

Discrimination Complaint Processing Update

From the Deputy Assistant Secretary
for Resolution Management
Office of Resolution Management



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EEOC Promotes Faster Settlement of EEO Complaints

The U.S. Equal Employment Opportunity Commission (EEOC) released a new chapter to its Management Directive 110 setting forth the authority for settlement of federal sector discrimination disputes. The guidance contained in the chapter is intended to facilitate settlement of federal sector EEO cases at all stages of the complaint process.

"The Commission strongly supports the earliest possible settlement of EEO complaints in appropriate cases," said EEOC Chairwoman Ida L. Castro. "By spelling out the standards for settling such cases, this new chapter will enable federal agencies and employees to resolve disputes in a more efficient and expeditious manner." Chapter 12 on Settlement Authority states that agencies have broad authority to settle EEO disputes by applying the full range of remedies a court could order if the case were to go to trial. Moreover, agencies are authorized to enter into settlements of claims brought under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, and the Rehabilitation Act without a

finding of discrimination or an admission of wrongdoing. The guidance notes that agencies and their employees may be creative in crafting settlements. For instance, settlement of EEO complaints may contain monetary payments that are independent of any personnel action, providing that the payment does not exceed the amount of back pay, attorneys fees, costs or damages the employee would be entitled to in the case if discrimination has been found.

The new chapter also points out that settlement of EEO disputes may contain terms affecting the retirement status of the complainant. It explains that, in such cases, all appropriate contributions to the retirement funds must be made.

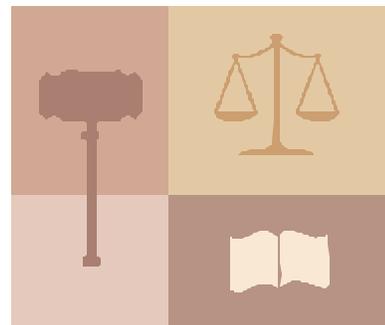
The EEOC worked closely with the Office of Personnel Management in developing the new Chapter 12 on Settlement Authority to ensure consistency in approach and guidance. "The issuance of this new chapter marks another step in the Commission's unwavering efforts to improve and streamline the federal sector EEO complaint process," added Chairwoman Castro. "It is apparent that it still takes too long to resolve EEO disputes, which has led to frustration and a lack of faith in the system by federal workers and their

representatives. The Commission is working hard to address the matter." Since becoming EEOC Chairwoman in October 1998, Ms. Castro has led an unprecedented effort to improve the federal government's EEO complaint process by increasing its fairness, effectiveness, and efficiency, while consulting broadly with agency stakeholders. Some of the important measures the EEOC has implemented under her leadership include the following:

- In July 1999, the EEOC announced the issuance of new 1614 regulations to streamline the EEO complaint process. The changes, which became effective November 9, 1999, advance the Administration's NPR goals of cutting red tape, removing unnecessary layers of review, and delegating decision-making to front-line employees.
- In August 1999, Chairwoman Castro announced a comprehensive enforcement initiative for the federal sector program. The initiative provides a strategic approach to federal sector reform by linking improved data analysis; prevention activities aimed at the root causes of discrimination, and a streamlined process for addressing EEO complaints.
- In September 1999, the EEOC announced a dynamic national training program on the revised 1614 regulations entitled "The New Federal EEO Complaint Process and You." The sold-out training seminars

were held at over a dozen locations nationwide.

- In October 1999, the EEOC and NPR launched a joint Interagency Task Force on the Federal Sector to examine how to enhance the federal EEO process and stimulate change that will prevent discrimination in the first instance. Members of the task force include representatives of the EEOC, NPR, Cabinet departments and agencies, stakeholder groups, federal employee unions, and other organizations. A preliminary status report is expected to be issued this fall. Ms. Ventris Gibson, Deputy Assistant Secretary for Resolution Management is the Department's representative to the taskforce.
- In March 2000, the EEOC announced a series of federal sector town hall meetings in major cities nationwide.



QUESTIONS AND ANSWERS ON SETTLEMENT AUTHORITY CONTAINED IN MANAGEMENT DIRECTIVE 110

Q: What gives federal agencies the legal authority to settle EEO disputes?

A: All of the statutes enforced by the EEOC -- Title VII (prohibiting employment discrimination on the basis of race, color, sex, national origin, or religion), the Rehabilitation Act (protecting federal employees with disabilities against discrimination), the Age Discrimination in Employment Act (protecting employees age 40 and over from discrimination) and the Equal Pay Act (guaranteeing equal pay to men and women performing substantially equal jobs) authorize agencies to enter into settlements of claims brought under the statutes.

Q: Must an agency admit that it unlawfully discriminated or took unjustified or unwarranted personnel action to settle an EEO dispute?

A: No. Agencies do not have to admit to wrongdoing in order to settle an EEO claim. Because the legal authority to settle these cases is found within the EEO laws themselves, the Back Pay Act requirement that there must be a finding of an unjustified or unwarranted personnel action to justify a payment of back pay in connection with other personnel claims doesn't apply.

Q: What types of settlements may parties to an EEO dispute agree to?

A: Agencies have significant flexibility in structuring settlement agreements. As long as the parties agree, they can settle for any relief that a court could order if the case were to go to trial. For example, an agency and an employee may agree to a retroactive or prospective personnel action, back pay, attorney's fees, costs, and/or monetary damages. Remedies can also include more creative measures such as the provision of out-placement services to a discharged employee, so long as the costs don't exceed what the employee would be entitled to under the EEO laws.

Q: Can agencies settle EEO cases for cash payments to the employee, but no corresponding personnel actions?

A: Yes. Settlements may involve monetary payments without any personnel action, provided that the monetary payment does not exceed the amount of back pay, attorney's fees, costs and/or damages the employee would be entitled to in the case if discrimination had been found. For example, if the parties agree, they could settle a case involving a claim of a discriminatorily denied promotion with a cash payment to the employee but no promotion.

Q: Could an agency settle a case for a retroactive personnel action but no, or only partial, back pay?

A: Yes, again. For example, an agency and employee might agree to a retroactive personnel action and a lump sum cash payment that does not specify

to what extent it includes back pay, damages, and/or attorneys' fees. The parties could also agree to a retroactive personnel action, such as a promotion, without any accompanying back pay or monetary payment. As long as the personnel action and the monetary payments do not exceed the employee's legal entitlements, such a settlement would be acceptable.

Q: Can settlements of EEO disputes contain terms affecting the retirement status of the complainant?

A: Yes. However, if a settlement provides for a retroactive personnel action, all appropriate contributions to the retirement funds must be made before that personnel action can have an effect on the employee's retirement pension or status. In addition, the rates of basic pay or grade and step deemed to be received by the complainant and the periods during which each rate of pay was received must be specified in the settlement terms.

Q: Did the EEOC consult with the Office of Personnel Management (OPM) in preparing the new chapter?

A: Yes. EEOC worked with OPM to ensure consistency in approach and guidance.

EEOC ISSUES GUIDANCE ON THRESHOLD ISSUES

EEOC released a new section of its Compliance Manual on "threshold" issues, the factors considered by the Commission in determining who can pursue a legal claim of employment discrimination.

"This new Compliance Manual section will be extremely helpful not only to agency staff, but also to employers, workers, and their representatives," said EEOC Chairwoman Ida L. Castro. "It contains a wealth of accessible information on a broad range of important questions regarding what claims can be brought under the anti-discrimination laws."

Charging parties alleging workplace discrimination must satisfy certain "threshold" requirements before the Commission can address a substantive bias claim. Such issues

include, for example, who can be bring a charge of discrimination, the time frame under which to file a charge, whom a charge can be brought against, and what is covered by the civil rights laws. The new section replaces former Section 605: Jurisdiction in the Compliance Manual. It also replaces nine other Commission policies.



VA AND EEOC PARTNERS ON COST PER EEO COMPLAINT

On May 22, 2000, EEOC approved VA's efforts to develop a cost per complaint model that identifies the

cost of EEO complaints in the administrative process, including EEOC hearings and appeals. The goals of the model are to assist VA and other Federal agencies in determining the impact of EEO complaints on resources, to identify trends, and to prioritize workplace dispute resolution strategies. Previous efforts to calculate processing costs resulted in estimates of \$40,000 to \$70,000 per complaint, but these estimates did not include all applicable indirect costs. The cost per complaint study expands the existing ORM estimate by identifying claims processing activities that both directly and indirectly support discrimination claims processing. The study will end in July 2000 with a model ORM and other Federal agencies may use.

EEOC ISSUES FINAL RULE ON MITIGATING MEASURES UNDER THE ADA

On June 8, 2000, EEOC issued a final rule rescinding parts of its Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) involving mitigating measures used by an individual to eliminate or reduce the effects of an impairment. A text of the final rule is scheduled for publication in today's Federal Register. "In keeping with our commitment to provide timely guidance to our stakeholders, this revised guidance clarifies the legal standard for determining when a person who uses mitigating measures meets the ADA's definition

of disability," said EEOC Chairwoman Ida L. Castro. "The Commission is rescinding portions of its Interpretive Guidance on the ADA to be consistent with Supreme Court rulings last term."

In 1999, the Supreme Court ruled in *Sutton v. United Airlines, Inc.*, and *Murphy v. United Parcel Service, Inc.*, that the determination of whether an individual has a current disability under the ADA must be made by considering any mitigating measures that a person uses to eliminate or reduce the effects of an impairment. Mitigating measures may include medication and assistive devices such as hearing aids, walkers, or canes. EEOC's final rule rescinds parts of its Interpretive Guidance sections 1630.2(h) and (j), which had stated that mitigating measures should not be considered in determining whether an individual has a disability. The rule was published without a Notice of Proposed Rulemaking and solicitation for public comment because it is not a significant regulatory action. The rest of the guidance remains in full effect. The next publication of the Code of Federal Regulations will incorporate the revision to the Interpretive Guidance.



RUNNING OUT OF TIME

The employee in this case had a real problem with getting to work on time. She admitted that she regularly arrived at work well after her starting time, even after repeated warnings from her supervisor that it was important that she be there at the beginning of the working day. She blamed her repeated tardiness on her family responsibilities, and promised to try to do better. But, when her attendance problems persisted, she was removed. She sued her employer under Title VII (EEO), claiming that she was discriminated against on the basis of national origin. The employer offered as its reason for removal the numerous instances of tardiness.

The court found no evidence to support the employee's claims that she had been the victim of discrimination. Indeed, noted the court, the employee herself admitted that she was habitually late for work, and could not produce any evidence that other employees were given more lenient treatment than she was. In fact, she acknowledged that two other employees, not of her national origin, had also been removed in the past for excessive absenteeism. *Gomez v. Pellicone, No. 96 CIV 06778.*

ORM WORKLOAD STATUS

In May 2000, ORM received 552 requests for EEO counseling with an average processing time in the counseling stage of 26 days, well within the 30 statutory requirement established by EEOC. ORM EEO

Counselors average 9 cases per counselor at any given time.

ORM's Intake Specialists produced 288 acceptability determinations, or procedural final agency decisions. Of these, 56 were dismissed in total, 173 accepted for investigation, and the remaining in requests for additional information. Nationwide, ORM averaged 75 days to process a final agency decision. ORM has 448 cases pending final decision.

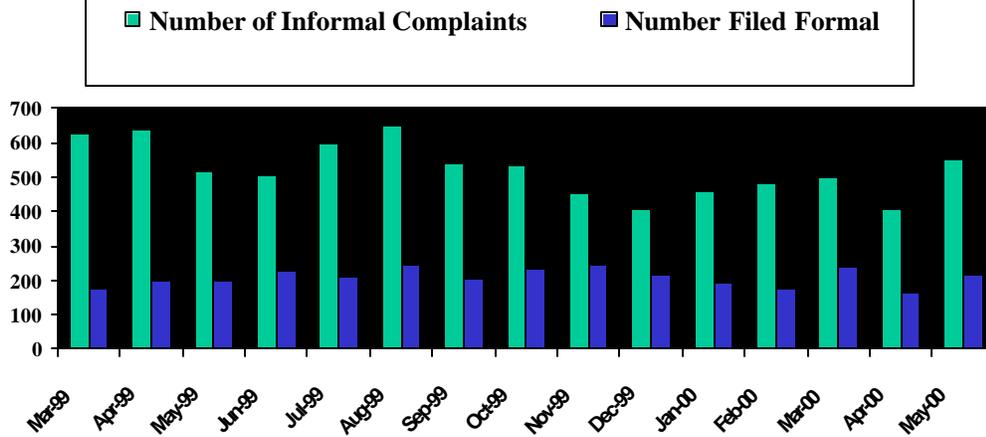
The Investigative stage contains the highest workload area for ORM. In May, investigators completed 340 investigations. Nearly 1240 are pending. The average processing time for investigations was 92 days. Where some ORM facilities are experiencing a greater time period to complete investigations, contract investigators and other ORM investigators assist.

Currently, there are 1331 cases pending EEOC hearing and 215 cases are pending final agency decision by OEDCA.

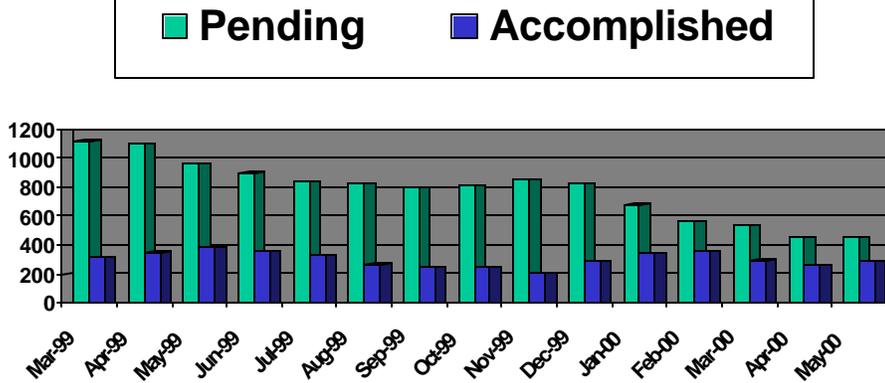
ORM's total formal complaint activity is 4,073 cases. Additionally, ORM has 48 EEOC enforcement actions pending, 12 cases pending breach of settlement determination, and 2 cases pending compensatory investigation.

We continuously strive for improving the process and its timeliness. The charts on the following pages depict ORM accomplishments from May 1999 to May 2000.

ORMs COUNSELING ACTIVITY WORKLOAD



ACCEPTABILITY DETERMINATIONS



INVESTIGATIONS

