Protected Bases

- Race
- Color
- Religion
- Sex
- National Origin
- Age (40 and over)
- Disability
- Retaliation



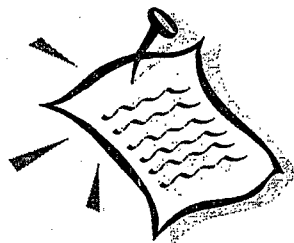
What is Workplace Harassment?

- Harassment is any unwelcome verbal or physical conduct based on one of the protected bases that is so objectively offensive as to alter the conditions of the victim's employment. This standard is met when:
 - ✓ The conduct culminates in a tangible employment action, or
 - ✓ The conduct was sufficiently severe or pervasive to create a hostile work environment



Who Can Commit Workplace Harassment?

- A Management Official
- A Co-Worker
- A Non-employee



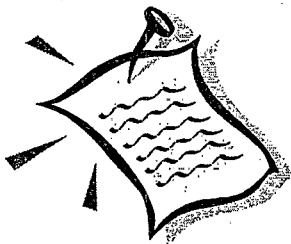
Elements of a Harassment Claim

- Conduct must be unwelcome
- Conduct based on a protected basis
- Conduct results in a tangible employment action or creates a hostile work environment



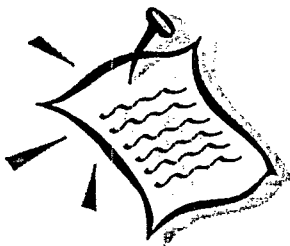
Unwelcome Conduct

- “Unwelcome” conduct is where the employee did not solicit or invite the conduct and regarded it as undesirable.
- Critical Inquiry: Did the complainant explicitly or implicitly communicate that the conduct was unwelcome?
 - ✓ Submission does not mean welcomeness
 - ✓ Active participation would likely defeat the claim



Scenario # 1

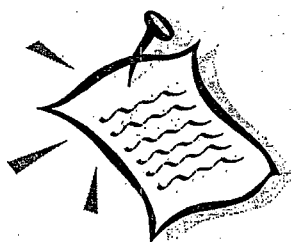
Deborah's male co-workers frequently engage in bawdy sexual banter and horseplay in the office. They trade stories about their sexual exploits and kid each other about each other's sexual prowess. Deborah sometimes has conversations of a sexual nature with one of her male co-workers, but she has let the others know that she is offended by their banter and horseplay. Deborah has complained to her supervisor, but he has taken no action.



Evaluate Deborah's harassment claim.

Basis

- Harassment based on sex, including same-sex, (sexual and non-sexual) violates Title VII
- Harassment based on race, color, religion, age (40 and over), disability or in retaliation for protected activity also violates federal anti-discrimination laws.



Scenario # 2

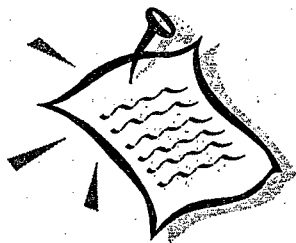
Joseph is a rude and offensive individual. He constantly makes disrespectful statements to his co-workers about their appearance, knowledge, and job performance. Alex is particularly offended by Joseph's inappropriate behavior. Joseph daily calls Alex a "big headed, lazy bum." Fed up with Joseph's behavior, Alex initiates the EEO process.



Analyze Alex's harassment claim?

Harassment: Tangible Employment Action

- A supervisor's harassment results in a significant change in employment status or benefits, *etc.* (e.g. demotion, termination, failure to promote, *etc.*)
- Only individuals with supervisory or managerial responsibility can commit this type of harassment
- If a tangible employment action results from harassment by a supervisor, the agency is automatically liable



Scenario # 3

Kim believes that her supervisor, Ted, subjected her to unwelcome sexual conduct. For example, on one occasion, he gazed at her from head to toe and stated that she looked fantastic. Kim informed Ted that while she appreciated his comment, she did not consider his behavior appropriate for the workplace. Ted replied that Kim needed to loosen up and accept favorable comments. On other occasions, Kim would notice Ted suggestively looking at her body as she walked by his office area. When Ted interviewed Kim for a promotion, he expressed reservations because Kim was not flexible or loose enough for the position. Kim was denied the promotion. Believing that Ted was punishing her for rejecting his advances, she resigned one month later.

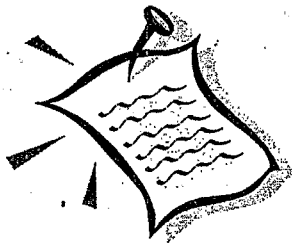


Evaluate Kim's potential sexual harassment claim.

Would it make a difference if Ted granted, rather than denied, the promotion to Kim?

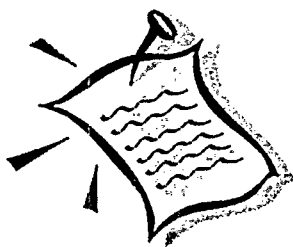
Hostile Environment Harassment

- Unwelcome comments or conduct based on a protected basis which unreasonably interferes with an employee's work performance or creates an intimidating, hostile or offensive work environment
- Anyone can commit this type of harassment, a management official, a co-worker or a non-employee



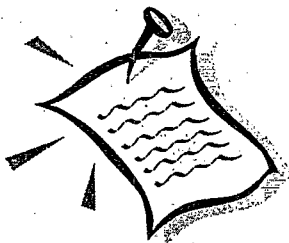
Hostile Environment Harassment Standards

- Key Issues
 - Frequency and severity
 - Reasonable person standard
- Tangible affect on the individual's job not necessary
- Psychological harm not necessary



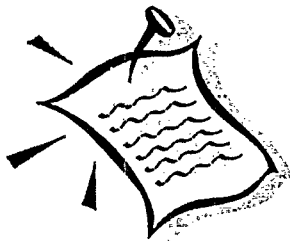
Reasonable Person

- Is the conduct severe or pervasive enough to create an environment that a reasonable person would find hostile, intimidating or abusive?
and
- The employee perceived the conduct as such.



Scenario # 4

Charles believes that his co-worker, Bob, engages in behavior that is offensive to Charles based on his race (African-American). For example, Bob (who is Caucasian) sent an e-mail to the employees in their unit attaching a series of jokes beginning with the phrase, "You know you're in the ghetto when" Charles told Bob that the jokes were racially offensive. Bob expressed surprise that Charles took offense and stated that he did not believe that the word "ghetto" only pertained to African-Americans. On another occasion, Bob sent another e-mail to his co-workers attaching jokes about Ebonics. Charles complained to their supervisor, but the supervisor took no action.

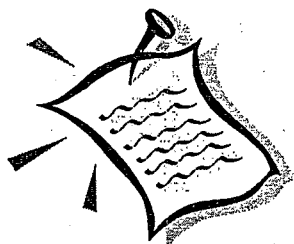


Discuss Charles' racial harassment claim.

Agency Liability: Hostile Work Environment

Harassment By a Management Official

- Agency is liable even if management did not know, unless both elements of an affirmative defense are met:
 - ◆ If exercised reasonable care to prevent or promptly correct any harassment, and
 - ◆ The employee unreasonably failed to take advantage of any preventative or corrective opportunities offered by the agency or to avoid harm otherwise.
- Harassment by high ranking officials, agency is directly liable - no affirmative defense available.



Agency Liability: Hostile Work Environment

Harassment By Co-Worker or Non-Employee

- Agency is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

- ◆ Agency knowledge is assumed if:

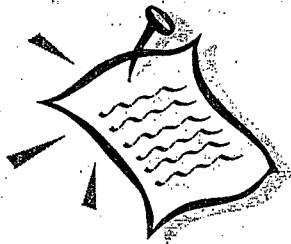
- ✓ The victim complains about the harassment, or
- ✓ The conduct occurred in the presence of a supervisor, or
- ✓ The conduct is widespread



Scenario # 5

Anna's supervisor frequently made remarks that were offensive to her and other Hispanic employees. He also made crudely demeaning references to women.

Anna did not complain to higher management about the supervisor's conduct. One month before Anna resigned, a former employee wrote a letter to the head of Anna's department complaining about the supervisor's harassment. The agency conducted an investigation, and the supervisor was reprimanded and disciplined.

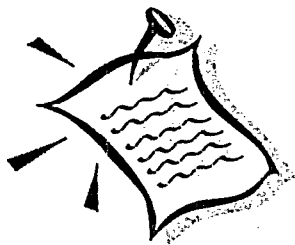


Can Anna establish a claim of harassment?

Scenario # 6

Jack joins his new secretary, Nancy, at a farewell gathering for an agency employee. During the gathering, he rubs his hands on her shoulder and back and states that he would like to take her out to dinner. Nancy declines the invitation and demands that Jack remove his hands. Jack immediately apologizes and states that he had misread the signals between the two of them.

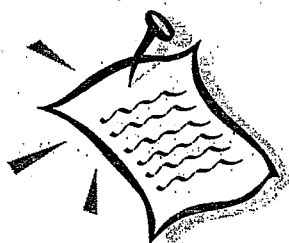
This was the first time that Jack made an advance toward Nancy, and he never again makes other sexual advances toward her. Nancy considers filing a complaint, but she assumes that no one will believe her since there were no eye witnesses.



Evaluate Nancy's potential claim.

Scenario # 7

Joan dreads each time her photocopier breaks down because the repair person assigned to her office always leers at her and makes sexually suggestive remarks. Joan has complained to her supervisor, but the supervisor says he does not have any control over the repair person because that individual is an employee of the photocopier service company and not an employee of the agency. The supervisor does relay Joan's complaints to the service company, but no action is taken.

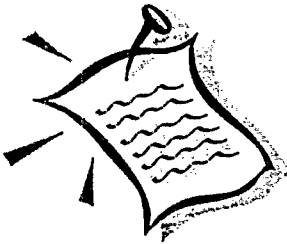


Analyze the supervisor's response to the issue?

How Harassment Affects the Workplace

For agencies:

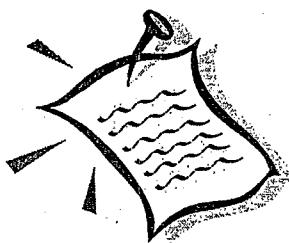
- High legal costs and damage awards
- Poor public image
- Lower productivity and morale
- Higher costs for hiring and training new employees



How Harassment Affects the Workplace

For employees:

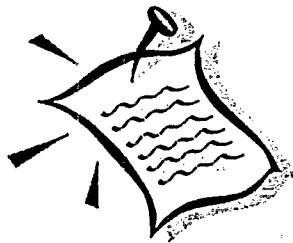
- Emotional and physical pain
- Less effective job performance
- Poor employee morale
- Personal and financial problems



Appropriate Preventative Actions

All Management Officials and Employees should:

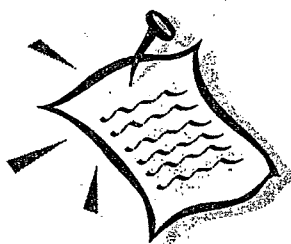
- Know the agency's harassment policy
- Set a positive example by treating others with respect
- Don't make assumptions about jokes
- Think before speaking and consider others' feelings and perceptions
- Never go along with the crowd if behavior is offensive



Preventative and Corrective Actions For Agencies

Establishing Effective Anti-Harassment Policy

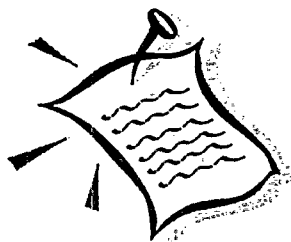
- Policy should be written and well disseminated
- Protect against retaliation
- Explain the conduct that is prohibited
- Create multiple paths to complain about harassment
- Provide for prompt investigations of complaints
- Set time frames in which the agency will act
- Assure that immediate and appropriate corrective action, including discipline, will be taken
- Ensure confidentiality to the extent possible



Preventative and Corrective Actions For Agencies

Investigate Allegations of Harassment

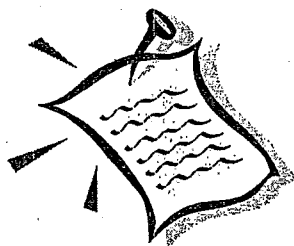
- Ensure prompt, thorough and impartial investigations
- Be objective, don't make assumptions
- Ensure confidentiality to the extent possible
- Make credibility determinations
- Check personnel records
- Take immediate and appropriate corrective actions



Conducting an Investigation

Relevant Information from the Aggrieved/Alleged Victim

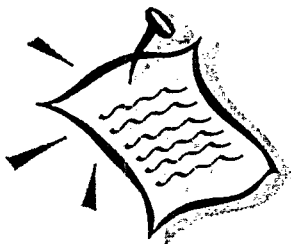
- What happened?
- When did it happen?
- Where did it happen?
- How did the alleged victim respond?
- Were there any witnesses?
- How frequent was the conduct?
- Is there documentation of the incident?
- How would you like to see the matter resolved?



Conducting an Investigation

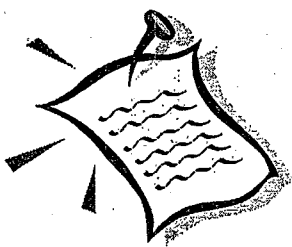
Relevant Information from the Alleged Harasser

- What is the response to the allegation?
- If false - why would complainant lie?
- Other individuals with relevant information?
- Any documentation/other relevant information?



Corrective Action

- If it is determined that harassment occurred, corrective action should be undertaken immediately. Corrective measures should be designed to end the harassment and ensure that it does not recur.
- The severity of disciplinary action should depend on factors such as the severity and frequency of the misconduct, the impact on the complainant, and whether the harasser engaged in similar misconduct before.



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- ✓ Both objective and subjective standards apply: How would a **reasonable person** have reacted in the complainants position? How did the complainant react?
- ◆ The individual's job need not be affected.
- ◆ Severe psychological harm is **not** necessary to establish a violation.
- ◆ Hostile, offensive or intimidating actions which are directed toward an employee's protected status under federal employment discrimination statutes, including race, color, sex, religion, national origin, age or disability constitute hostile environment harassment. Conversely, actions which are based on personality differences, or conflicts unrelated to the protected bases described above, while unfair, do not constitute unlawful harassment.
- **Agency liability:**
 - ◆ **Hostile environment harassment by a management official:**
The agency is liable even if higher management did not know of the management official's harassment, unless it can establish both elements of a two-part affirmative defense.
 - ✓ it exercised reasonable care to prevent and correct promptly any harassment; **and**
 - ✓ the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the agency or to avoid harm otherwise.
 - ◆ Additionally, whenever a high-ranking official engages in hostile environment harassment, the agency is directly liable and does not have recourse to the affirmative defense.

Management's Responsibilities: Preventing Harassment

- ◆ **Hostile environment harassment by co-workers:** The agency is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action.
- ◆ **Hostile environment harassment by non-employees:** The agency is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action within its control.
- ✓ It is assumed that the agency has knowledge of the harassment under the following circumstances:
 - * The victim complains about the harassment
 - * The conduct occurred in the presence of a management official
 - * The conduct is so widespread that the agency reasonably knew or should have known

IX Appropriate Preventative Actions for All Employees

- ◆ Know the agency's policy on workplace harassment.
- ◆ Set a positive example by treating others with respect, and letting them know the same is expected of them.
- ◆ Avoid making assumptions that jokes, friendly gestures or comments are harmless or welcome. They may not be viewed that way by others.
- ◆ Think before making personal comments or asking questions that may be misinterpreted. Consider whether or not they will make the other individual uncomfortable.
- ◆ Never go along with a crowd or accept behavior that is offensive. Make feelings known.

EPA Employment Civil Rights Training

- ◆ Make credibility determinations.
 - ✓ Are the statements believable?
 - ✓ Did the individual seem to be telling the truth, how was his/her demeanor?
 - ✓ Did the individual have a reason to lie?
 - ✓ Is there witness testimony or physical documentation that corroborates the individual's testimony?
 - ✓ Did the alleged harasser have a history of similar behavior in the past?
- ◆ Take immediate and appropriate corrective action.
- ◆ If it is determined that harassment occurred, corrective action should be undertaken immediately. Corrective measures should be designed to end the harassment and ensure that it **does not recur**.
- ◆ The severity of **disciplinary action should depend on** factors such as the severity and frequency of the misconduct, the impact on the complainant, and whether the harasser engaged in similar misconduct before.
- **Other Preventative Measures**
 - ◆ Routinely educate employees about what constitutes unlawful harassment and about the agency's anti-harassment policy and complaint procedures.
 - ◆ Train management officials and employees concerning actions which may constitute harassment and what they should do if they are harassed.
 - ◆ Monitor enforcement of the anti-harassment policy.

Management's Responsibilities: Preventing Harassment

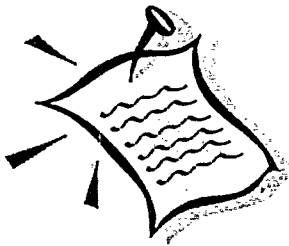


**Notes: Management's Responsibilities:
Preventing Harassment**

Management's Responsibilities: Preventing Retaliation

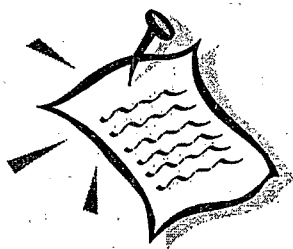
Examples of Participation

- Filing an EEO complaint
- Serving as a witness in an EEO matter
- Representing an individual in an EEO matter
- Requesting a reasonable accommodation



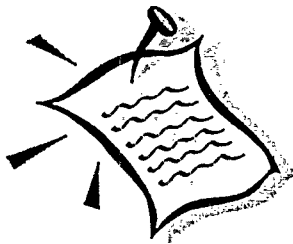
Protected Activity: Participation

- Participation in a failed EEO complaint is nevertheless considered protected activity.
- The practices challenged in prior or pending statutory proceedings need not have been engaged in by the named responsible management official.
- An individual is protected against retaliation for participating in employment discrimination proceedings even if those proceedings involved an entirely different agency.



Scenario #3

Eric had worked for the CIA. While with the CIA, he filed several complaints alleging sex and race discrimination. Frustrated with what he considered to be continuing discriminatory harassment, Eric applies for a job with the EPA. As part of the selection process, the EPA management official calls Eric's CIA supervisor with the CIA and receives a negative reference. The CIA supervisor also tells the EPA management official that Eric filed several complaints over the years. In light of the negative reference, the EPA does not hire Eric. Later, he learns that his CIA supervisor gave him a negative reference.



Is this retaliation?

DESK REFERENCE GUIDE

Management's Responsibilities: Preventing Retaliation

I INTRODUCTION

- Federal management officials serve as role models for subordinate employees and for management officials in the private sector in complying with all of the governing EEO employment laws and regulations. Vigorous compliance with and effective enforcement of the anti-discrimination statutes by management officials sets the foundation for a healthy and open work environment. All of the statutes which the Commission enforces (*i.e.*, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and the Equal Pay Act of 1963), prohibit retaliation by an agency because an employee, a former employee or an applicant for employment engaged in protected activity. If retaliation for such activities was permitted to go unremedied, it would create a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the Commission's administrative process or other employment discrimination proceedings.

II. RETALIATION

- Treatment that is reasonably likely to deter protected EEO activity is unlawful.

III. RETALIATORY ACTIONS

A. General Types of Retaliatory Actions

- The most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. Other types of retaliatory actions include threats, reprimands, negative evaluations, and harassment.

B. Retaliatory Actions can Occur after the Employment Relationship has Ended

- In 1992, the U.S. Supreme Court unanimously held that the law prohibits employers from retaliating against former employees as well as current employees for engaging in protected activity. Examples of post-employment retaliation include actions that are designed to interfere with the individual's prospect for employment, such as unjustified negative job reference, refusing to provide a job reference, and informing a prospective employer about the individual's protected activity.

C. Retaliatory Actions Need not Qualify as "Ultimate Employment Actions" or Materially Effect the Terms or Conditions of Employment to Constitute Retaliation

- Although some courts have held that the retaliation provisions apply only to retaliation that takes the form of a final employment action (*i.e.*, RIF, terminations, suspensions, *etc.* . . .) or that materially affects the terms, conditions, or privileges of employment, the Commission has taken the position that the statutory retaliation provisions prohibit any action that is based on a retaliatory motive and is likely to deter the employee or others from engaging in protected activity. Although petty slights and trivial annoyances are not actionable, the Commission maintains that significant retaliatory treatment can be challenged regardless of the level of harm. In general, retaliation comes in one of two forms: participation or opposition.

IV PROTECTED ACTIVITY: PARTICIPATION

- The anti-retaliation provisions make it unlawful to discriminate against an individual because s/he has filed a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under the governing EEOC statutes or requested a reasonable accommodation. This protection applies to individuals who testify or otherwise participate in such proceedings. In the federal sector, once someone initiates contact with an EEO Counselor, s/he is engaging in

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participation. Participation in a failed EEO complaint is nevertheless considered protected activity.

- The anti-retaliation provisions of the governing EEOC laws and regulations prohibit retaliation against someone so closely related to or associated with the individual exercising his or her statutory rights that it would discourage or prevent the individual from pursuing those rights. For example, it would be unlawful for an agency to retaliate against an employee because his/her spouse, who is also an employee filed an EEO complaint. Both spouses in such circumstances, could bring retaliation claims.
- An individual is protected against retaliation for participating in employment discrimination proceedings even if those proceedings involved an entirely different agency. For example, a finding of retaliation would be found if a management official refused to hire the complainant because s/he was aware that the complainant filed a complaint against a former agency.
- The practices challenged in prior or pending statutory proceedings need not have been engaged in by the named responsible management official.

V. PROTECTED ACTIVITY: OPPOSITION

- The anti-retaliation provisions make it unlawful to discriminate against an individual because s/he opposed any practice made unlawful under the employment discrimination statutes.
- Examples of Opposition include:
 - ◆ Complaining to any management official about alleged discrimination against oneself or others;
 - ◆ Picketing;
 - ◆ Signing a petition to be presented to the administration about a perceived discriminatory practice at the agency; or

- ◆ Requesting reasonable accommodation for a disability or religious accommodation.

VI. STANDARDS GOVERNING APPLICATION OF THE OPPOSITION CLAUSE

A. Manner of Opposition Must be Reasonable

- The manner in which an individual protests perceived employment discrimination must be reasonable in order for the anti-retaliation provisions to apply. In applying a reasonableness standard, the Commission balances the right of individuals to oppose employment discrimination and the public's interest in enforcement of the EEO laws against an agency's need for a stable and productive work environment.

B. Opposition Need Only be Based on Reasonable and Good Faith Belief

- An individual is protected against retaliation for opposing perceived discrimination if s/he had a reasonable and good faith belief that the opposed practices were unlawful. It is well settled that a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful.

VII. ELEMENTS OF RETALIATION CLAIM

- There are three elements to any retaliation claim:

1. Protected activity (*i.e.*, participation in the statutory complaint process or opposition to discrimination); and
2. Employment action; and
3. Causal connection between the protected activity and the employment action.

VIII. CAUSAL CONNECTION

- In order to establish unlawful retaliation, there must be proof that the agency took an employment action because the employee engaged in protected activity. Proof of retaliatory motive can be by direct or circumstantial evidence.

A. Direct Evidence

- Direct evidence of a retaliatory motive is any written or verbal statement by a management official that s/he undertook the challenged action because the employee engaged in protected activity. Direct evidence of retaliation is rare.

B. Circumstantial Evidence

- The most common method of proving retaliation is through circumstantial evidence. Retaliation is found whenever the complainant raises an inference of retaliation and the agency fails to produce a legitimate non-discriminatory reason for the challenged action, or if the reason given by the agency for the challenged action is shown to be pretext to hide retaliatory motive.
- A circumstantial inference of retaliation arises whenever there is proof, other than direct evidence, that a protected activity and an employment action are related. Typically, the link between protected activity and an employment action is established if the action followed shortly after the protected activity, and the individual that undertook the action was aware of the complainant's protected activity before taking the action. An inference of retaliation may arise even if the time period between the protected activity and the employment action was long ago, if there is other evidence of bias (*e.g.*, the management official routinely spoke of complainant's EEO activity that took place two years before).

Additional Resources

Laws Enforced by EEOC - <http://www.eeoc.gov/laws.html>

Guidelines on Religious Exercise and Religious Expression in the Federal Workplace
<http://onr.navy.mil/onr/Guidelines.htm>

or

<http://clinton4.nara.gov/WH/News.html/19970819-3275.html>

Addressing Sexual Orientation Discrimination in Federal Civilian Employment -
<http://www.opm.gov/er/address2/guide01.htm>

Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation
Discrimination - http://www.eeoc.gov/facts/fs-orientation_parent_marital_political.html

Prohibited Personnel Practices - <http://www.osc.gov/ppp.htm>

Executive Order 11478 - <http://www.eeoc.gov/federal/eo11478/eo11478.html>

Executive Order 13087 - <http://www.eeoc.gov/federal/eo11478/eo13087.html>

29 Code of Federal Regulations Part 1614 - <http://www.eeoc.gov/federal/1614-final.html>

Management Directive 110 - <http://www.eeoc.gov/federal/md110.html>

Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate
the Provision of Reasonable Accommodation -
<http://www.eeoc.gov/policy/guidance.html>

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations
of Employees Under the American with Disabilities Act -
<http://www.eeoc.gov/policy/guidance.html>

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under
the Americans with Disabilities Act - <http://www.eeoc.gov/policy/guidance.html>

EPA Employment Civil Rights Training

Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors
<http://www.eeoc.gov/policy/guidance.html>

Compliance Manual - Section 8: Retaliation - <http://www.eeoc.gov/docs/retal.html>