THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

May 13, 2010

TO ALL EMPLOYEES

SUBJECT: Processing Equal Employment Opportunity Complaints Based on Sexual Orientation

As Secretary of the Department of Veterans Affairs (VA), I encourage a diverse workforce and will continue to strive to identify and eliminate unfair treatment through procedures and practices that are fair and free of discrimination and barriers for all employees and applicants for employment. To this end, effective immediately, the agency has changed its process for processing complaints of discrimination based on sexual orientation. VA strictly prohibits discrimination or harassment on this basis.

Executive Order (EO) 13087 was issued by former President Clinton on May 28, 1998. The EO prohibits discrimination based on sexual orientation in the competitive service of the Federal civilian workforce. The EO does not create any new enforcement rights, such as the right to proceed before the Equal Employment Opportunity Commission (EEOC). The EO emphasizes that a person's sexual orientation should not be the basis for the denial of employment or promotion, and further, it sets the stage for constructive measures by the Federal government to ensure the workplace is free from harassment and discrimination. In addition, VA prohibits discrimination and harassment on the basis of sexual orientation as expressly stated in my EEO, Diversity, and No FEAR Policy Statement memorandum issued on February 27, 2009.

Previously, VA's Office of Resolution Management processed complaints of discrimination based on sexual orientation through the informal counseling stage only. Effective immediately, complaints of discrimination filed based on sexual orientation that meet the appropriate requirements, will be processed through formal investigation as outlined in EEOC regulation 29 C.F.R. 1614. Attached is a list of the most frequently asked questions to help you better understand how complaints of discrimination filed based on sexual orientation will be processed.

It is my conviction that each employee has a moral and ethical obligation to eradicate discrimination in any form and foster a workplace that is free from discrimination.

Eric K. Shinseki

Attachment

THE DEPARTMENT OF VETERANS AFFAIRS

Procedures for Processing Complaints of Discrimination Based on Sexual Orientation
Frequently Asked Questions

1) How does the agency define sexual orientation?

Sexual orientation is generally defined as homosexuality, bisexuality, or heterosexuality, whether such orientation is actual or perceived, and includes association with another individual of a particular sexual orientation.

2) How do I file a complaint of discrimination based on sexual orientation?

You may contact the Office of Resolution Management's toll free number at 1-888-737-3361.

3) Are discrimination complaints filed based on sexual orientation processed the same as any other complaints of discrimination?

For the most part, complaints of discrimination filed based on sexual orientation will be processed according to the EEO complaint process outlined in EEOC regulation 29 C.F.R. 1614, up to and through the investigation stage of the EEO process. It should be noted that where sexual orientation is the only basis for filing the complaint, there will be no right to proceed before the EEOC, as sexual orientation is currently not a covered basis under Title VII of the Civil Rights Act of 1964.

4) What is the timeframe for filing an informal complaint?

You must contact an EEO counselor within 45 days from the alleged incident as with any discrimination complaint.

5) Will I have the opportunity to participate in Alternative Dispute Resolution (ADR) to resolve my complaint of discrimination based on sexual orientation?

Yes, you can request ADR at any time during the EEO complaint process.

6) What happens after the informal counseling process ends?

You will be issued a *Notice of Right to File a Formal Complaint of Discrimination*. If you wish to pursue the matter further, you must file the formal discrimination complaint within 15 days of receipt of the notice as with any discrimination complaint.

7) What happens after the formal complaint has been filed?

Your complaint will undergo a procedural review to determine if it meets the procedural requirements for investigation. The requirements are:

a) Does the complaint meet the required timeframes for filing a complaint?
b) Was the issue previously raised in a previous complaint?
c) Does the complaint state a claim?[1]
d) Was the complaint filed first in another forum with jurisdiction?
e) Were the issues in the complaint discussed with an EEO counselor?

8) What happens in the event my complaint contains an allegation based on sexual orientation and additional bases covered by EEOC regulations?

All allegations will be investigated concurrently. However, after the investigation, those allegations not based on sexual orientation will be processed in accordance with existing procedures outlined in 29 C.F.R. 1614. The VA's Office of Employment Discrimination Complaints Adjudication (OEDCA) will determine whether to proceed with a final decision regarding the sexual orientation allegation or defer action on the sexual orientation allegation until the 29 CFR 1614 procedures are exhausted.

9) When can I expect a Final Agency Decision to be issued on my claim that I have been discriminated against solely on the basis of sexual orientation?

OEDCA will issue a Final Agency Decision on the merits of your claim within 60 days of its receipt of your complaint file. There will be no right to appeal to EEOC since sexual orientation currently is not a prohibited basis under Title VII.

10) Will I be able to seek reconsideration from OEDCA if I am dissatisfied with their decision?

Yes, a request for reconsideration may be filed with OEDCA regarding a Final Agency Decision adjudicating a claim of sexual orientation discrimination, if one of the following factors exist:

A. There is newly discovered and material evidence, which by due diligence could not have been discovered, is established;

B. The OEDCA decision was based upon an erroneous interpretation of fact or law; or misapplication of the procedures set forth in this Policy; or

C. The decision will have a substantial impact on the policies, practices, or operations of the Agency.

Remedies and Relief

If discrimination is found, the remedies and relief available will be appropriate to the merits of the case. Compensatory damages may not be available to employees or applicants for employment for discrimination based solely on sexual orientation.

Employees may be awarded back pay and benefits computed pursuant to 5 U.S.C. § 5596 and attorney's fees, where an award of back pay and interest, is at issue. In all other situations, attorney's fees are not authorized.

Representation

Employees are entitled to a representative of their choosing. However, the representative cannot be an EEO counselor, EEO investigator, EEO manager, or anyone logically connected to the EEO complaint process.

Official Time

EEOC regulations provide that an employee shall have a reasonable amount of official time to present their complaint and to respond to the Agency's request for information, if he or she is in an on duty status. Employees who serve as representatives of complainants, if they are current employees of the Agency are also entitled to official time. The employee and the Agency should arrive at a mutual understanding as to the amount of official time to be used prior to use of such time.

Other Avenues of Redress

Other avenues of redress available to raise a claim of discrimination based on sexual orientation include the Negotiated and Administrative Grievance Procedures both of which permit claims of discrimination. Raising the matter with the Office of Special Counsel and/or the Merit Systems Protection Board may also be an option available to you.[2]

ADR is a process that can be used to address workplace issues related to sexual orientation before an EEO complaint process is initiated.

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[1] Examples are: Is the individual an applicant for employment, an employee, or a former employee? Does the complaint allege a personal harm or loss?

[2] It is important to note that choosing one of these forums will result in a waiver of your right to contact an EEO counselor within 45 days.