Fighting Discrimination in the Federal Government

A Guide for AFGE Representatives

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

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Revised October 2000

What, Where, How, & When?

Overview Chart of Federal Employee Hearing Rights

What	Where	How	When
Lost Opportunity due to: ♦ **Race** ♦ **Color** ♦ **Sex, includes** * **sexual harassment** * **pregnancy discrimin.** ♦ **National Origin** ♦ **Religion** ♦ **Age** ♦ **Disability** ♦ **EEO Reprisal**	EEOC	EEO Charge	45 days From date of lost opportunity until first meeting with Agency's EEO counselor
Contract violation: ♦ **EEO violation** ♦ **any other CBA violation**	Arbitration	Negotiated Grievance Duty of Fair Representation	See Union's Collective Bargaining Agreement
Adverse Action including ♦ **Removals** ♦ **Suspension of more than 14 days** ♦ **Reduction in grade or pay** ♦ **Furlough without pay of less than or equal to 30 days**	MSPB	MSPB Appeal	30 days
Whistleblowing	MSPB	Individual Right of Action pursuant to statute	65 days from Office of Special Counsel (OSC) investigation closure or 120 days after notice of OSC

Where Should I Go?

	EEOC	MSPB	Arbitration
1) Supervisor schedules a mandatory staff meeting on the Hindu holiday of Dwali. An Indian employee tells the supervisor that he cannot attend because he is Hindu and therefore obligated to celebrate Dwali. The supervisor excuses the employee after stating, "Dwali, that doesn't sound like a real holiday." This is the only staff meeting that the employee misses that year. On the employee's next evaluation, the supervisor criticizes the employee's "poor attendance" at staff meetings.			
(2) Supervisor fires a male employee for passing a note while at work to a female employee that says, among other things, "without your pig tail you will never go to heaven you sh— sucking bi—-." Where is the correct forum for the male employee to review the termination of his employment? Based on Carter v. Chrysler Corp. (1999).			
(3) A supervisor at a federal agency refuses to promote any individual who has his or her tongue or eye-brow(s) pierced. Where is the correct forum for a tongue-pierced individual to grieve if he or she is the best qualified individual to receive the promotion and yet does not receive the promotion?			
(4) Two employees, one White and one Black, have been absent from work without approved leave on three occasions in the last month. As a result, the White employee is suspended without pay for 14 days. The Black employee is suspended without pay for 15 days. Where is the correct forum for the Black employee to have the suspension reviewed?			

Remember

While you might have more than one option to select, you only get to SELECT ONE!

You get the process to which you complain first IN WRITING!

You have to stick with the ONE you choose!

I. EEO LAWS APPLICABLE TO FEDERAL EMPLOYEES

EEO laws are a Federally mandated employment practice requiring employment decisions to be based on relevant job factors such as, but not limited to, training, merit and experience and not based on a person's race, religion, national origin, color, sex, disability, and/or age.

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

For the most part, these civil rights statutes merely state what is prohibited conduct and do not include procedures for the processing of allegations of discrimination. Unions may elect to grieve equal employment discrimination matters under their AFGE collective bargaining agreement. Alternatively, the U.S. Merit Systems Protection Board will review allegations of discrimination in an appeal of an adverse action (removals or suspensions of more than 14 days). However, the vast majority of EEO discrimination claims are processed in the "agency complaint processing system" known as Part 1614, see Appendix 1. Part 1614 is further explained by the EEOC in Management Directive-110 (MD-110). MD-110 can be found on EEOC's web cite, www.eeoc.gov.

STATUTES

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

As originally passed by Congress in 1964, Title VII did not apply to federal employment. It was not until March 24, 1972, the effective date of the 1972 amendments, that employment discrimination in the federal workplace became prohibited by statute.

Title VII prohibits discrimination on the basis of race, color, religion, national origin, and sex in federal employment practices. Additionally, employers are required to reasonably accommodate for religious obligations. The law also prohibits reprisal or retaliation for civil rights activities.

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

The ADEA was enacted in 1963 and became effective for federal employment practices in April 1974. It prohibits discrimination on the basis of age against persons who are 40 years of age or older.

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

The Rehabilitation Act requires that each federal agency develop an affirmative action plan "for the hiring, placement and advancement of handicapped individuals." The Rehabilitation Act not only prohibits discrimination against "qualified handicapped individuals," it also requires that federal agencies grant reasonable accommodation where appropriate. Following the enactment of the Americans with Disabilities Act in 1990, the term "disability" is substituted for the term "handicap."

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

The EPA was applied to the federal sector workforce by the Fair Labor Standards Act amendments of 1974. The EPA prohibits the paying of males and females different wages for "equal work" when the performance of such work requires equal skill, effort, and responsibility and the work is performed under equal working conditions. It applies only to differing pay as between workers of different sexes.

E. The Pregnancy Discrimination Act of 1978

The Pregnancy Discrimination Act requires an agency to treat pregnant women the same as a non-pregnant employee. It changes the definition of "sex" in the Civil Rights Act of 1964 to include pregnancy. Neither the Pregnancy Discrimination Act nor the Rehabilitation Act require an agency to give preferential treatment or accommodations to pregnant women on the basis of their pregnancy.

EXECUTIVE ORDERS

A. Sexual Orientation, E.O 13087

Sexual orientation is currently not protected by Title VII of the 1964 Civil Right Act or any act that amends Title VII. However, on May 28, 1998, President Clinton ordered that Executive Order No. 11478 be amended to prohibit discrimination in the Federal Government on the basis of sexual orientation to the extent permitted by law. As a result, discrimination on the basis of sexual orientation is illegal but there is no EEO process by which to enforce one's right. Enforcement of one's right to be free of sexual orientation discrimination is available through your union contract.

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

B. Genetics, E.O. 13145

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

C. Parental Status, E.O. 13152

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

not even inquire whether the employee is willing to stay late if given the promotion. It is the assumption that is discriminatory.

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

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

On July 26, 2000, President Clinton ordered that agencies establish effective written procedures to facilitate the provision of reasonable accommodation for people with disabilities. Specifically, the procedures are required to describe how to initiate an accommodation request, the agency process for determining an accommodation request, and set forth processing time limits. The written procedures are due for EEOC review no later than July 26, 2001.

W H A T I S D I S C R I M I N A T I O N ? ?

II. FORMS OF DISCRIMINATION

Discrimination is the act of perceiving an individual as a categorization instead of as an individual and often found as part of prejudice and bigotry. Illegal discrimination is discrimination on the basis of one of the protected bases listed in the EEO laws applicable to federal employees. The law has recognized three forms of discrimination, (1) disparate treatment, (2) disparate impact, and (3) harassment. The law also imposes certain responsibilities such as the obligation to reasonably accommodate a disability and a religious obligation.

A. Disparate Treatment

Disparate treatment cases are the most common types of EEO problems. Disparate means different or unequal. Disparate treatment occurs when a supervisor or coworker treats an individual of a protected status differently than he or she would treat an individual from an alternate protected status on the basis of that status.

Disparate treatment cases are sometimes called "intentional discrimination," that is, the employer intended to discriminate against you because of your race (or sex, or age, etc.). One example of disparate treatment is an employer who will not select the black applicant (or the female applicant) because the employer didn't want a black (or female) employee in that job. Another example of disparate treatment is when an employer treats one employee differently than another employee due to the difference in race, national origin, age, etc.

B. Disparate Impact

The disparate impact analysis challenges a facially neutral rule or policy that has an adverse impact against an EEO status and is not job related. The classic impact cases were high school diploma or so-called general intelligence written tests requirements which tended to screen out a disproportionate number of black applicants, and the minimum height requirement which tended to screen out a high proportion of female and Asian applicants. Disparate impact cases include both objective employment practices and subjective employment practices such as interviews or performance appraisals.

C. Harassment

Harassment is unwelcome conduct (including speech) that is sexual in nature or references one's protected status in an annoying, offensive, or irritating manner. Harassment is often repetitive or persistent.

D. Failure to Reasonably Accommodate Failure to reasonably accommodate a qualified individual with a disability or religious obligation after the individual requests such an accommodation is a form of discrimination.

III. DISCRIMINATION COMPLAINT PROCESS UNDER PART 1614

A. Historical Development of Part 1614

On October 1, 1992, the EEOC implemented a discrimination complaint process known as Part 1614 (29 C.F.R. Part 1614), replacing Part 1613 that had existed for the prior 20 years.

Part 1614 is the agency complaint processing system created by the Equal Employment Opportunity Commission (EEOC) that eventually leads to a hearing and decision before an administrative judge working for the EEOC. Even though Part 1614 is controlled by your agency (which investigates itself, reviews decisions, appoints counselors, etc.), and is sometimes frustrating and slow, many federal employees know that this is the proper place for their EEO complaint. AFGE union representatives successfully litigate employment discrimination complaints under this agency system everyday, including sexual harassment cases with substantial compensatory damages, disability rights cases seeking reasonable accommodation, race, color, religion, national origin, sex, and age discrimination cases. Understanding the process is the key to working this enforcement system of your civil rights.

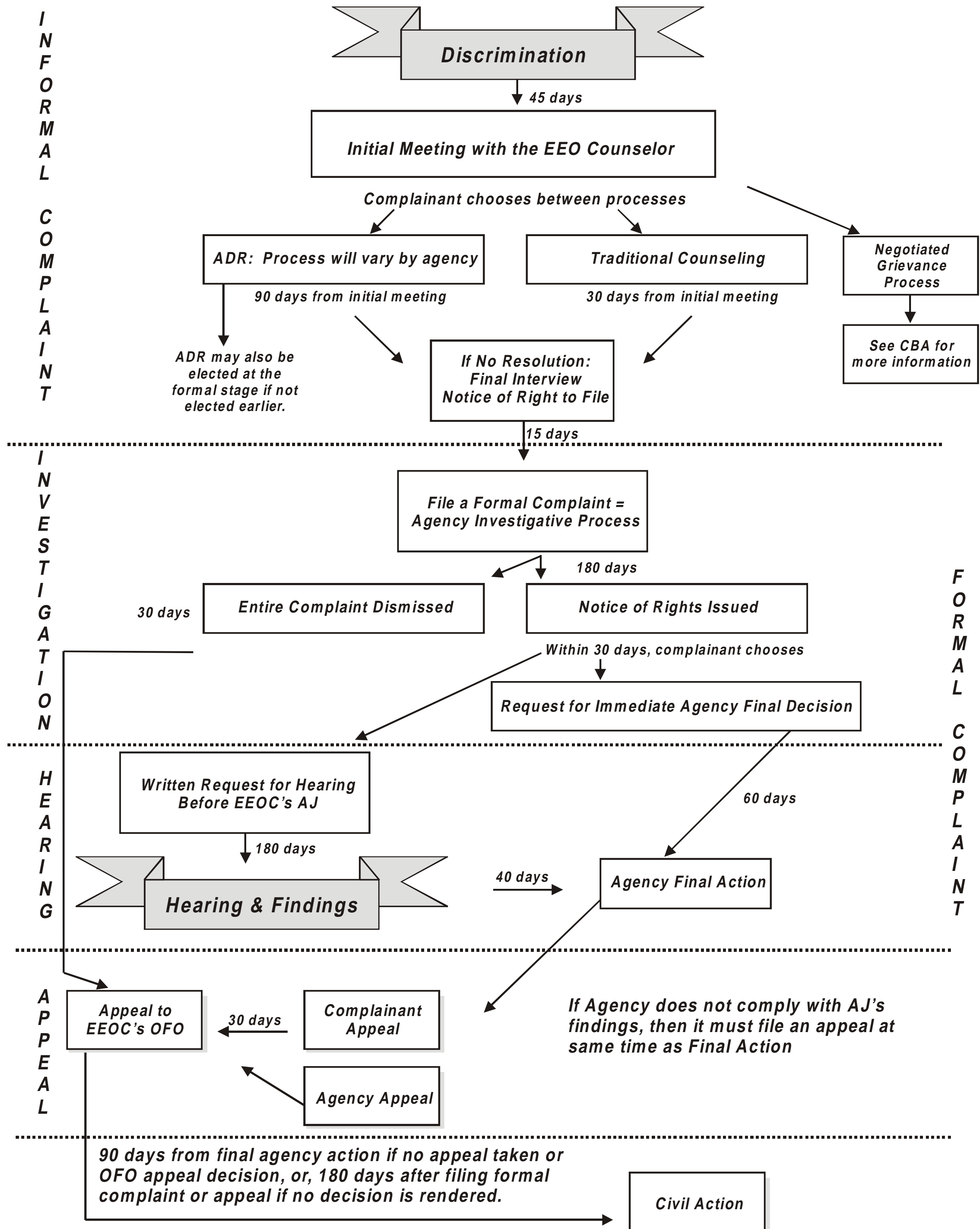
Part 1614, like its predecessor, is a framework for the agency complaint processing system, and was not designed to be a perfectly fair, impartial, adversarial system. Part 1614 can be divided into four stages, namely, (1) the pre-complaint process, (2) the agency investigation, (3) the EEOC hearing, and (4) the appeal. Filing a civil action in federal district court is not part of the administrative process, but may follow directly after one has "exhausted," i.e. gone through, the administrative process.

The EEOC revised Part 1614 effective Nov. 9, 1999 to close many of the loopholes that had permitted agency abuses and caused employee frustration. The newly reformed Part 1614 differs from the old one in multiple ways, most importantly:

- eliminating the opportunity for agencies to rewrite EEOC findings and decisions with which they disagree;
- requiring agencies to have available an ADR process for EEO complaint resolution (remember that ADR programs are negotiable!);
- prohibiting agencies to dismiss complaints for failure to accept a certified offer of full relief;
- prohibiting the hearing AJ's to remand issues to agencies for counseling or investigation;
- requiring agencies to consolidate complaints filed by the same person;
- eliminating appeals of partial dismissals until the final decision's appeal;
- adopting new time frames;
- permitting appeals from EEOC decisions by either party, but providing interim relief pending appeals to OFO; and
- permitting amendments to complaints, even class action allegations, at any reasonable time.

These newly reformed regulations are included in this workbook at Appendix 1.

B. The Overview Chart



C. The Stages of the Complaint Process

1. The Initial Meeting with the Agency's "EEO Counselor"

A federal employee who believes that he or she has been discriminated against by an agency on a basis prohibited by Title VII, the ADEA, or the Rehabilitation Act must consult with an "EEO counselor" of the agency involved and seek to resolve informally the disputes. **The initial contact with the counselor must take place within 45 calendar days of the date of the alleged discrimination, the effective date of the personnel action involved, or the date the aggrieved person knew or reasonably should have known of the discrimination event or personnel action.** Under Part 1614, you must visit the agency's EEO counselor to begin your EEO case on the road to a hearing before a judge from EEOC. That's why you are there; not because you have voluntarily entrusted your EEO complaint to the "counselor's" office. Experienced union representatives regard this EEO counselor in the agency complaint process as the first step grievance stage of the process.

THE AGGRIEVED PERSON'S RIGHTS

There are several important things to know about the initial consultation with the EEO Counselor. *First*, the aggrieved person has the right to remain anonymous during the counseling phase, unless he or she consents in writing otherwise. *Second*, the aggrieved person needs to be specific and very complete about the discriminatory events during the consultation with the EEO Counselor. Failure to include a given discriminatory event at this point may prevent the employee from raising the issue in the formal complaint and obtaining a hearing on the issue. *Third*, keep in mind that the EEO counselor is appointed to this position by the agency. He or she is not the EEO representative for the employee, no more than the agency labor-relations officer is the representative (or the solution) for a union grievance. *Finally*, keep in mind that the aggrieved may bring a representative, including his or her union representative, to be there with him or her at this first step of the agency complaint processing system.

THE EEO COUNSELOR'S RESPONSIBILITIES

The counselor, at the earliest opportunity, shall advise the aggrieved person in writing of his or her rights and responsibilities involving the EEO process. The EEO Counselor is no longer required to explain these rights and responsibilities to an aggrieved person. The rights and responsibilities literature should include, among other statements, information about your right to choose between participation in the negotiated grievance process, the traditional agency EEO process, or the agency ADR process if available for the particular case.

Did You Write Down
The Date You 1st tried to Meet the EEO Counselor, & The Date You Actually Met with the EEO Counselor ?!?

2. The Informal Complaint Stage

By this point, the aggrieved person has chosen whether to participate in the (1) the negotiated grievance process, (2) the traditional agency EEO process, or (3) the ADR process if one exists for that particular case. If the individual chooses the negotiated grievance process or ADR process, the individual does not participate in the traditional pre-complaint process. One may choose ADR at any time, but once chosen, the traditional agency process will halt and change.

THE PRECOMPLAINT TRADITIONAL AGENCY EEO PROCESS

The counselor has 30 days to complete his or her obligations, unless the aggrieved person agrees in writing to extend this period for no more than an additional 60 days. Among the duties of the counselor to be completed in this period are:

- advise the availability of alternate remedies (union grievance, for instance)
- determine issues of the complaint
- conduct a limited inquiry
- seek a resolution
- advise right to file formal complaint
- prepare a report documenting counseling efforts

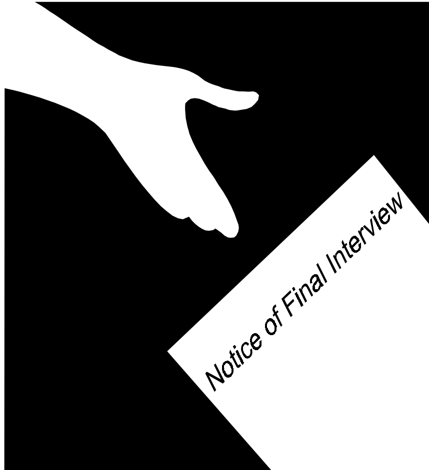
THE PRECOMPLAINT ADR PROCESS

Agencies are now required to have available an ADR program during the pre-complaint *and* formal complaint process. However, agencies are permitted to make a case-by-case decision whether the ADR process is appropriate in particular cases. Union representatives should bargain for agency standards that specify when a case is appropriate for the ADR process.

If the aggrieved person chooses to participate in ADR, the pre-complaint period is extended to 90 days. Local unions can bargain over acceptable forms of ADR, including mediation panels, expedited arbitration, etc. Since each EEO complaint processing costs federal agencies approximately $30,000, agencies should be willing to fully fund any expedited arbitration dispute resolution procedure.

Agencies "should have" an official at the ADR session with full authority to resolve the dispute. If another agency official is necessary for the discussion, the agency is responsible for making sure that official is reachable.

3. If there is NO RESOLUTION from the Informal Complaint Stage



If the counselor is unable to resolve the dispute within 30 days from the date the aggrieved person has contacted the counselor, or, if the ADR process does not resolve the issues within 90 days, then the aggrieved will meet with an agency EEO counselor for a "final interview" within the time periods allotted for resolution. **Demand your right to meet in a timely manner.** In other words, the final interview must take place on or before the 30th day that a counselor has to resolve the dispute, if the aggrieved is participating in the traditional pre-complaint process. Similarly, the final interview must take place on or before the 90th day that the ADR has to resolve the dispute, if the aggrieved is participating in the ADR pre-complaint process.

At the final interview, the counselor is required to notify the individual of the right to file a formal complaint with the agency and the persons with whom the aggrieved person may file that complaint. This notice is commonly referred to as "notice of final interview" because it should be issued at the final interview. The counselor should also inform the aggrieved person of the right to request a hearing after the six month investigative stage which follows the filing of the formal complaint and the right to thereafter receive a decision from an EEOC Administrative Judge with the next six months. The counselor is required to prepare a report. The report's content will vary based on which process was used by the aggrieved employee.

4. Filing a Formal Complaint

The aggrieved person may **within 15 days** after receiving notice of final interview file a formal complaint of discrimination. **Don't forget to keep a copy of what you file!** Although the EEO counselor should specify in the notice the persons with whom the aggrieved person may file the formal complaint, typically the complaint should go to the Agency Director of Equal Employment Opportunity, the Agency Head, the Field Installation Head, or other official designated by the Agency. The aggrieved person should, of course, file the complaint with the person or persons designated in the EEO Counselor's notice of final interview. It is also best to provide a copy of the formal complaint to the EEO Officer to ensure prompt processing. The complaint must be (1) in writing, (2) specific regarding the EEO matters alleged, and (3) signed by the complainant.

The complainant must be notified of the right to appeal any dismissal of the complaint, and the obligation of the agency to complete the investigation within 180 days unless the parties agree in writing to an extension.

5. Dismissal of Individual Complaints

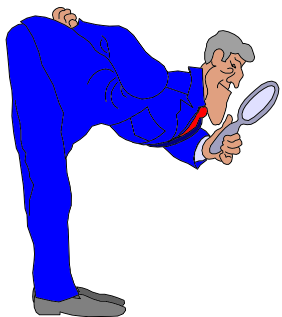
The agency (or an AJ at the hearing stage) may reject or cancel allegations in a complaint for a variety of reasons. An allegation may be rejected if:

- the complaint was not filed timely; or
- the allegation sets forth identical matters pending before or previously decided by the agency; or
- the allegation fails to state a claim under Title VII, the ADEA, or the Rehabilitation Act; or
- the complaint is pending in court; or
- an agency is merely proposing to take action that may be discriminatory; or
- the complainant elects to pursue the matter under a negotiated grievance procedure; or
- the complainant fails to respond within 15 days to a written request to provide relevant information and is told will follow; or
- the complaint is a "spin off complaint," i.e., a separate complaint alleging dissatisfaction with the processing of a previously filed complaint; or
- the complaint is part of a clear pattern of abuse of the EEO process.

The agency can no longer dismiss a complaint for refusal, by the aggrieved person, to accept a certified offer of full relief from the agency. But wait, there is a catch. See "offer of resolution" below at page 21.

In the past, dismissal by the agency of a portion of complaint was immediately appeal-able. This is no longer true. Instead, the aggrieved may (1) file -- at the end of the 180 day investigative period – for a hearing before an AJ regarding the entire complaint including a review of the partial dismissal, or (2) appeal after final action is taken on the entire complaint.

When the agency dismisses the entire complaint, this should be considered the agency's final decision. The final decision shall also include notice of the right to appeal to the EEOC's Office of Federal Operations within 30 days from receipt of the dismissal.



Don't let the agency stall!
It has 180 days to
complete the investigation

6. Investigation of Allegations

Allegations that are accepted by the agency must be investigated by the agency. The investigator has the authority to administer oaths and to require statements from witnesses. Agencies may use an exchange of letters or memos, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matter at issue. It is very important that the complainant respond promptly to agency requests for information (which also contain a warning that failure may result in dismissal of the complaint) could very well result in the agency's dismissal of the complaint.

Within 180 days of the filing of a non-amended complaint (or if the complaint was amended within the earlier of 180 days after the last amendment or 360 days after the filing of the original complaint) the agency is to provide the complainant a copy of the investigative file. At the same time, the agency is to provide the complainant notice of his or her right to request a hearing before an AJ (see below section #7) or receive an immediate final decision from the agency (see below section #8b). The parties may agree to extend this 180 day time limit for not more than 90 days. ***AFGE strongly recommends that the complainant choose a hearing instead of the immediate final decision from the agency.***

7. The Hearing Stage

When a request is filed in a timely manner, the AJ will then hold a closed hearing and issue findings of fact and conclusions of law on the complaint within 180 days of the request for a hearing, unless good cause is found to extend this time period. Note that due to a backlog of cases, some AJ's fail to make the 180 day deadline. The AJ can no longer remand issues to agencies for counseling or other processing. The AJ may dismiss a complaint for the same reasons that the agency is entitled, even if the agency did not do so.

a. Requesting a Hearing

If the complainant wishes to request a hearing before an EEOC AJ, he or she **must send the written request directly** to the EEOC. The complainant should also send a courtesy copy to the agency's EEO office. The request for a hearing must be in writing. If the complainant does send their request to the agency, then the agency must notify the local EEOC field office.

The request must be submitted within 30 days after a receipt of a copy of the investigative file from the agency. However, if 180 days have expired since the complainant filed a formal complaint, and, the agency has neither completed its investigation nor provided a notice of right to request a hearing and a copy of the investigative file, then the complainant may request a hearing before an AJ.

b. Discovery Rights

Discovery is a process by which each party may learn more about the other side in preparation for hearing. Discovery is intended to add to the record already in existence. Although the discovery process is entirely under the control of the AJ, discovery requests are made directly to the agency.

(1) Forms of Discovery

There are multiple forms of discovery, including (a) interrogatories, (b) requests for documents, (c) depositions, (d) stipulations, and (e) admissions. Samples of written types of discovery are found in Appendix 2 of this workbook. Use these samples to spark ideas for your own discovery!

Interrogatories are written questions that the other side responds to in writing. Absent specific authorization from the AJ, neither party may serve more than 1 set of interrogatories and ask more than 30 questions (no subparts allowed).

Parties may ask for up to 30 documents in the control of the other party through a written request for documents. Remember, you do not need to ask for documents already contained in the report of investigation! Make sure to be specific in identifying the document or type of document requested. Parties can request up to 30 admissions of facts. A stipulation is an agreement between parties regarding facts. There is no limit as to how many facts to which parties may stipulate, and they are strongly encouraged.

Depositions are similar to hearings without the AJ present. The purpose of the deposition is to ask questions that may *lead* to relevant information. At the deposition, both parties are present, a witness is questioned, and the deposition is recorded or transcribed. Generally, the party requesting the deposition pays for the deposition. Employees will get official time for any deposition in which they are involved.

(2) The Acknowledgment Order & Time Limits

Soon after the request for hearing is made, parties will receive an Acknowledgment Order from the AJ notifying the parties of their right of discovery. Currently, there is no standard Acknowledgment Order, or requirement that the AJ place the right of discovery notice in an Acknowledgment Order. Therefore, the orders and notice of rights to discovery vary from one judge to the next. Most acknowledgment orders will set forth strict time deadlines regarding requests for discovery, responding to discovery, and motions to compel. Make sure to follow the time table set forth in the order or submit a motion to continue the deadline before the deadline expires! If no deadlines exist in the Acknowledgment Order, check chapter 7 of MD-110 for discovery procedures. Remember, unless stated otherwise, “days” means calendar days.

(3) Responding To Discovery

The form of response is dependant on the form of discovery. For a stipulation, you may either agree or disagree to stipulate. In a request for admission, you must respond in writing with either an “admit” or “deny.” Some AJs will assume that silence is an admission. For interrogatories, document requests, and depositions, a response can either be:

- compliance with the request in a format documenting the compliance;
- non-compliance coupled with an objection stating that the request is irrelevant, over burdensome, repetitious, or privileged;
- non-compliance coupled with a reminder that a written agreement or stipulation of the parties that prevents the need for the response (for example, if the parties stipulate to a given fact that prevents the need for production of documents as to that fact); or
- a request for an extension of time to comply or to produce a written agreement not to exceed 15 calendar days.

The form of the objection will differ between written discovery and depositions in that an objection will be written in written discovery and oral at the deposition.

If the agency fails to respond to complainant’s discovery within the time requirement (usually 15 calendar days of receipt of the request), typically, complainant may file a motion to compel discovery. However, complainant should check the Acknowledgment Order or chapter 7 of MD-110 if the order is silent to determine if a motion to compel is the appropriate next step. This motion must be filed with the EEOC AJ and it must contain a certification that a copy was served on the opposing party. The opposing party must respond with their opposition and must also certify that a copy of the response was mailed to the party who

first filed the motion. Note that if complainant fails to respond to the agency's discovery, the agency must go through the same steps.

The AJ's decision on the motion may result in (1) an order requiring the party to produce the discovery compelled within a certain number of days, (2) an order that documents, witnesses or other evidence at issue be produced at the hearing, or (3) a denial of the motion. If the AJ orders a party to produce discovery and the party fails to respond fully, the AJ may draw adverse inferences, exclude other evidence, issue a decision against the interest of the party, or take other appropriate action as a sanction.

c. Summary Judgment

In addition, the AJ may determine individually, or upon request of a party, that some or all facts are not in dispute, and issue a summary decision on the matters after giving the parties an opportunity to respond in writing. A summary decision may serve to limit the information or issues discussed at the hearing or eliminate the hearing entirely.

d. No Subpoena Power

Agency's are required to produce at the hearing all approved witnesses currently employed by the Agency. The EEOC AJ does not have any subpoena power over individuals not employed — even if they once were — by the Agency.

8. Final Agency Action

a. Following a decision by the AJ

The agency now has 40 days from the receipt of the administrative judge's decision to take final action on the complaint by issuing a "final order." The final order will notify the aggrieved person (1) whether or not the agency will fully implement the decision by the administrative judge, and (2) notice of the complainant's right to appeal to EEOC. If the agency decides not to (fully) comply with the administrative judge's decision, then the agency must file an appeal of the decision with the EEOC on the same day it issues the final order. **This is an important change!** Under the newly reformed Part 1614, the agency cannot simply reject or modify the decision of the Administrative Judge. Instead, if the agency looses, it must appeal and provide **interim relief pending appeal**. The interim relief provisions are very similar to the MSPB provisions. In a case that involves removal, separation or suspension continuing beyond the date of the order, if the AJ orders restoration to one's prior duty status, then the agency must restore the employee pending the result of the appeal. There is an exception: if the agency determines that the return or presence of the complainant will be "unduly disruptive," then the agency does not have to return the complainant but does have to pay salary and benefits as if the person were restored. Any statement or brief filed by the agency in support of the appeal must be submitted within 30 days of the notice of filing an appeal.

b. In all other circumstances

In all other circumstances the agency shall take final action by issuing a final decision.

- When complainant requests an immediate final decision, then the agency shall take final action within 60 days from the date the complainant requested an immediate agency decision.
- When complainant does not reply to notice of right to a hearing or immediate final decision, then the agency shall take final action within 60 days from the end of the 30-day period during which the complainant had the right to reply.

The final decision shall include notice of the right to appeal to the Commission or to file a civil action, the name of the proper defendant and the applicable time limits for appeals and lawsuits.

9. Appeals to the Commission

a. Requesting an Appeal

Within 30 days of the dismissal of a complaint or the receipt of the Agency's final action, a complainant may file an appeal (EEOC Form 573 and an affidavit of service) to the Director, Office of Federal Operations, EEOC, at P.O. Box 19848, Washington, DC 20036. The complainant should also send a courtesy copy to the opposing party. Any statement or brief submitted by the complainant in support of the appeal must be submitted within 30 days of the notice of filing an appeal. The agency has 30 days to oppose an appeal.

b. Standard of Review

The standard of review should be a guide when considering one's chances of winning on appeal. As a general rule, no new evidence will be considered on appeal unless there is a showing that the evidence was not readily available before the decision being appealed.

An appeal from an agency's final action when there was no hearing by an AJ shall be reviewed *de novo*. "*De novo*" means that the OFO will evaluate the evidence as if they are the judge. See 29 C.F.R. 1614.405(a).

An appeal from a summary judgment decision or a decision without a hearing by an AJ will be reviewed *de novo*. An appeal from a decision after a hearing by an EEOC AJ, has two standards of review. For findings of facts based on testimonial or documentary evidence, the OFO will uphold the AJ if the finding is supported by "substantial evidence" in the record. See 29 C.F.R. 1614.405(a). A finding that discriminatory intent did not exist is a finding of fact. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). For conclusions of law by an AJ, the OFO will evaluate *de novo*. This is true regardless of whether there was or was not a hearing before the AJ made the legal conclusions.

c. Decisions By the Office of Federal Operations

The OFO has been very slow in deciding appeals. On average of late, the OFO has taken 3-5 years to render a decision. Once the OFO does issue a decision, it shall be binding unless either party requests reconsideration within 30 days of receipt of OFO's decision.

10. Request for Reconsideration

Unlike an appeal, the OFO does not have to reconsider their decision. However, if a party asks for reconsideration within 30 days from its receipt of the OFO decision, it must show that:

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

If the agency is the party requesting the reconsideration, complainant should file an opposition explaining why the agency did not meet either of the above requirements for the OFO to grant reconsideration.

11. Right To Civil Action

The complainant may file a civil action of employment discrimination in the local U.S. District Court within 90 days of a final agency decision, or of the final decision of the EEOC. Alternatively, a complainant may file the civil action at anytime once the complaint is over 180 days old, if no final decision has been received.

D. Representation

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

E. Dissatisfaction with the Complaint Process

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

When a complainant feels as though the processing of his or her complaint has been handled in an outrageous or shocking manner, the complainant may complain about the manner of process. In the past, these complaints were handled as separate complaints, or “spin-off complaints.” The reformed part 1614 still allows for the filing of such a complaint, but the spin-off complaint is not evaluated in a separate process from the underlying discrimination complaint.

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

F. Offer of Resolution

An agency is entitled to make an offer of full relief until 30 days before the hearing in front of the AJ. If the aggrieved does not accept the offer, and upon completion of the case is not awarded a more "favorable" outcome than the initial offer, then the aggrieved is limited in the amount of attorney's fees and costs he or she may collect.

IV. EEO DISCRIMINATION STANDARDS OF PROOF

It is unlawful for the federal government to discriminate against an employee on the basis of race, color, religion, sex, national origin, age, or disability. These seven protected characteristics constitute the different types of EEO (or equal employment opportunity) cases that may be brought against a federal agency. An employee who believes he or she suffers from a loss of any employment opportunities because of unlawful EEO discrimination or because of retaliation for bringing an EEO case may raise the problem and proceed to a hearing either **before EEOC** (if the EEO counselor is contacted within 45 days of the event) **or MSPB** (if there is a "mixed case" timely filed) **or arbitration** (if the grievance is timely under the terms of your collective bargaining agreement).

In order to win an EEO case, the employee must prove that the lost opportunity was due to unlawful discrimination. One proves a case by providing evidence. There are two types of evidence: ***direct, and indirect*** (also called circumstantial).

Direct evidence is the most powerful evidence and is often analogized to a smoking gun. Such evidence of unlawful discrimination would include statements of hostility toward a protected status (race, color, sex, etc.), such as "I didn't think a woman (or a person with a disability) could do that job," or a slur. If you have credible direct evidence, you may win your case on that alone. Absent direct evidence, however, you may win your case by indirect or circumstantial evidence by proving disparate treatment or disparate impact.

A. Disparate Treatment Cases

Disparate treatment cases are cases in which a supervisor or employee treats a member of one protected status differently than a member of a different status due to the protected status.

Disparate treatment discrimination can be proved either by direct or indirect (circumstantial) evidence. Few cases today are proved by direct evidence of discrimination, with the exception of sexual harassment and disability cases, because few will admit to such behavior. Therefore, most cases of disparate treatment are proved by indirect or circumstantial evidence.

The initial model for analyzing indirect evidence in a disparate treatment came from the Supreme Court case of McDonnell Douglas v. Green, 411 U.S. 792 (1973). It has since been modified. However, for approximately twenty years, McDonnell Douglas v. Green organized the evidence as follows: (1) complainant establishes a prima facie case; (2) employer rebuts; and (3) complainant demonstrating that the reason given in rebuttal was merely pretext. Under McDonnell Douglas the complainant retained through the trial the burden of persuading the judge or arbitrator that the agency engaged in intentional discrimination. Once the complainant established a case, the agency then had the burden of going forward with the presentation of a nondiscriminatory reason. It was then left to the judge to decide the "ultimate factual issue"- whether the agency intentionally discriminated against the complainant.

On June 25, 1993, in St. Mary's Honor Center v. Hicks, 509 U.S. 502, the Supreme Court altered the requirements for establishing a disparate treatment case. Unfortunately, the alteration may make it substantially more difficult for complainants to establish disparate treatment cases. As with most Supreme Court shifts in analysis, the precise definition of this alteration will develop over years of lower court interpretation. However, it appears that the complainant must still prove a *prima facie* case and the

employer must then produce a legitimate, nondiscriminatory reason to justify rejecting the complainant, just as in McDonnell Douglas v. Green. But now, contrary to McDonnell Douglas, the complainant may have to prove more than that the employer's offered reason was unworthy of belief. Some judges may now require that the complainant show additional evidence that the true reason for the employment decision was discrimination.

Under the Hicks modification, it seems that complainants must now: (1) produce direct statements by the agency of discriminatory reasons for making the employment decision (evidence that is very hard to come by); or (2) disprove all possible reasons (and not simply those the agency offers at trial) for the employment decision other than discrimination; or (3) prove that the agency's defense was not applied alike (such as between male and female employees or Black and White employees) and the only difference between the complainant and the male employees (or white employees, for example) is their sex (or race, for example). Although these seem to be the most likely ways for the complainant to prove that the agency's offered reasons for the employment decision were untrue and that the real reason was discrimination, there may be other ways as well.

The EEOC has indicated that the EEOC Administrative Judge may (although is not required to) find for the complainant if the complainant proves the prima facie case, and then proves that the agency's offered legitimate, nondiscriminatory reason for the decision was untrue. This is the standard McDonnell Douglas analysis, without the mandate that the judge was required to find for the complainant under such circumstances. Thus, federal employees may find greater sympathy in the agency complaint process with its access to EEOC Administrative Judges about one year after the filing of a complaint, than the analysis available in the federal courts where Hicks rules.

Because of the serious difficulties the Hicks case presents for complainants, we have asked for Congressional relief from this decision. We are hopeful that Congress will take action in the near future.

BURDEN SHIFTING MODEL: DISPARATE TREATMENT

Under McDonnell Douglas & St. Mary's v. Hicks:

COMPLAINANT	AGENCY
Complainant establishes a ***prima facie* case** of discrimination: a) complainant belongs to a protected EEO group (ex. race, disability); b) complainant was qualified for a vacancy or job benefit; c) complainant was subject to a negative employment action; and d) complainant was treated less favorably than a person from outside employee's EEO group, or vacancy went unfilled so as not to hire complainant.	
	The employer then produces **legitimate nondiscriminatory reason** to justify rejecting or denying the complainant (normally "the better qualified" defense).
Complainant must prove that the employer's defense and stated reason is **pretextual** because it is: a) unworthy of belief, and/or b) not "applied alike" between different EEO groups. Since the 1993 Supreme Court ruling in St. Mary's Honor Center v. Hicks, some judges may now require that the complainant show, in addition to proving the agency's defense unworthy of belief, evidence that the true reason for the employment decision was discrimination.	

B. Disparate Impact Cases

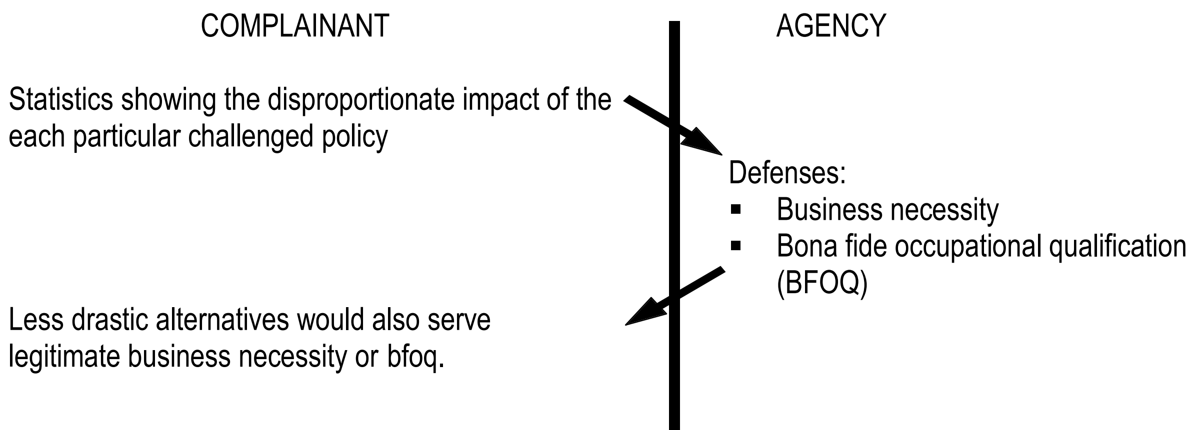
Disparate impact cases, however, are normally more complicated and probably will require the assistance of an experienced attorney. The disparate impact analysis challenges a facially neutral rule or policy that has an adverse impact against an EEO status and is not job related.

The disparate impact analysis was first articulated in a Supreme Court case called Griggs v. Duke Power, 401 U.S. 424 (1971). The Griggs case was effectively overturned by a 1989 Supreme Court decision. However, Griggs was again made law by the enactment of the Civil Rights Act of 1991 which adopted the concepts of "business necessity" and "job related" as set forth in Griggs. Under the amended civil rights law, complainants must demonstrate that each particular challenged employment practice causes a disparate impact unless the elements of the employer's decision-making process are not capable of separation, in which case the process may be analyzed as one employment practice.

Proof of disparate impact normally involves sophisticated statistical analysis showing the disproportionate impact of the challenged policy (the employer's statistical expert will no doubt contest your statistical case). The proper statistical comparison is between the racial or gender composition of the qualified persons in the labor market, or the qualified job applicants and the persons holding the at-issue jobs. Subjective employment selection procedures may also be challenged by statistical evidence showing that an employer's practices have a discriminatory impact on protected minority groups or women, without having to show that the employer deliberately intended to discriminate.

There are two employer defenses in disparate impact cases, business necessity (job relatedness) and bona fide occupational qualification (BFOQ). The concept of the "business necessity" or "job relatedness" defense is that the policy, though discriminatory in impact, furthers the safety and efficiency in job performance. Examples would include education degree requirements for professional jobs, written tests for technical jobs, etc. Of course, the employee can show that less drastic alternatives would also serve safety and job performance goals, and thus defeat this defense. The concept of BFOQ recognizes that sometimes sex, national origin or religion (race can never be a BFOQ) may be a requirement for the job. The BFOQ defense is rarely successful. The EEOC will closely examine any BFOQ defense by analyzing it with strict scrutiny.

BURDEN SHIFTING MODEL: DISPARATE IMPACT



C. The Rehabilitation Act

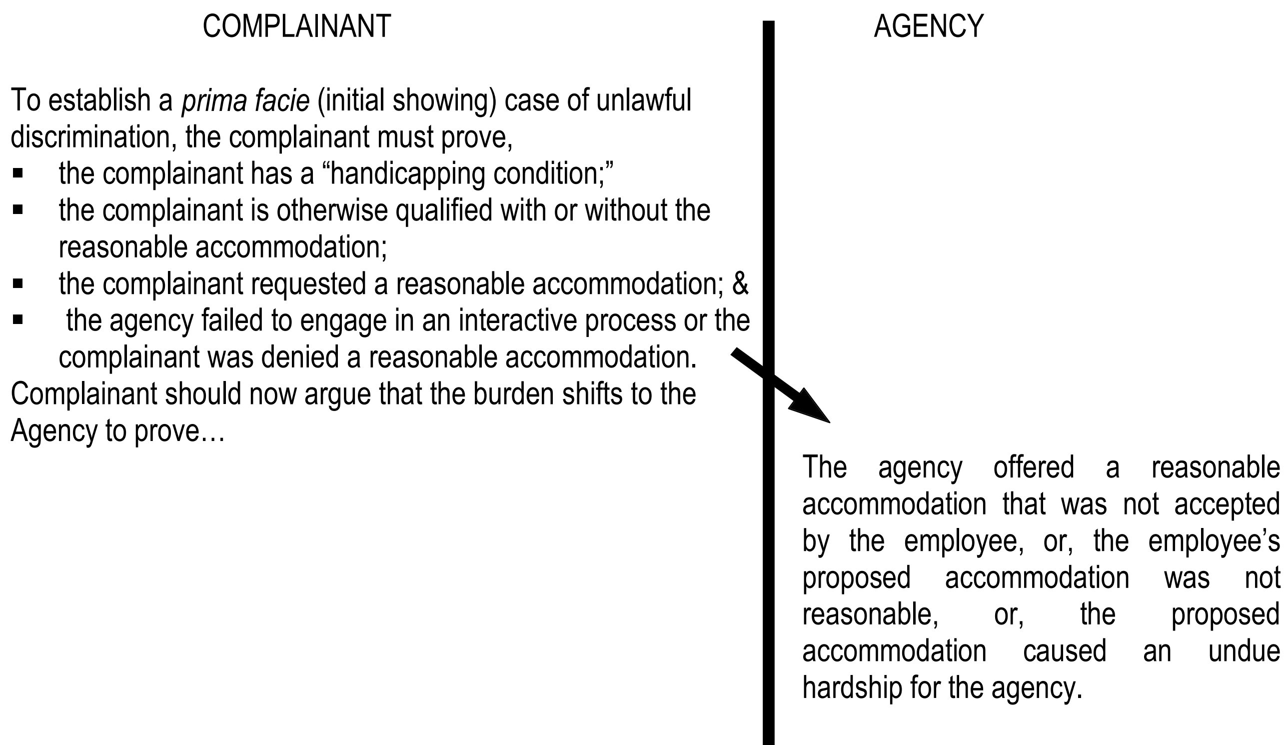
There are two methods of proving discrimination under the Rehabilitation Act, (1) disparate treatment, or (2) failure to grant a reasonable accommodation. A disparate treatment analysis is used when the complainant alleges that he or she has been treated differently from a non-disabled person due to his or her disability, perception of disability, or record of disability. See the disparate treatment analysis above.

The Rehabilitation Act requires an employer to engage in an interactive discussion with a qualified individual with a disability in order to provide him or her a reasonable accommodation. When the employer does not provide the reasonable accommodation even though it does not cause the employer undue hardship, the employer is denying the individual with disability equal employment opportunity and therefore discriminating against the individual.

The use of expert witnesses may be vital to proving your case. They may help:

1. Establish disability status;
2. Assess ability to perform essential functions with or without accommodation;
3. Show the various kinds of available assistive technology;
4. Evaluate efficiency and reasonableness of employee proposed accommodation;
5. Evaluate *lack of* efficiency and *lack of* reasonableness of employer proposed accommodation, if proposed;
6. Establish that the accommodation will not endanger others; and/or
7. Prove the disability's effect on a major life function.

BURDEN SHIFTING MODEL: REHABILITATION ACT



D. Reprisal

Establishing a *prima-facie* case for reprisal differs somewhat from disparate treatment and impact. The elements of a reprisal *prima-facie* case are:

1) Complainant previously engaged in a protected EEO activity: asserted (as a complainant) or helped assert (as a witness) EEO rights;
2) Specific knowledge of protected EEO activity (i.e. #1) by decision maker, not just the Agency;
3) Complainant was subject to an adverse action; and
4) Proof that the protected EEO activity was the reason for the adverse action.

Note that unlike other claims of discrimination, the Complainant needs to allege an adverse action, not just show a negative employment action. What an “adverse action” is for the purpose of reprisal, is unclear. It is not as limited as an “adverse action” for the purposes of MSPB. However, the EEOC has given conflicting definitions in its decisions. The courts have been a little more consistent although their test is not easy to apply: the action must be significant enough to have caused harm.

The fourth element of the *prima facie* case can be proven in two ways: by direct evidence or an inference based on the amount of time that elapsed between the protected EEO activity and the adverse action. Direct evidence is when the discriminator states that the reason for the action is due to the past EEO activity. Most cases rely on the inference. In order to satisfy the inference, the time between the two events must be small. The EEOC has repeatedly dismissed cases where the time elapsed has been more than 6 months.

E. Class Actions

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

Statistics may be used to prove any type of discrimination, but are particularly useful in class action suits. No minimum sample size is prescribed in federal law or statistical theory for determining when an inference of discrimination may be drawn. The adequacy of numerical comparisons with small sets of data depends on the degree of certainty required by the fact-finder as well as on the type of inference that the statistics are meant to demonstrate. As courts become increasingly sophisticated in their treatment of statistical analyses, expert testimony from consultants specializing in statistics is now essential for the presentation of most class actions.

Among the basis requirements of the class action determination are: numerosity (is the affected class so numerous that joinder of claims would be impractical -- usually more than 50 people); commonality (are there common questions of fact and law); typicality (are the claims and defenses of the named complainant typical of the absent class members claims and defenses); and adequacy of representation (can the class representative fairly and appropriately represent absent class members).

In the past, class actions before the EEOC have been so tedious that few cases were brought. Joinder of individual cases was the preferred process. The new revisions to Part 1614, effective November 9, 1999, have streamlined the processing of class actions. In addition, EEOC now permits a complainant to move for class action “at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint.” Part 1614.204(b).

The revisions in Part 1614 are intended to make the processing of class actions more attractive than before. Consideration should nonetheless compare the relative ease in joining multiple complaints to the complexities of processing “class actions” unless the number of such complaints would render joinder impractical.

V. DAMAGES

Keeping good notes and documentation will help you win your discrimination claim. It will also help you support your request for damages, also called relief. The relief granted in any case is dependent upon the status of the complainant (applicant or employee) and the alleged adverse action. EEO laws were originally created to be remedial. In other words, the goal of EEO laws is to return the complainant to the position he or she would have been had the illegal discrimination not occurred. When there is no negative outcome resulting from illegal discrimination, the only remedial relief available may be "declarative relief," i.e., an acknowledgment that discrimination occurred. While some forms of relief are common, other forms of relief are rarely granted. The following is a discussion of relief that may or may not be granted upon proving discrimination.

A. Back pay

Back pay may be appropriate in cases of failure to promote, denial of within-grade salary raise, suspension, removal and termination. Back pay is sometimes difficult to compute. Back pay may include overtime salary in situations where overtime would have been available and interest. Agencies have been permitted to deduct from the awarded back pay the salary corresponding to time during which the complainant would not have been able or willing to work regardless of the discrimination. In some cases, the complainant has a duty to mitigate damages. When the agency is able to prove that the complainant failed to mitigate damages, back pay may be reduced.

B. Attorney's fees

Reasonable attorney's fees are awarded for legal expenses performed by a lawyer in prevailing (winning) cases. As a result, attorney's fees are not awarded for the work provided by the union representative unless the representative is an attorney. Under the new Part 1614 regulations, the EEOC AJ may determine reasonable attorney's fees. Additionally, attorney's fees may be limited if the agency offered a settlement agreement that was rejected by the complainant and the ultimate award was less favorable than the settlement agreement. See page 21 of this Workbook.

C. Injunctive Relief

Injunctions require agencies to perform an action. Although the complainant may benefit financially from the injunction, injunctions are non-monetary. Examples of injunctive relief include promotion, hiring, reinstatement, return of benefits, reasonable accommodation if you have a handicapping condition, and removal or change in a negative evaluation. Reinstatement may not be appropriate when the employee has retired in the meanwhile or when the return of the employee to the position is impracticable.

D. Front Pay

Front pay is rarely awarded, particularly in the Federal sector. Front pay is only appropriate when, (1) the employee cannot be returned to the previous position due to outrageous hostility in the work place if the employee were returned *and* there is no comparable position to which the employee can be placed, or (2) the employer has historically resisted anti-discrimination statutes.

E. Disparate Treatment: Mixed Motive Cases

If a complainant shows that impermissible consideration of race, color, religion, sex, age, or national origin motivated an employment decision, an unlawful employment practice is established even if other, lawful factors also motivated the action. (42 U.S.C. 2000e-2(m)) On claims in which the employer demonstrates that the same action would have been taken even absent the discriminatory motive, *the court may not award damages or require reinstatement, hiring, or promotion*. The court may prohibit the employer from considering the discriminatory factor in the future, however, and award declaratory relief and attorney's fees and costs.

This provision was added to Title VII by the 1991 Civil Rights Act in response to a 1989 Supreme Court case, which held that if the employer could show that it would have made the same decision even absent the unlawful motive, the court must rule against the complainant. The Title VII amendment essentially adopts the position that when an employer shows the same decision would have been made regardless of the discriminatory factor, it is the question of remedy and not violation that is at issue.

F. The Federal Cap on Compensatory Damages

Section 1981a(b)(3) of the Civil Rights Act of 1991 limits the total amount of compensatory damages that may be awarded to an appellant at $300,000 when the agency has more than 500 employees. This does not mean that all employees who successfully allege discrimination will now receive $300,000. Injuries and a “nexus” to the discrimination must still be proved. According to EEOC guidance, past pecuniary (economic) losses are not subject to this cap. Back pay and attorney’s fees are also not subject to the federal cap since they are not compensatory damages.

EEOC has stated that front pay, in the rare case that it is awarded, is excluded from the
Federal Cap. The Circuit Courts do not agree regarding front pay and the federal cap. The 6th Circuit has held that front pay is included in the federal cap and the 8th Circuit has held that front pay is excluded from the federal cap. The EEOC has also stated that the federal cap applies to each claim, not each case. In other words, if an employee alleges both sexual harassment and retaliation occurred based on the same incident, the employee has two claims in one case. The EEOC would say that the federal cap per claim is up to $300,000 and therefore the cap is up to $600,000 for the entire case. To date, no court has agreed with the EEOC. Instead, the courts that have addressed the issue have stated that the cap is $300,000 for the entire case.

G. Post-Judgement Interest

When a complainant is awarded damages and the agency is required to pay within a certain time frames, and then fails to do so, the complainant may be entitled to post-judgment interest. Such interest is intended to compensate for the loss in value of money resulting from the delay in payment.

H. Punitive Damages

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

I. Compensatory Damages

As a result of the November 21, 1991 signing of the Civil Rights Act of 1991 (CRA 1991), federal employees are now entitled to compensatory damages at the administrative level and in district court. In fact, it was AFGE that lobbied Congress and drafted the language that was adopted by Congress into CRA 1991. Without AFGE's relentless advocacy on behalf of federal employees at Congress, compensatory damages would not have been an available remedy to federal employees who suffer intentional discrimination. Compensatory damages are awards of money for actual losses suffered for intentional discrimination.

Soon after the 1991 Act went into effect, the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB) and arbitrators began awarding compensatory damages. Never-the-less, controversy arose as to whether the EEOC was entitled to award compensatory damages. The Supreme Court accepted the case West v. Gibson in order to rule on this issue. AFGE did not remain silent! Instead, AFGE authored a friends of the court brief to the Supreme Court reminding the Court what AFGE taught Congress in 1991: federal employees are bound to the EEOC process and therefore deserve to have their entire complaint remedied by the EEOC. On June 14, 1999, the Supreme Court ruled in West v. Gibson that the EEOC does have the authority to award compensatory damages, reversing the court of appeals that have held otherwise.

Make your claim for compensatory damages with the agency a early as possible, and be creative but reasonable!

WHAT ARE COMPENSATORY DAMAGES?

Includes	Does not include

♦ Economic damages
  ♦ Lost employment benefits
  ♦ medical costs
  ♦ "out of pocket" expenses
♦ Non-economic damages
  ♦ Pain and suffering
  ♦ Emotional distress
  ♦ mental anguish
♦ past as well as future losses
	♦ back pay
	♦ attorney's fees

WHAT PROOF IS NEEDED?

The complainant must prove the injuries, the extent of the losses, and the connection ("nexus") between the intentional discrimination and the claimed damage. The EEOC, in Jackson v. USPS, 93 FEOR 3062, and two cases that followed (Carle v. Dept. of Navy, 94 FEOR 1043 and Mims v. Dept. of Navy, 94 FEOR 3153), stated that the complainant must provide "objective evidence" of economic losses, and/or other evidence of non-economic losses. The complainant is required to make only a prima facie case for damages, then the burden shifts to the agency to try to rebut the complainant's claims.

Compensatory damages may be established through the use of witness testimony and documents. You may want to call witnesses such as the individual, their friends, family members, co-workers, and union

representatives. Documents that may be helpful include personnel files, disciplinary records, work records, medical records and bills, and income tax records.

IN THESE TYPE OF CASES, ONE IS ….

Entitled to Compensatory Damages	Not Entitled to Compensatory Damages
Intentional discrimination on the basis of § race § color § religion § national origin § sex § handicap, unless the an agency makes a good faith effort to reasonably accommodate a qualified employee with a handicapping condition	§ Intentional discrimination based solely on age discrimination § When an agency makes a good faith effort to reasonably accommodate a qualified employee with a handicapping condition § Disparate impact cases, which challenge facially neutral rules or policies that have an adverse impact against a particular EEO status and are not job-related

Facts to prove through the use of testimony and documents

- The discrimination's effect on the complainant's physical and/or emotional health, with particulars such as but not limited to inability to sleep, general agitation, lethargy, frequent crying, social withdrawal, recurring nightmares, damaged social relationships (including marriage), diminished pleasure in activities, loss of libido, digestive problems, aggravation of asthma, less confidence on the job, concern for job or physical safety, physical pain such as headaches or stomach aches, & lowering of self esteem;

- Medical records which indicate physical manifestations of emotional distress or treatment by a medical professional for an emotional condition that are deemed (and noted in the records) related to the discrimination by the treating professional;

- Deprivation of career growth through evidence which compares complainant's career growth with that of his or her colleagues;

- Identification of specific career opportunity which was deprived due to discriminatory act.

WEST V. GIBSON, ____ U.S. ___

JUSTICE BREYER delivered the opinion of the Court:

The question in this case is whether the Equal Employment Opportunity Commission (EEOC) possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII of the Civil Rights Act of 1964, 84 Stat. 121, 42 U.S.C. section 2000e *et seq.* We conclude that the EEOC does have that authority.

....The CDA's sponsors and supporters spoke frequently of the need to create a new remedy in order, for example, to "help make victims whole." ....But the CDA's sponsors and supporters said nothing about limiting the EEOC's ability to use the new Title VII remedy or suggesting that it would be desirable to distinguish the new Title VII remedy from old Title VII remedies in that respect. This total silence is not surprising. What reason could there be for Congress, anxious to have the EEOC consider as a preliminary matter every other possible remedy, not to want the EEOC similarly to consider compensatory damages as well?

....[R]espondent points out that the CDA says nothing about the EEOC....Had Congress thought it important so to limit the scope of the CDA, however, it could easily have cross-referenced section 717(c), the civil action subsection itself, rather than cross-referencing the whole of section 717, which includes authorization for the EEOC to enforce the section through "appropriate remedies."

AFGE Brief as *Amicus Curiae*

"Four senators in total spoke directly about the amendment. All addressed the notion of parity between private employees and federal employees. At no point of the Congressional debate did any senator state that action at the EEOC level was not included in the amendment. The senators never explicitly limited their discussion regarding Section 717 to the subsections within that address only judicial proceedings. Additionally, at no point did any senator suggest that compensatory damages are not an appropriate remedy for the EEOC to grant. If the senators wished to limit the EEOC's grievances, they could have amended this..."

VI. SEXUAL HARASSMENT IN THE WORKPLACE

Sexual harassment is a form of illegal sex discrimination under Title VII of the Civil Rights Act of 1964. The EEOC defines illegal sexual harassment as "unwelcome conduct of a sexual nature...that is a term or condition of employment." In 1998, the Supreme Court confirmed in Oncale v. Sundower, 523 U.S. 75, that sexual harassment is not limited to impermissible conduct by one gender against the other. Instead, sexual harassment can be perpetrated by women against men or women, and by men against men or women.

A. Types of Sexual Harassment

The EEOC definition of illegal sexual harassment includes the three basic types of sexual harassment: quid pro quo, hostile environment, and sexual favoritism. *Quid pro quo* sexual harassment occurs when a supervisor or someone else with authority over an employee makes unwelcome sexual advances and states or implies that the employee must submit if the employee wants to receive or keep a job benefit. Hostile environment sexual harassment occurs when an employee is subjected to unwelcome sexual conduct based on sex that is so pervasive or severe that it creates an abusive or hostile work environment. Sexual favoritism sexual harassment will occur when there is a pervasive workplace pattern of rewarding employees who consensually submit to sexual demands, which then penalizes those who do not submit or were not a target of the demands.

Sexual Harassment is not limited to harassment by men against women. Both men or women can be sexual harassers. Similarly, both men and women can be sexually harassed.

B. Requirements For Establishing A Case

The three types of illegal sexual harassment have different requirements for establishing a case. To establish a case of ***quid pro quo*** **sexual harassment**, an employee must show that:

1. the harasser who is someone with authority over the employee

2. made unwelcome requests for sexual favors from or unwelcome sexual advances toward the employee

3. and stated or implied that the employee must submit to receive or keep a job benefit, and, as a result,

4. the employee suffered economic harm or tangible work detriment.

To establish a case of hostile **environment sexual harassment**, the employee must show that:

1. a supervisor, co-worker, or a non-employee over whom the employer has or could have control

2. subjected the employee to unwelcome sexual conduct based on the employee's sex

3. that was sufficiently pervasive or severe

4. so as to create a sexually hostile work environment.

To establish a case of hostile environment sexual harassment, the employee need not suffer economic loss or tangible work detriment.

To establish a case of **sexual favoritism or sexual harassment**, the employee must show that:

1. There is a widespread practice of granting job benefits to employees who engage in consensual sexual activity with supervisors

2. which then penalizes those employees who do not support, or who are not requested to engage in the sexual conduct.

Both women and men who believe they are being penalized because of the pervasive sexual favoritism may establish a case of illegal sexual favoritism.

C. Employer Liability

The different types of sexual harassment have different standards for holding the employer liable for the sexual harassment, in addition, to holding the harasser liable. In quid pro quo cases, employers are strictly liable to victims who suffered economic harm as a result of the harassment, if the harasser had actual authority to alter the employee's work conditions. This is so, regardless of whether the employer had actual knowledge of the harassment when it occurred. In the past, if an employee could not prove that there was tangible harm as a result of quid pro harassment, the employee would loose the case. Now, due to two 1998 Supreme Court cases, if the employee does not suffer actual economic harm in a quid pro quo case, it is analyzed from as a hostile work environment case.

In hostile environment and sexual favoritism cases where the harasser is a supervisor, then the employer is strictly liable unless (1) there was no tangible harm, and (2) the employer took reasonable care and acted promptly to correct the situation, and (3) the employee failed to reasonable take advantage of any corrective opportunity offered by the employer. In all other cases of hostile environment and sexual favoritism, the employer can be held liable only when they know or should know about the harassment and fail to take prompt and reasonable remedial action. Therefore, it is important that the victim complaint to the agency about these types of sexual harassment.

D. Complaint Process For Sexual Harassment Cases

The process for filing a sexual harassment complaint is the same as that for any other discrimination complaint. For instance, the victim could file a grievance and go to arbitration, or initiate a complaint of discrimination that would be heard by the EEOC after going to the agency EEO counselor. The EEOC process for filing a discrimination complaint is described in general on pages 10-21 of this booklet. Furthermore, when the agency removes an employee who claims a motivating reason was sexual harassment, or suspends for more than 14 days an employee who claims that sexual harassment was a

motivating reason, the victim can raise the allegations of sexual harassment before an Administrative Law Judge of the Merit Systems Protection Board.

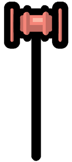
E. Remedies

The remedies available to federal employees for illegal sexual harassment are the same as those allowed for other Title VII cases. Remedies for sexual harassment may include reinstatement, promotion, and back pay. In addition, since the passage of the Civil Rights Act of 1991, victims may also receive compensatory damages up to a $300,000 cap. For more information on damages available under the Civil Rights Act of 1991, see pages 29-33.

F. More Information

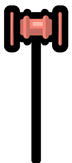
For more information on sexual harassment, see AFGE's booklet "Stop Sexual Harassment Before it Stops You: A Guide For AFGE Members."

RECENT SUPREME COURT DECISIONS
DISABILITY RIGHTS



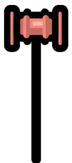
Murphy v. United Parcel Service, ___ U.S. ___ (1999)

United States Supreme Court, using the new Sutton standard, holds Murphy's high blood pressure is not a disability because when medicated the high blood pressure does not substantially limit him in any major life activity.



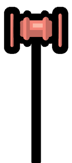
Cleveland v. Policy Management Systems, ___ U.S. ___ (1999)

United States Supreme Court holds that filing for and receiving disability benefits (SSDI) does not automatically estop one from pursuing a request for an accommodation at the employment site. Since the Social Security Administration does not consider accommodations when it determines whether one is disabled, stating on one's disability form that one is completely disabled does not conflict with the statement that if one receives an accommodation for the disability one can work. ***It is the Complainant's burden to explain any inconsistent statements between request for disability and request for accommodation.***



Sutton v. United Air Lines, ___ U.S. ___ (1999)

United States Supreme Court holds that "mitigating measures," such as corrective eye glasses, contact lenses, &/or medications, should be taken into account when deciding whether a person is disabled. The Court also holds that the existence of a physical standard/ criteria for a job does not, in and of itself, violate the law protecting individuals with disabilities.



Albertsons, Inc. v. Kirkingburg, ___ U.S. ___ (1999)

United States Supreme Court, using the new Sutton standard, holds that Kirkingburg's monocular vision is not a disability. Kirkingburg's body has learned to compensate for his impairment. Therefore the Court reasons that his impairment does not substantially limit his ability to see, even though his method of seeing is significantly different than other people's. The Court also holds that an employer may rely on a government standard regarding vision, even when the employee qualifies for an experimental waiver program offered by the government.

VII. DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES

Although individuals with disabilities currently prefer to be called "individuals with disabilities" rather than "handicapped," the Rehabilitation Act of 1973, the Act that protects federal employees with disabilities, still refers to disability as a "handicapping condition." In order to avoid confusion, the following section will use the terms used by the statute, however, the terms can be used interchangeably.

The Rehabilitation Act of 1973 (Section 501, 29 U.S.C. 791) requires agencies to reasonably accommodate the needs of qualified federal employees and applicants with a known "handicapping condition." This means that, if an employee has a known handicapping condition, the Rehabilitation Act may require the agency to change or adjust the position or the workplace to enable the individual to perform the essential functions of the position. For more information, contact AFGE Women's/Fair Practices Departments for AFGE's Guidebook on Disability Rights.

A. Requirements For Receiving Protection

The employee or applicant satisfy two requirements to receive the protection of the Rehabilitation Act. First, he or she must be a **qualified person**, as the Act defines that term. Second, the employee or applicant must have a **handicapping condition**, as the Act defines that term. See 29 C.F.R. 1614.203(a).

The term **qualified person** means a person who, with or without reasonable accommodation, can perform the essential functions of the position without endangering the health and safety of the individual or others. In addition, the individual must, depending on the type of appointing authority being used, (1) meet the experience and/or educational requirements (which may include passing a written test) of the position in question, or (2) meet the criteria for appointment under one of the special appointing authorities for handicapped persons.

A person with a **handicapping condition** is one who: (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities (for example, walking, seeing, hearing, working, or performing manual tasks like reaching, standing, or lifting,); or (2) has a record of such impairment (that is, has a history of, or has been classified as having, an impairment); or (3) is regarded as having such an impairment (for example, conditions people mistakenly believe are limiting, such as a facial disfigurement, or an involuntary head jerk).

Many different impairments may qualify as handicapping conditions. Examples include: HIV and AIDS; addiction to alcohol or drugs (as long as the person is not currently using illegal drugs); nervous breakdown; diabetes; carpal tunnel disease; sickle cell anemia; deafness; blindness; and being wheel-chair bound. Remember that an impairment is only a disability if it also substantially limits a major life function.
When determining whether an impairment substantially limit a major life function, one should factor in any "mitigating measures." For example, if an individual has vision loss that while wearing glasses is entirely corrected so that no major life function is impaired, the individual is not disabled.

B. Examples of Reasonable Accommodation

There are many examples of reasonable accommodation the agency may provide. The individual who qualifies for protection under the Rehabilitation Act should bear in mind, however, that the agency has the right to choose the accommodation it wishes to provide, as long as the accommodation enables the individual to perform the essential functions of the job. The employer or applicant should provide as much input as possible to assist in the decision over what accommodation the agency should make, since the employee or applicant may know best the accommodation that will enable him or her to perform most efficiently on the job. For suggestions and ideas on reasonable accommodations, contact the Job Accommodations Network (JAN), at 1-800-526-7234 (Voice/TDD).

Examples of reasonable accommodation include: providing a reader or sign language interpreter (for the blind or deaf); making the workplace readily accessible (building a ramp, changing the desk height, modifying toilet facilities, providing cups at the water fountain); restructuring the job or reassigning some of the marginal job functions; redesigning or adapting equipment (providing instructions in Braille, providing a shoulder rest); and, as a last resort, reassigning the employee to a funded, vacant position. See 29 C.F.R. 1614.203(c).

C. Alcoholism

Alcoholism is considered a handicapping condition, and therefore warrants reasonable accommodation. For example, if there is reason to suspect that an employee may be an alcoholic, the employee may be referred to employee assistance counseling and be granted leave if he or she enters a rehabilitation program. However, there have been important recent changes in this area of the law. The law used to require that no disciplinary action may be taken against a qualified alcoholic employee until the employee has been given a "firm choice" or rehabilitation or discipline. Unfortunately, recent decisions by the EEOC and the MSPB eliminate the agency's obligation to provide a "firm choice" to alcoholic employee prior to imposing discipline for disability-related misconduct. Therefore, agencies are no longer obligated to provide accommodation to an employee who raises alcoholism for the first time as an excuse for misconduct or performance deficiencies which warrant removal.

In the case of Johnson v. Babbitt, EEOC Petition No. 03940100 (March 28, 1996), the EEOC determined that while agencies are clearly obligated to reasonably accommodate qualified employees who are disabled by alcoholism, they are no longer required to provide the reasonable accommodation of a firm choice under Section 501 of the Rehabilitation Act. Agencies may now hold alcoholic employees to the same requirements for acceptable conduct and performance to which it holds all other employees.

However, the Johnson decision still requires agencies to accommodate qualified employees who are disabled by alcoholism, and it specifically recognizes that a flexible work schedule or leave to accommodate an employee's treatment is still required as one form of reasonable accommodation. Furthermore, while a firm choice is no longer mandated by law, agencies may continue to provide firm choice as an option. Union actions, because it provides an opportunity for rehabilitation. Similarly, contract language can establish firm choice as a required provision for handling alcoholic employees.

An MSPB decision, Kimble v. Navy, MSPB Docket No. SF-0752-95-0404-I-1, June 11, 1996, adopted the EEOC's ruling in Johnson and paved the way for agencies to formulate individual firm choice offers to employees on a case-by-case basis.

The new decisions eliminate the "firm choice" doctrine from all future EEOC and MSPB cases and have also influenced the courts. In Burch v. Coca Cola, Co., No. 95-10990 (5th Cir. 1997), the Court explained that unlike the pre-1992 Rehabilitation Act, employers are neither required to provide a firm choice between treatment and discipline nor required to provide a retroactive accommodation by excusing pre-accommodation misconduct.

D. Requirements For Establishing A Case

The requirements for establishing a violation of the Rehabilitation Act are basically the same as other disparate treatment discrimination complaints. See pages 22-24 of this workbook describe the requirements for establishing a case of disparate treatment discrimination.

In order to establish a violation of the Rehabilitation Act, the complainant must first establish a prima facie case. This means that the complainant must show by a preponderance of the evidence that: (1) he or she has a handicapping condition; (2) he or she is a qualified person; (3) an adverse employment action occurred; and (4) the handicapping condition caused the conduct or performance about which the agency complains.

Once the complainant establishes a prima facie case, the agency must articulate a legitimate, non-handicap reason for its action. The agency may also attempt to demonstrate that accommodation would impose an "undue hardship" on the agency. "Undue hardship" is a very difficult standard for the government to meet. The complainant must then show that the agency's reasons are pretextual, and/or that the accommodation would be reasonable.

E. Complaint Process For Rehabilitation Act Cases

The process for filing a Rehabilitation Act complaint is the same as that for any other discrimination complaint. For instance, the victim could file a grievance and go to arbitration, or initiate a complaint of discrimination that would be heard by the EEOC after going to the agency EEO counselor. Furthermore, when the agency removes (or suspends for more than 14 days) an employee who claims a motivating reason was the individual's disability, the victim can raise the allegation before an Administrative Law Judge of the Merit Systems Protection Board. The EEOC process for filing a discrimination complaint is described in general on pages 10-21 of this booklet.

F. Remedies

Under the 1991 Civil Rights Act, if your agency intentionally discriminates against you, and you are a qualified person with a handicapping condition, you may be able to recover up to $300,000 in compensatory damages plus back pay and attorney's fees. Typical forms of compensatory damages may include economic damages (such as medical costs, lost benefits, and other "out of pocket" expenses) and non-economic damages (such as pain and suffering and emotional distress).

However, there is an exception. If the agency makes a good faith attempt to reasonably accommodate a qualified person with a handicapping condition, compensatory damages are not available. For more information on compensatory damages, refer to page 31 of this workbook.

G. The American With Disabilities Act (ADA)

Since 1973, Federal employees with disabilities have been protected against discrimination by virtue of the Rehabilitation Act of 1973. However, the Rehabilitation Act of 1973 only protected federal employees and not state government, local government employees, or private sector employees.

Congress attempted to remedy this disparity between federal employees and private sector employees by passing into law the Americans with Disabilities Act of 1990. The ADA was based in large part on the Rehabilitation Act of 1973. The ADA provided protection for state and local government employees as well as the majority of private sector employees. Federal employees are not covered by the ADA since they are still covered by the Rehabilitation Act.

Since the ADA was passed into law, many courts have interpreted passages of the ADA. The court interpretations of the ADA have been applied to the Rehabilitation Act as well. Therefore, these court rulings apply and have modified the rights of Federal employees.

VII. MSPB and Adverse Actions

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

· a removal
· a suspension for more than 14 days
· a reduction in grade
· a reduction in basic pay, or
· a furlough of 30 days or less

"Adverse actions" are very narrowly interpreted by the MSPB. So, for example, a reduction in basic pay does not include a reduction of special, premium, or locality pay. Furthermore, pursuant to the Civil Service Reform Act, adverse actions may be taken "against an employee only for such cause as will promote the efficiency of the service". 5 U.S.C. Section 7513.

To reach the ultimate conclusion of whether service efficiency is enhanced through an adverse action, the agency must satisfy its burden of proof that the appellant is at fault for the conduct charged, that the conduct for which the appellant is faulted impairs service efficiency (the nexus), and that the penalty is appropriate.

Even if the agency satisfies these three burdens, the Board must overturn an adverse action when the employee demonstrates one of the following affirmative defenses: harmful error, prohibited personnel practice, or decision reached not in accordance with law. 5 U.S.C. Section 7701 (c)(2).

The Civil Service Reform Act established eleven actions as "prohibited personnel practices." Under 5 U.S.C. Section 2302(b), any person who has the authority to take, direct others to take, recommend or approve any personnel action shall not, with respect to such authority:

- discriminate on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation. 5 U.S.C. Section 2302(b)(1);

- solicit or consider employment recommendations based on factors other than personal knowledge or records of job related abilities or characteristics. 5 U.S.C. Section 2302(b)(2);

- coerce the political activity of any person 5 U.S.C. Section 2302(b)(3);

- deceive or willfully obstruct any person from competing for employment. 5 U.S.C. Section 2302(b)(4);

- influence any person to withdraw from competition for any position in order to improve or injure the employment prospects of any other person. 5 U.S.C. Section 2302(b)(5);

- give unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant. 5 U.S.C. Section 2302(b)(6);

- engage in nepotism (hire or promote relatives or advocate such activity). 5 U.S.C. Section 2302(b)(7);

- take reprisal against a whistleblower. 5 U.S.C. Section 2302(b)(8);

- take reprisal for the exercise of any appeal rights granted by any law, rule or regulation. 5 U.S.C. Section 2302(b)(9);

- discriminate on the basis of personal conduct which does not adversely affect the job performance of the employee, applicant, or others. 5 U.S.C. Section 2302(b)(10); or

- take or fail to take a personnel action violating any law, rule, or regulation implementing or directly concerning the 5 U.S.C. Section 2301 merit systems principles. 5 U.S.C. Section 2302(b)(11).

In order to establish a prima facie case of discrimination, before the Board, the appellant must show that he or she is a member of protected group, that he was similarly situated to an individual who is not a member of his protected group, and that he was treated more harshly and disparately than the individual who is not a member of his protected group. The appellant must also show that the difference in treatment was based upon the intent to discriminate. Such intent can be shown by circumstantial evidence.

The appellant may also alleged that the adverse action was in retaliation for disclosures made which were protected by the Whistleblower Protection Act (WPA). The WPA amended 5 U.S.C. Section 2303(b)(8) to define whistleblowing as "any disclosure of information" by an employee which he "reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to public health or safety..." See also 5 C.F.R. Section 1209.4(b) (1991). If the appellant proves that a disclosure described in 5 U.S.C. Section 2302(b)(8) was a contributing factor in his removal, the Board will order the agency to take corrective action unless the agency can demonstrate by clear and convincing evidence that it would have taken the same personnel action absent the appellant's protected disclosure. 5 C.F.R. Section 1209.7 (1991). One of the ways in which an appellant may prove that the disclosure was a contributing factor is to show that the officials taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. McDaid v. Department of Housing and Urban Development, 46 M.S.P.R. 416 (1990).

Subpart A--Agency Program to Promote Equal Employment Opportunity

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1614.102 Agency program.
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1614.107 Dismissals of complaints.
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Subpart A--Agency Program to Promote Equal Employment Opportunity

1614.101 General policy.

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

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

1614.102 Agency program.

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

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

(2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives;

(3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;

(4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, age or handicap, and solicit their recruitment assistance on a continuing basis;

(5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(6) Take appropriate disciplinary action against employees who engage in discriminatory practices;

(7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;

(8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program;

(9) Reassign, in accordance with 1614.203(g), nonprobationary employees who develop physical or mental limitations that prevent them from performing the essential functions of their positions even with reasonable accommodation;

(10) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(11) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;

(12) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(13) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and

(14) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

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

(1) Develop the plans, procedures and regulations necessary to carry out its program;

(2) Establish or make available an alternative dispute resolution program. Such program must be available for both the pre-complaint process and the formal complaint process.

(3) Appraise its personnel operations at regular intervals to assure their conformity with its program, this part 1614 and the instructions contained in the Commission's management directives;

(4) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head.

(5) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(6) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation;

(7) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

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

(l) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in 1614.101 and the agency program;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

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

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

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

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

1614.103 Complaints of discrimination covered by this part.

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

(b) This part applies to:

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

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

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

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

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

(6) The Government Printing Office; and

(7) The Smithsonian Institution.

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

(d) This part does not apply to:

(1) Uniformed members of the military departments referred to in paragraph (b)(1):

(2) Employees of the General Accounting Office;

(3) Employees of the Library of Congress;

(4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or

(5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).

1614.104 Agency processing.

(a) Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provisions contained in 1614.105 through 1614.110 and in 1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives.

(b) The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue decisions that are consistent with acceptable legal standards, to explain the reasons for its decisions, and to give complainants adequate and timely notice of their rights.

1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b)(1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with 1614.108(f), election rights pursuant to 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the claims raised in precomplaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a

subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

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

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

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

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

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

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

1614.106 Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by 1614.105(d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

(d) A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a complainant may file a motion with the administrative judge to amend a complaint to include issues or claims like or related to those raised in the complaint.

(e) The agency shall acknowledge receipt of a complaint or an amendment to a complaint in writing and inform the complainant of the date on which the complaint or amendment was filed. The agency shall advise the complainant in the acknowledgment of the EEOC office and

its address where a request for a hearing shall be sent. Such acknowledgment shall also advise the complainant that:

(1) The complainant has the right to appeal the final action on or dismissal of a complaint; and

(2) The agency is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period. When a complaint has been amended, the agency shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, except that the complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint.

1614.107 Dismissals of complaints.

(a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:

(1) That fails to state a claim under 1614.103 or 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(2) That fails to comply with the applicable time limits contained in 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(4) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and 1614.301 or 1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;

(6) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(7) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available;

(8) That alleges dissatisfaction with the processing of a previously filed complaint; or

(9) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination. A clear pattern of misuse of the EEO process requires:

(i) Evidence of multiple complaint filings; and

(ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or

(iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system.

(b) Where the agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in paragraphs (a)(1) through (9) of this section, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated, and shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested

on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

1614.108 Investigation of complaints.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

immediate final decision pursuant to 1614.110 from the agency with which the complaint was filed.

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

1614.109 Hearings.

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

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

(c) *Offer of resolution*.

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

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

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

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

(e) *Conduct of hearing*. Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and

are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(f) *Procedures.*

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

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

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

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

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

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

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

(v) Take such other actions as appropriate.

(g) ***Decisions*** *without hearing*.

(1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

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

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

(h) *Record of hearing*. The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative

judge shall make the document available to the agency representative for reproduction.

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

1614.110 Final action by agencies.

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

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

Subpart B--Provisions Applicable to Particular Complaints

1614.201 Age Discrimination in Employment Act.

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

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

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

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

days after the filing of a class complaint if the agency has not issued a final decision;

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

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

1614.202 Equal Pay Act.

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

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

1614.203 Rehabilitation Act.

(a) *Definitions*—

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

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

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

(iii) Is regarded as having such an impairment.

(2) *Physical or mental impairment* means:

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

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

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

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

(5) *Is regarded as having such an impairment* means has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or has none of the impairments defined in paragraph (a)(2) of this section but is treated by an employer as having such an impairment.

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

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

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

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

(c) Reasonable accommodation

(1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation

would impose an undue hardship on the operations of its program.

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

(i) Making facilities readily accessible to and usable by individuals with handicaps; and

(ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(3) In determining whether, pursuant to paragraph (c)(1) of this section, an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include:

(i) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;

(ii) The type of agency operation, including the composition and structure of the agency's work force; and

(iii) The nature and the cost of the accommodation.

(d) *Employment criteria*.

(1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:

(i) The agency demonstrates that the test score or other selection criterion is job-related for the position in question and consistent with business necessity; and

(ii) OPM or other examining authority shows that job-related alternative tests, or the agency shows that job-related alternative criteria, that do not screen out or tend to screen out as many individuals with handicaps are unavailable.

(2) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skill (except where those skills are the factors that the test purports to measure).

(e) *Preemployment inquiries.*

(1) Except as provided in paragraphs (e)(2) and (e)(3) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is an individual with handicaps or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the essential functions of the job, or the medical qualification requirements if applicable, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Office of Personnel Management may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

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

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

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

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

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

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

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

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

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

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

(f) *Physical access to buildings*.

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

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

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

(h) *Exclusion from definition of "individual(s) with handicap(s)"*.

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

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

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

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

(2) Except that it shall not violate this section for an agency to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (h)(1) (i) and (ii) of this section is no longer engaging in the illegal use of drugs.

1614.204 Class Complaints.

(a) *Definitions.*

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

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

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

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

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

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

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

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

(c) *Filing and presentation of a class complaint.*

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

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

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

(d) Acceptance or dismissal.

(1) Within 30 days of an agency's receipt of a complaint, the agency shall: Designate an agency representative who shall not be any of the individuals referenced in 1614.102(b)(3), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or agency to submit additional information relevant to the complaint.

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

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

the allegation shall be consolidated with the class complaint.

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

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

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

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

(e) *Notification*.

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

(2) Such notice shall contain:

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

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

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

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

(f) *Obtaining evidence concerning the complaint*.

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

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

(i) To draw an adverse inference that the requested information would have reflected unfavorably on

the party refusing to provide the requested information;

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

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

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

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

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

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

(g) *Opportunity for resolution of the complaint.*

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

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

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

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

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

(i) *Report of findings and recommendations*. (1) The administrative judge shall transmit to the agency a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class and any individual relief, where appropriate, with regard to the personnel action or matter that gave rise to the complaint.

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

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

(j) *Agency decision.*

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

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

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

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

(5) The final decision of the agency shall require any relief authorized by law and determined to be necessary or desirable to resolve the issue of discrimination.

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

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

(k) *Notification of decision*. The agency shall notify class members of the final decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 days of the transmittal of its final decision to the agent.

(l) *Relief for individual class members*.

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

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

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

Subpart C--Related Processes

1614.301 Relationship to negotiated grievance procedure.

(a) When a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing

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

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

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

1614.302 Mixed case complaints.

(a) *Definitions*—

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

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

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

(b) *Dismissal*.

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

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

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to 1614.107(d) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable to the Commission except where it is alleged that 1614.107(d) has been applied to a non-mixed case matter.

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

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

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

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

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

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

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

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

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

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

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

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

20419, and the petitioner must certify as to the date and method of service.

1614.304 Contents of petition.

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

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

(1) The name and address of the petitioner;

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

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

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

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

1614.305 Consideration procedures.

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

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

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

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

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

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

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

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

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

1614.306 Referral of case to Special Panel.

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

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

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

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

1614.307 Organization of Special Panel.

(a) The Special Panel is composed of:

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

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

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

(b) *Designation of Special Panel member*—

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

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

1614.308 Practices and procedures of the Special Panel.

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

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

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

(d)Administrative assistance to Special Panel.

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

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

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

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

(f) *Filing and service of pleadings*.

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

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

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

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

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

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

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

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

1614.309 Enforcement of Special Panel decision.

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

1614.310 Right to file a civil action.

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

(a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or

(b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or

(c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or

(d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or

(e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or

(f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or

(g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or

(h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

Subpart D--Appeals and Civil Actions

1614.401 Appeals to the Commission.

(a) A complainant may appeal an agency's final action or dismissal of a complaint.

(b) An agency may appeal as provided in 1614.110(a).

(c) A class agent or an agency may appeal an administrative judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and a class member, a class agent or an agency may appeal a final decision on a petition pursuant to 1614.204(g)(4).

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

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

1614.402 Time for appeals to the Commission.

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

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

1614.403 How to appeal.

(a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The appellant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed.

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

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

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

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

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

1614.404 Appellate procedure.

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

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

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

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

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

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

(4) Take such other actions as appropriate.

1614.405 Decisions on appeals.

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

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

(1) The appellate decision involved a clearly erroneous interpretation of material fact or law; or

(2) The decision will have a substantial impact on the policies, practices or operations of the agency.

1614.406 Time limits. [Reserved]

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

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

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

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

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

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

1614.408 Civil action: Equal Pay Act.

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

1614.409 Effect of filing a civil action.

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

Subpart E--Remedies and Enforcement

1614.501 Remedies and relief.

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

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

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

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

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

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

(b) *Relief for an applicant*.

(1)(i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

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

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

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

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

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

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

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

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*--

(1) *Awards of attorney's fees or costs*. The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. **In a decision or final action, the agency, administrative judge, or Commission may award the applicant or employee reasonable attorney's fees (including expert witness fees) and other costs incurred in the processing of the complaint.**

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid for services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the agency, administrative judge or Commission, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Agencies are not required to pay attorney's fees for services performed during the pre-complaint process, except that fees are allowable when the Commission affirms on appeal an administrative judge's decision finding discrimination after an agency takes final action by not implementing an administrative judge's decision. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.*

(i) When the agency, administrative judge or the Commission determines an entitlement to attorney's fees or costs, the complainant's attorney shall submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the agency or administrative judge within 30 days of receipt of the decision and shall submit a copy of the statement to the agency. A statement of attorney's fees and costs shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. The agency may respond to a statement of attorney's fees and costs within 30 days of its receipt. The verified statement, accompanying affidavit and any agency response shall be made a part of the complaint file.

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

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

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

and fees for exemplification and copies necessarily obtained for use in the case.

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

1614.502 Compliance with final Commission decisions.

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

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

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

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

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

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

1614.503 Enforcement of final Commission decisions.

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

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

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

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

(e) *Commission notice to show cause*. The Commission may issue a notice to the head of any federal agency that has failed to comply with a

decision to show cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

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

(g) *Notification to complainant of completion of administrative efforts*. Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq*., and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

1614.504 Compliance with settlement agreements and final actions.

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

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

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

1614.505 Interim relief.

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

(2) Service under the temporary or conditional restoration provisions of paragraph (a)(1) of this section shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds the decision on appeal. Such service shall not be credited toward the completion of any applicable probationary or trial period or the completion of the service requirement for career tenure if the Commission reverses the decision on appeal.

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

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

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

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

Subpart F-Matters of General Applicability

1614.601 EEO group statistics.

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

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

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

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

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

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

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

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

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

1614.602 Reports to the Commission.

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

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

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

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

1614.603 Voluntary settlement attempts.

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

1614.604 Filing and computation of time.

(a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(b) A document shall be deemed timely if it is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period.

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

1614.605 Representation and official time.

(a) At any stage in the processing of a complaint, including the counseling stage under 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to

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

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

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

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

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

1614.606 Joint processing and consolidation of complaints.

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

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

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

The form discovery requests provided in this workbook are merely sample discovery requests. The complainant and his or her representative should read through the interrogatories, requests for admission and requests for production of documents and individualize them to the extent necessary. The complainant and his or her representative should feel free to deviate from the questions provided adding additional questions where appropriate, and leaving some out where appropriate (for example, complainant's representative should exclude questions that do not seem relevant to the complainant and even some that the complainant is certain her or she already knows the answer the agency will give). The motion to compel should explain why the discovery is calculated to produce or lead to the production of material evidence that is not repetitious of facts or documents already in the complaint file, is not privileged or restricted information, and is not overly burdensome.

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
(Fill in name of field or district office)

NAME OF COMPLAINANT (fill in)	:	
	:	
Complainant,	:	
	:	**EEOC No.** (fill in)
vs.	:	**Case No.** (fill in)
	:	
AGENCY HEAD (fill in)	:	
Title (fill in)	:	
AGENCY NAME (fill in)	:	
	:	
Agency.	:	

COMPLAINANT'S REQUEST FOR INTERROGATORIES

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

For each individual identified, please state his or her name, whether or not he or she has a known (fill in protected bases relevant to the case, for example, if it is a disability discrimination case fill in disability here), whether he or she is still employed by the agency, business address, and business telephone number, or if no longer employed by the Federal Government, the individual's forwarding information.

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

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

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

2. Identify any and all individuals who witnessed (fill in the key event or events, if appropriate) or who otherwise have information that is relevant to the issue involved in this hearing, but are not listed in response to interrogatory No. 1, above.

3. State any and all qualifications necessary for the position of (fill in the name of the position to which you were not hired).

4. With respect to each formal complaint of discrimination filed against the agency in (fill in city or state location, unless the agency is relatively small) during the relevant time period, identify the complainant, identify the bases of the discrimination alleged, state the date and charge number, state the recommended decision of the EEOC administrative judge, if any, and the action, if any, taken by the agency.

5. Describe every lawsuit filed in federal court against the agency involving charges of discrimination in employment during the relevant time period and indicate the disposition of each.

6. Please state whether (fill in name of alleged discriminating official) has ever been named the alleged discriminator in a complaint of discrimination. If so, please state the basis of the allegation (discrimination based on disability, gender, race, etc); date of each complaint; a description of the disability if disability was one of the bases of the complaint; a description of the investigation and resolution of each complaint; the name and title of the person(s) responsible for resolving each complaint; and the current employment status of the person filing the complaint.

7. State whether, at any time during the relevant time period, any job or job series (a series of jobs through which employees are sequentially promoted) were restricted to (a certain sex, race, religion, ethnicity -- choose whichever categories are appropriate for the complaint), by any rule, procedure, custom or practice, or by any other means.

8. If the answer to previous interrogatory is in the affirmative, further describe each and every situation in which it occurred, including department name and location, the jobs so restricted, whether or not the restrictions were at any time removed or the disparity corrected, and the nature of any rights granted to incumbent minority or female employees.

9. Describe all the requirements for the position(s) of (fill in any job relevant to the complaint), including educational requirements, work experience requirements, recommendations of superiors and/or managers (if so, state the criteria used and indicate the person or persons who made or make such reports), transfer or promotion rights, and other requirements.

10. State whether there have been any changes in requirements for the positions(s) of (fill in the same jobs you listed in interrogatory no. 9), and describe all such changes.

11. Identify all persons who participated in the decision not promote the Complainant to the position of (fill in appropriate position) and the reason each gave for the denial.

12. State the method of recruitment for new employees. If there is no particular method, state any and all ways that new employees are notified of open positions at the agency.

13. List by name and location all newspapers and publications in which (fill in name of agency and location) regularly advertises for the filling of job vacancies.

14. Identify any and all employees whose job duties included preparing, posting, or administering the preparation or posting of available employment opportunities at (fill in the agency and location) for the period (fill in applicable time period).

15. Identify the person who filled the position of (fill in the name of the position to which you were not promoted or position for which you were not hired) and describe his or her qualifications.

16. Identify all persons who held the position of (fill in appropriate position) during the period of (fill in appropriate time period) and state the

- date on which employment commenced
- qualifications
- prior employment record
- starting salary
- job ratings
- any special training, including whether each person attended any school or course and if so, when and by whom such training was provided
- whether he or she was promoted or demoted and if so, state in detail the reasons for such promotion or demotion.

17. Identify all person denied promotion within the agency at (fill in location) whom were (fill in protected bases relevant for this case) and for each state position occupied at time of denial and reason for denial.

18. State of each year, the number of applications, the (fill in protected bases relevant for this case) of each applicant for employment filed commencing with (fill in appropriate date) and for each year thereafter at the agency in (fill in location), and the action taken with respect to each application.

19. State separately for each year, the number of employees and their the (fill in protected bases relevant for this case), whether they were discharged, terminated or laid off, including temporary lay-offs, with the agency at (fill in location) commencing with (fill in appropriate date) and for each year thereafter.

20. Does the agency have a policy or procedure for transfer of employees from one department or operational unit? If so, please describe.

21. Until the date Complainant ceased employment/was demoted at the agency, were there any complaints relating to his/her ability to do his/her work? If so, please detail identify the person making the compliant.

22. Identify who was present when Complainant was laid off/discharged/demoted and describe in detail any conversation that commenced?

23. What is the Agency's alleged legitimate, non-discriminatory reason for the personnel action(s) at issue in this Complaint and on what facts do you rely to support this alleged legitimate, non-discriminatory reason?

24. Please describe what education and continuing education, if any, the agency requires management to have/take in order to learn of anti-discrimination laws and policies, Agency policies, and new advances in anti-discrimination law. Please state whether the alleged discriminating officials have taken any training classes regarding anti-discrimination laws and policies, Agency policies, and new advances in anti-discrimination law.

25. Does the agency have policies and/or guidelines relevant to the writing and dissemination of performance evaluations, (fill in any policy that you believe has been violated), the prevention of discrimination based on (fill in protected bases relevant for this case), reasonable accommodation, the facilitation of reasonable accommodation for disability, and the maintenance of medical documents in confidence? If yes, please attach copies (see Document Request No. ___) and state
    - the name of the person(s) responsible for the oversight and administration of the policies and/or guidelines;
    - the method, if any, the Agency uses to alert management of these policies and guidelines; and
    - the method, if any, the Agency uses to alert employees of these policies and guidelines.

26. Identify specifically all document, records or other materials used in preparing your answers to or containing information relating to matter raised in the preceding interrogatories setting forth such information separately for each interrogatory and indicating location and custodian of the document.

27. Regarding the Requests for Admission served upon the agency on (fill in date), for each denial or partial admission, state with specificity the reason the statement cannot be admitted as true. Identify all evidence that would support the reasoning for each denial or partial admission.

DISABILITY RELATED QUESTIONS

28. Does the agency allege or contend that the Complainant is not a qualified individual with a disability? If yes, please state the factual basis for this belief.

29. Does the agency allege or contend that it was unable to reasonably accommodate the Complainant? If yes, please state the factual basis for this belief; any expert opinion relied upon; efforts made to attempt accommodation; the undue hardship involved; and all communications with complainant relative to efforts to accommodate.

30. Does the agency allege or contend that complainant was unable to do an essential function of the job? If yes, please state the essential function complainant allegedly was unable to accomplish; what effort was made to communicate this to the complainant; the names and titles of other employees who can perform the duties; whether the requirement for these duties has ever been waived in the past, and if so, the name of the employee affected and the circumstances of the waiver.

31. Please describe in as much detail as possible the manner in which the Agnecy maintains and stores employee records, including but not limited to employee medical records, state the location of said records, and identify the person responsible for maintaining the records for the Agency.

32. Please identify each individual under the alleged discriminating official's supervision who the agency considers disabled and state the nature of the individual's disability, any accommodation requested, and the Agency response to the accommodation request.

33. Please describe the method the Agency used during the relative time period to determine if a disability can be reasonably accommodated, and state the effective date for the use of this method, any expert opinion that supports the use of this method, whether this method is still used by the agency and if not, why.

34. Please identify any disabled employee that the agency was unable to accommodate during the relevant time period and state the name, nature of the disability, and the reason the agency could not accommodate the disability.

35. On what bases did the agency determine that the Complainant's handicap could not be reasonably accommodated?

36. Describe the essential functions of the position of (fill in the position for which Complainant did not receive appropriate accommodation).

37. Describe the different possible accommodations the agency considered in making its determination about accommodating the Complainant and explain the reason(s) for rejection of each alternative accommodation.

38. At any time between (fill in time period surrounding decision not to accommodate Complainant's handicap), were they any funded, vacant positions within the agency at (fill in location)? If so, please name positions and describe essential functions of each position.

39. At any time before Complainant's termination/demotion was Complainant give a "firm choice" between treatment for his or her alleged alcoholic condition and termination/demotion? If so, by whom, when, and what precisely was the Complainant told?

40. State under what circumstances the agency decided not to permit, as a reasonable accommodation, leave for the Complainant to obtain suitable living arrangements and after-care treatment following her hospitalization for alcohol and substance abuse.

41. State what efforts have been made during the past (fill in applicable years) years by the agency to accommodate appellant's alcoholism and substance abuse.

42. Does the agency have any height or weight requirements in effect for the position of (fill in appropriate position)? If so, please describe.

______________________ ______________________________________

Date Complainant's Representative (fill in)
Address and Phone Number (fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) _________, 20__, to the agency's representative, (fill in name) at (fill in address or fax number).

____
(Fill in name of person who served copy)

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
(Fill in name of field or district office)

NAME OF COMPLAINANT (fill in)	:	
	:	
Complainant,	:	
	:	**EEOC No.** (fill in)
vs.	:	**Case No.** (fill in)
	:	
AGENCY HEAD (fill in)	:	
TITLE (fill in)	:	
AGENCY NAME (fill in)	:	
	:	
Agency.	:	

COMPLAINANT'S REQUEST FOR ADMISSIONS

The Complainant, through his/her (choose one) designated representative, requests that the agency admit or deny the following requests for admission under the provisions of 29 C.F.R. 1614. You are required to respond to these requests for production of documents no later than fifteen (15) calendar days after receipt of these requests.

1. Of the (fill in number) employees, only (fill in number) were Black/female, etc.,at (fill in agency) in (fill in location).

2. There were only (fill in number) Black/female, etc. employees in GS positions above (fill in appropriate position grade) out of (fill in number) employees in GS positions above (fill in same position grade as above) at (fill in agency) in (fill in location).

3. There were no Black/women, etc., in supervisory positions from the year (fill in year) to (fill in year) at (fill in agency) in (fill in location).

4. Only (fill in number) minority employees received promotions in the twelve month period from (fill in appropriate date) to (fill in appropriate date) at (fill in agency) in (fill in location).

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

____________________ ______________________________
Date Complainant's Representative (fill in)
Address and Phone Number (fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) _________, 20__, to the agency's representative, (fill in name) at (fill in address or fax number).

____
(Fill in name of person who served copy)

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
(Fill in name of field or district office)

NAME OF COMPLAINANT (fill in)	:	
	:	
Complainant,	:	
	:	**EEOC No.** (fill in)
vs.	:	**Case No.** (fill in)
	:	
AGENCY HEAD (fill in)	:	
Title (fill in)	:	
AGENCY NAME (fill in)	:	
	:	
Agency.	:	

COMPLAINANT'S REQUESTS FOR PRODUCTION OF DOCUMENTS

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

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

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

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

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

4. All documents that the Agency intends to use at hearing including but not limited to documents intended to be introduced into evidence, used as rebuttal, or used to refresh the recollections of witnesses at the hearing.

5. All documents that the agency contends support the defenses it will assert or that relate to any claims alleged in this complaint.

6. All documents, speeches, articles or publications of the Agency, management employees or employees that refer or relate to discrimination and harassment based on (fill in relevant protected bases).

7. All manuals, handbooks, policies, procedures, notices, directive or handouts issued by the Agency or alleged discriminating official(s) pertaining to:
   - (fill in policies alleged to have been violated)
   - Falsification of an official agency document,
   - Maintaining records in confidence,
   - Responding to accommodation requests,
   - Medical documents,
   - Discrimination,
   - Harassment,
   - Telecommuting,
   - Disability, or
   - Pregnancy.

8. All notes, documents, memoranda, notes, letters or records of any kind pertaining to
   - Complainant's job performance during the relevant time,
   - Complainant's meeting or failure to meet deadlines during the relevant time,
   - Complainant's cancellation of meetings during the relevant time,
   - The client's opinion(s) of Complainant's work,
   - Negative and/or critical comments concerning the Complainant or Complainant's work during the relevant time, or
   - Favorable comments concerning the Complainant or Complainant's work during the relevant time.

9. All documents that support answers given in the interrogatories.

10. All documents relating to the Agency's efforts during the relevant time to prevent employment discrimination in the workplace and give reasonable accommodations.

11. All documents pertaining to meetings, discussions, encounters, and/or conversations during the relevant time period, whether in private or public, that the any agent or employee of the Agency had with Complainant, or alleged discriminating official(s) regarding complaint's work, work performance, disability, medical condition, performance evaluation, approved leave, or accommodations.

12. All documents used to support the performance appraisal at issue in this Complaint.

13. All written statements made by any individual or documents relevant to the allegations contained in the complaint.

14. Any and all writings or documents pertaining to the reduction in force instituted during the relevant time period.

15. Any and all writings or documents pertaining the selection of the individual for the position of (fill in applicable position) over the other applicants at the agency at (fill in appropriate location).

16. Any and all employment applications filed at the agency at (fill in appropriate location) from (fill in appropriate date) to the present.

17. Any and all employment application forms used at the agency at (fill in appropriate location) from _____ to the present.

18. Any and all manuals, guidelines, written memoranda pertaining to advertisement for, application, selection, and promotion for the position of (fill in appropriate position) at the agency.

19. Any and all confidential files kept on each person in the position of (fill in appropriate position) at the agency at (fill in appropriate location).

20. Any and all current agency regulations and orders, instructions, or other directives relating to the treatment and rehabilitation/accommodation of individuals employed by the agency afflicted with alcoholism.

21. Any and all manager's handbooks and guides issued by the agency containing guidance on employee discipline.

22. All other documents in the possession of the Agency that pertain to this complaint and that are not described above.

______________________ ____________________________________
Date Complainant's Representative (fill in)
Address and Phone Number (fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) _________, 20__, to the agency's representative, (fill in name) at (fill in address or fax number).

____
(Fill in name of person who served copy)

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
(Fill in name of field or district office)

NAME OF COMPLAINANT (fill in)	:	
	:	
Complainant,	:	
	:	**EEOC No.** (fill in)
vs.	:	**Case No.** (fill in)
	:	
AGENCY HEAD (fill in)	:	
Title (fill in)	:	
AGENCY NAME (fill in)	:	
	:	
Agency.	:	

COMPLAINANT'S MOTION TO COMPEL RESPONSE TO WRITTEN INTERROGATORIES

The Complainant, through his or her (pick one) designated representative moves that the EEOC Administrative Judge issue an order compelling the agency to respond to the Complainant's (fill in date the interrogatories were dated) Request for Interrogatories.

The Interrogatories (a copy of which is attached) were served on the agency on (fill in date). The agency has not filed a response or objections to them within the appropriate fifteen calendar day period/has objected to interrogatory numbers on the following bases:

(Fill in appropriate interrogatory numbers and agency's bases for objection).

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

The interrogatories are not repetitious of facts or documents already in the complaint file because (fill in explanation specific to the interrogatories).

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

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

______________________ ____________________________________
Date Complainant's Representative (fill in)

Address and Phone Number (fill in)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed/faxed this (fill in) day of (fill in) _________, 20__, to the agency's representative, (fill in name) at (fill in address or fax number).

____
(Fill in name of person who served copy)