



Discrimination Complaint Processing Update

From the Deputy Assistant Secretary
For Resolution Management
Office of Resolution Management
Department of Veterans Affairs

From the Deputy Assistant Secretary

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Cost Avoidance

How do you measure the cost to your organization in lost productivity and lower employee morale due to the issues leading to workplace complaints and other grievances?

In 1998 it was estimated that it cost between \$40,000 and \$70,000 to process an EEO complaint.

Even beyond those costs are the costs to employee morale and lost opportunities to improve the lines of communication between management and employees,

not to mention the cost to an agency's image due to high profile complaints.

With the implementation of the No FEAR Act (See page 3) effective October 1, 2003, agencies must reimburse the Judgment Fund for any monies paid out in judgments, awards, or compromise settlements to federal employees, former federal employees, and applicants for federal employment for Title VII and other discrimination claims. The Act also requires agencies to post statistical data on their Web sites detailing EEO complaint activity for the preceding year.

What can we do to avoid discrimination complaints and their accompanying costs? How can we address them expeditiously, at lower cost and improve employee morale? One way is to use early resolution techniques, such as education, training and mediation to address the causes of complaints and to resolve them earlier and at a lower cost. This requires a commitment on the part of management and employees to

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address the issues leading to complaints, openly and frankly, and to seek ways to resolve these issues when they arise rather than relying on the formal EEO complaint process to be the final arbiter of the outcome. The pay-off in using these techniques is “fewer complaints” and “lower costs,” with the involved parties finding mutually satisfactory resolution between themselves, without the involvement of outside parties. Another pay-off is improved morale and communication between managers and employees.

Eliminating the causes of complaints will result in fewer complaints. Early resolution of complaints can lead to increased productivity with improved employee and customer satisfaction as the result. This is a “win-win” situation for everyone and is an achievable goal with everyone’s commitment to the creation of an employer of choice environment in VA where everyone is treated fairly and equally. These steps add up to improved service to our most valued customer: *Veterans*.

Back to the figures – if the total cost for counseling, procedural decisions and investigations is averaging between \$40,000 and \$70,000 per complaint, how much more cost effective would it be to encourage resolution during the informal stage of the complaint process?

Focusing on early resolution through strategies such as mediation will help restore employee confidence, improve employee morale, and open lines of communication between management and employees. How much is this worth? The opportunities and means are available to address these issues effectively and at a lower cost to everyone involved. Eliminating the causes of complaints and focusing on early resolution are the answer to cost avoidance when it comes to addressing EEO complaints and other grievances.

James S. Jones

Program Highlights

Implementation of the No FEAR Act

By Alison Mangels, Office of the COO

President Bush signed the Notification and Federal Employee Anti-discrimination and Retaliation (No FEAR) Act into law on May 15, 2002. Its purpose is to hold Federal agencies more accountable for employment discrimination, retaliation, and whistleblower protection. The Act is effective October 1, 2003.

Title II of the Act requires Federal agencies to reimburse the Judgment Fund for any monies paid out in judgments, awards, or compromise settlements to federal employees, former federal employees, and applicants for federal employment for any of the following claims: Title VII, Age Discrimination in Employment Act (ADEA), Rehabilitation Act, Fair Labor Standards Act, Whistleblower Act, and prohibitions of discrimination based on marital status or political affiliation, and anything covered by Merit System Protection Board (MSPB). This reimbursement applies only to those cases that go to U.S. District Court. Federal Agencies are already responsible for paying for settlements or final agency decisions made during the administrative EEO process.

Title II also requires written notification of the rights and protections afforded by the Act be made available to employees, former employees and applicants for employment. A posting on the Internet site of the Federal agency may satisfy this requirement. Each Federal Agency must also provide employees training regarding the rights and remedies applicable under the No FEAR Act.

There are two reporting requirements in the Act. The first is outlined in Title II and is related to those cases that are filed in U.S. District Court. The Office of Personnel Management (OPM) has jurisdiction for the implementation of Title II and is preparing guidance, which will be issued in stages. The first stage of the guidance, which will be released in early October 2003, lays out the reimbursement procedures that agencies must follow when they tap the Treasury fund to pay legal bills in bias and whistle-blower cases.

Title III of the Act has the biggest impact on ORM because it requires agencies to post certain statistical information on their public websites concerning complaints of employment discrimination filed with them under 29 C.F.R 1614. On August 5, 2003, the Equal Employment Opportunity Commission (EEOC) issued an interim final rule which tells Federal

agencies what information to post, how to post it, and when to post it. The following information must be posted:

- ❑ Number of complaints filed.
- ❑ Number of individuals who filed.
- ❑ Bases raised in complaints.
- ❑ Issues raised in complaints.
- ❑ Processing time for each stage of the process.
- ❑ Findings of discrimination sorted by basis and whether there was a hearing.
- ❑ Findings of discrimination sorted by issue and whether there was a hearing.
- ❑ Number of pending complaints that were filed in prior fiscal years.

When posting data for a current fiscal year, the Act requires the posting on a year to date basis, updated quarterly. When posting data for prior years, the Act requires the posting on a fiscal year basis. The first posting of data is required by January 31, 2003. The first posting will include fiscal year to date data, in addition to the year-end data for the five immediately preceding fiscal years.

It is important that accurate, current, and complete complaint data is entered into the Web Based Tracking System (WBTS) to ensure the accuracy of the information ORM will provide in response to the reporting requirements of the No Fear Act.

ORM will meet with the Office of General Counsel (OGC), Office of Human Resources Management (OHRM), Office of Employment Discrimination Complaint Adjudication (OEDCA), Veterans Health Administration (VHA), Veterans Benefits Administration (VBA), National Cemetery Administration (NCA), and Inspector General (IG) in late September to discuss VA compliance with the requirements of the Act.

Look for future articles on this subject as more information becomes available in the coming months. ■

EEOC to Score Agencies' Efforts to Promote Diversity



A September 1, 2003, article “EEOC to Score Agencies’ Efforts to Promote Diversity” in Federal Times describes how the Equal Employment Opportunity Commission (EEOC) will now score agencies on their progress in hiring a diverse work force. Agencies will now compile work-force demographics annually, beginning next year, and pinpoint where disparities exist in comparison to the national labor force. These new measures, outlined in EEOC’s policy guidance *Management Directive 715*, are effective October 1, 2003.

This directive, discussed at the recent EEOC EXCEL conference in Atlantic City, focuses on giving agencies the tools they need to identify and overcome barriers to a discrimination-free workplace. EEOC will provide instructions on how to comply with the new directive by the end of December 2003.

The article states that agencies will be rated on their progress in developing a model work force based on six activities outlined in the directive. Agencies will have to pay closer attention to discrimination and diversity at the top of their organization, hold managers and supervisors accountable for results, and improve the collection of data to measure their progress.

EEOC will issue a scorecard each year as part of its annual report on the federal work force. Agencies will be assessed on:

- ❑ Written commitment to equal opportunity for employees and job applicants by agency heads and other senior management officials.
- ❑ Integrating EEO into the agency’ strategic mission.
- ❑ Holding managers, supervisors, EEO officials, and personnel officers accountable for results. Agencies must evaluate managers and supervisors on their efforts to ensure equality, maintain clearly defined and consistently applied personnel policies, and review each finding of discrimination to determine disciplinary actions.
- ❑ Proactively preventing discrimination by eliminating barriers to open competition for jobs.
- ❑ Maintaining an efficient and fair process for resolving complaints and disputes, and evaluating the impact and effectiveness of EEO programs.

- ❑ **Appointing a dispute resolution specialist to promote alternative dispute resolution (ADR) programs.**
- ❑ **Having systems that collect and maintain demographic data on employees and applicants and track the progress of employee complaints through the process.**
- ❑ **Compliance with federal laws, EEOC regulations and reporting requirements, and final orders for corrective action and relief in EEO matters.**

Agencies will also have to complete a self-assessment using demographic data to compare their numbers to comparable statistics from the national work force. If the comparisons reveal disparities, agencies must review their policies and procedures to determine whether barriers to employment exist that could be removed. Agencies will be required to take steps to correct disparities in employment that are identified through this process.

EEOC's objective, by requiring agencies to review their hiring efforts regularly and take steps to remove impediments to a diverse work force, is to help reduce the number of discrimination complaints filed each year. Cari Dominguez, Chair, EEOC, is quoted, in the closing of the article, as saying " The easiest and best way to combat discrimination is to stop it from occurring in the first place."

Additional information on *Management Directive 715* is available at EEOC's Web site <http://www.eeoc.gov> and you can view the complete directive at <http://www.eeoc.gov/federal/eeomd715.html>. ■

State Department Invites ORM to Discuss VA's EEO Program

Staff from the Office of Resolution Management, at the invitation of the Department of State's Assistant Secretary for Civil Rights, visited the State Department on July 30, 2003, to discuss VA's Equal Employment Opportunity (EEO) complaint process. A recent Equal Employment Opportunity Commission (EEOC) press release highlighting VA as one of six agencies EEOC Chair Cari Dominguez commended for reducing processing times precipitated the invitation. The Department of State's Civil Rights Office wanted to learn how VA successfully reduced its timeframes in certain areas.

The Civil Rights staff has requested that additional meetings be held. ORM looks forward to partnering with the Department of State to share best practices in the discrimination complaint-processing arena. ■

Reasonable Accommodation

The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 requires federal agencies to provide reasonable accommodation to qualified employees or applicants with disabilities, unless to do so would cause undue hardship.

Executive Order 13164, *Establishing Procedures to Facilitate the Provision of Reasonable Accommodation*, was signed on July 26, 2000. The Order helps to implement the requirement of the Rehabilitation Act of 1973 that agencies provide reasonable accommodation to qualified employees and applicants with disabilities. It is an important part of the government's national policy to create additional employment opportunities for people with disabilities.

An "individual" with a disability is a person who:

- ❑ Has a physical or mental impairment or condition that substantially limits one or more major life activities; or
- ❑ Has a record of having such an impairment; or
- ❑ The employer treats as if he or she has such an impairment.

What is an accommodation?

An accommodation is a change involving the workplace that enable a person with a disability to enjoy equal employment opportunities. Many individuals with disabilities can apply for and perform jobs without the need for an accommodation. However, where workplace barriers exist, such as physical obstacles or rules about how a job is to be performed, reasonable accommodation serves two fundamental purposes. First, reasonable accommodations remove barriers that prevent people with disabilities from applying for, or performing, jobs for which they are qualified. Second, reasonable accommodations enable agencies to expand the pool of qualified workers, thus allowing the agencies to benefit from the talents of people who might otherwise be arbitrarily barred from employment.

VA Directive 5975.1, *Processing Requests for Reasonable Accommodation by Employees and Applicants with Disabilities*, dated May 30, 2002, details VA's policy on providing reasonable accommodations to qualified employees or applicants for employment with disabilities.

Reasonable Accommodation is defined as:

An adjustment to job duties or to the work environment that assists a qualified individual with a disability in performing the essential duties of his or her position; or a modification of or adjustment to the job application

process that enables a qualified applicant with a disability to be considered for the position sought. Reasonable accommodation may include, but are not limited to:

- (1) Making facilities readily accessible to, and usable by, individuals with disabilities;
- (2) Job restructuring;
- (3) Allowing a part-time or modified work schedule;
- (4) Obtaining or modifying equipment or devices;
- (5) Appropriately adjusting or modifying examinations and training materials;
- (6) Providing readers, interpreters, and other auxiliary aids;
- (7) Ensuring that all contracts for the use of external facilities reflect the obligation that such facilities are accessible to qualified individuals with disabilities; and
- (8) Reassignment to another position.

Essential Functions

The essential functions of a job are those job duties that are so fundamental to the position that the individual cannot do the job without being able to perform them. A function can be “essential” if, among other things, the position exists specifically to perform that function, there are a limited number of other employees who could perform the function if it were assigned to them, or the function is specialized and the incumbent is hired based on his/her ability to perform it.

Undue Hardship

Agencies do not have to provide reasonable accommodations that would impose an undue hardship on the operation of the agency. An undue hardship means that a specific accommodation would require significant difficulty or expense. This determination, which must be made on a case-by-case basis, considers factors such as the nature and cost of accommodation on the operations of the agency.

Informal Dispute Resolution and EEO Complaints

Executive Order 13164 requires each agency to “Encourage the use of informal dispute resolution processes to allow individuals with disabilities to obtain prompt reconsideration of denials of reasonable accommodation. Agencies must also inform individuals with disabilities that they have the right to file complaints in the Equal Employment Opportunity process and other statutory processes, as appropriate, if their requests for reasonable accommodation are denied.” ■



Case Law:

The Digest of Equal
Employment Opportunity Law
Summer Quarter 2003

Disability Law-Reasonable Accommodation and Undue Hardship

Agency Fails to Meet Burden of Showing Undue Hardship in Denying Reasonable Accommodation. In this case, the Commission found that the agency had failed to meet its burden of showing undue hardship when it denied complainant the reasonable accommodation he had requested (needing to work in another area during the cleaning of machinery, which created a great deal of dust) for his disability (asthma), resulting in his being unemployed for two years. An arbitrator sustained complainant's grievance and ordered complainant's immediate reinstatement and make-whole relief. An AJ found, and the Commission agreed, that the sole reason complainant was placed off the clock and kept in off duty status for nearly two years, was because he did not submit forms specifically stating that he was requesting a permanent light duty position within the time frame ordered by agency officials. This, the Commission stated, did not absolve the agency of its duty to provide reasonable accommodation under the Rehabilitation Act. As part of the relief awarded, the Commission directed the agency to retroactively reinstate complainant with modifications consistent with his medical restrictions, provide back pay with interest, and consider compensatory damages. *Lawler v. United States Postal Service*, EEOC Appeal No. 01A01535 (March 27, 2003).

ADR Awareness/Introduction to ADR Training Slides



Want to know more about Alternative Dispute Resolution (ADR)? VA's Office of Alternate Dispute Resolution (ADR) and Mediation, as part of its ADR training initiative, offers a slide presentation entitled *ADR Awareness/Introduction to ADR Training Slides* on its Web site www.va.gov/adr. Click on "ADR Training" to view this slide presentation that provides a step-by-step overview of the mediation process. This presentation is recommended to anyone interested in the mediation process and how it works. ■

ORM Bay Pines Field Office Conducts Mediation Training in Puerto Rico

The Bay Pines Field Office and our Learning Resources Division recently conducted Mediation Training in Puerto Rico. This training was part of ORM's efforts in helping VA facilities and other government agencies establish a Shared Neutrals Mediation Program in Puerto Rico. Attendees included employees from the VA Medical Center, Regional Office, and National Cemetery in Puerto Rico. Other attendees included employees of the Federal Emergency Management Authority, U.S. District Attorneys Office, Fort Buchanan Military Base, U.S. District Court, U.S. Customs Service, and the Office of Personal Management (OPM). ■

Benefits of ADR

- Less Costly than Formal Processing
- Faster
- Useful for all Disputes
- Convenient
- Confidential
- Less Formal
- Focuses on Issues not People
- Risk Free
- Facilitates Healing
- Gets to Root Causes
- Clarifies Interest
- Builds Basis for Future Relationships
- Ensures all Parties are Heard
- Encourages Communication
- Non-Adversarial
- Disputants Maintain Control

Win, Win - Everybody Wins

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The Office of the Deputy Assistant Secretary for Resolution Management publishes *Discrimination Complaint Processing Update* quarterly. Please contact Terry Washington or Tyrone Eddins, External Affairs Program, by e-mail or by calling (202) 501-2800 concerning the contents of this newsletter. Additional information on ORM services and programs is available on our Web site at <http://vaww.va.gov/orm> (Intranet) or <http://www.va.gov/orm> (Internet).