

2003 Federal EEO Handbook



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EEO Myths and Realities

The federal government's Equal Employment Opportunity (EEO) complaint process is a frequent source of confusion, misperception, and mystery for Federal employees. This handbook will outline and dispel some of the prevalent myths about the EEO process and provide insights into the realities and possible outcomes of that process. In addition, this handbook will outline the EEO complaint process from start to finish. Finally, we will discuss the pros and cons of filing an EEO complaint versus the various other types of complaints federal employees can file to seek resolutions to workplace disputes.

There are many myths surrounding the federal EEO process. This chapter covers the most common ones, along with the “realities” about the process.

1. You can file an EEO complaint about anything, even if it does not involve discrimination.

Many federal employees and their representatives mistakenly believe that they can file an EEO complaint over any workplace disagreement, regardless of whether the cause for the disagreement is unlawful employment discrimination. The reality is that EEO complaints can only be filed over workplace disagreements with agency management that relate to a term or condition of employment where the disagreement is caused by management's intentional discrimination against the employee because of his or her race, color, sex, religion, national origin, age, disability, and/or prior EEO activity (otherwise known as reprisal or retaliation). An employee can also complain that an otherwise neutral agency policy has a disparate impact on him or her because of race, sex, national origin, or religion. To date, the federal courts, which, along with the U.S. Equal Employment Opportunity Commission (EEOC), have jurisdiction to adjudicate employment discrimination complaints against federal agencies, have not definitively decided whether those so called “disparate impact” cases can be successful when the basis for the complaint is age or disability discrimination.

In addition to requiring proof that the employer's actions against the employee were motivated by discrimination or reprisal, or otherwise had a disparate impact on the employee because of his or her membership in a protected group, employees must also show that the allegedly discriminatory practice by management was an actionable tangible adverse employment decision that affects a term or condition of employment.

For example, hiring, termination, and promotions (or other decisions impacting pay) are generally thought to be ultimate or tangible employment actions that impact terms or conditions of employment. On the other hand, performance appraisals and reassignments that do not impact pay may not constitute actionable employment decisions over which an employee can file a successful EEO complaint. Generally, the EEOC, which is the executive branch administrative agency charged with deciding administrative EEO complaints in the federal government, takes a

more expansive view of what constitutes an actionable employment decision than do many of the federal courts in which EEO complaints by federal employees may alternatively be filed. Therefore, depending on the circumstances of a given complaint, the forum in which an employee chooses to litigate his or her EEO complaint, i.e., a federal court or the EEOC, may currently result in a different outcome, depending on the type of employment decision over which the complaint is filed.

Regardless of the nature of the employment decision over which an EEO complaint can be filed, in order to be successful, the complaint must allege that the employment action at issue was motivated by discrimination against the complaining party based upon their race, color, sex, national origin, religion, age, disability, and/or prior EEO activity. Therefore, the myth that an employee can prevail on an EEO complaint over any negative personnel action that impacts them is not true. Moreover, if an employee files an EEO complaint about some management action that is not motivated by discrimination, that complaint may foreclose them from filing a complaint over the same personnel action under another complaint processing mechanism, such as a grievance. Thus, understanding the reality that EEO complaints can only successfully be filed over claims of unlawful employment discrimination regarding tangible employment actions is crucial to successfully processing and resolving such a complaint.

2. Only minorities, women, and lower level employees can file EEO complaints.

Contrary to this myth among some white males and higher-graded employees, the EEO laws are there to protect against unlawful employment discrimination on any legally recognized basis. Therefore, non-minorities may have a cause of action in certain circumstances to the same extent as their female and minority colleagues. Also, the EEO complaint process is available for any employee who feels discriminated against, regardless of grade level, although it is true that the stakes may be higher as an individual's grade level goes up.

As previously stated, the various EEO laws protect against unlawful employment discrimination on the basis of a person's race, color, sex, national origin, religion, age, disability, and/or prior EEO activity. Thus, for example, a white male, born in the United States, and of any religion, may have a valid EEO complaint if he feels that he has been treated less favorably by his employer than similarly situated non-whites, females, or those of a different national origin or religion because of his membership in one or more of those recognized EEO classifications. It should be noted, however, that the protection of the Age Discrimination in Employment Act, which prohibits unlawful age discrimination, does not begin until a person has reached the age of 40. Likewise, to gain protection under the Rehabilitation Act and the Americans with Disabilities Act, one must either be disabled or perceived to be disabled by one's employer and must be the victim of an adverse personnel action because of a disabled status in order to have a claim other than one seeking reasonable accommodation for a disability. Under those theories, non-minorities have successfully pursued EEO complaints over the years.

As for higher-graded employees, as explained above, they too have the same EEO rights and protections as all other federal employees. However, allegations of discrimination may more easily lead to retaliation against such a complainant by agency management. This retaliation can be especially damaging to the career potential of higher-graded employees, particularly when their underlying claims of discrimination are not well supported by facts. Also, retaliation against higher-graded employees may be subtle and difficult to prove even though it is certainly illegal. Therefore, the decision to file an EEO complaint should be arrived at only after a reasonable investigation of the facts and a realistic assessment of how such a complaint could impact an employee's career potential within their employing agency. Consultation with a qualified attorney may be a smart decision before one initiates any EEO complaint.

3. Once an employee files an EEO complaint, he or she can do anything and management won't be able to take any action, even if the employee has conduct or performance problems.

Unfortunately, some employees believe the myth that filing an EEO complaint will insulate them from future adverse employment actions by their employer because management may fear that such future actions could be viewed as retaliation against the employee due to his or her prior EEO activity. Although that strategy may work in some agencies or with particular supervisors, the reality is that an agency may still properly discipline an employee for proven misconduct or performance problems, regardless of whether that employee has previously filed EEO complaints, as long as the discipline was not taken because of that prior EEO activity or caused by discriminatory intent on management's part. In fact, even if a complaining employee can prove that discrimination or EEO reprisal partially motivated a given adverse employment action taken against him or her, if the Agency can still prove by clear and convincing evidence that it would have taken the same discipline against the employee due to his or her actual misconduct in the absence of discrimination or reprisal, that discipline will be upheld even though it was partially motivated by discrimination or reprisal.

The reality is that, even after they file EEO complaints, complaining employees still have the same performance and conduct obligations to their agency defendant as any other employee of the agency. For example, a complainant cannot expect to become a professional complaint filer, not do any work, and expect not to be legitimately disciplined. Likewise, an EEO complaint does not exempt a complainant from employer work conduct rules. A problem employee can still be appropriately dealt with and a manager shouldn't be afraid to do that, so long as the proper safeguards are in place. For example, a manager faced with a problem employee who has filed an EEO complaint against him or her, should ensure that any future disciplinary or other adverse employment action taken against that complainant is based upon adequate documentation. Likewise, the manager should obtain advice from Employee Relations and the agency's General Counsel before taking actions adverse to a complaining employee. Notwithstanding, a manager should not intentionally treat a complaining employee worse or differently than other employees who have not filed an EEO complaint. Although that concept may be difficult for a manager to deal with emotionally, especially when faced with a "frequent filer," it is the law. Managers who unlawfully discriminate or retaliate against their employees may themselves face discipline from

their employer. Moreover, unlawful discrimination and reprisal is bad management because, not only is it unlawful, but it erodes the confidence that subordinates place in their managers, destroys the workplace environment, and harms the successful accomplishment of the agency's mission.

4. Management acts in concert to discriminate against employees and will protect a manager against whom a complaint is filed.

Although employees may believe that their agency's managers act in concert to discriminate against employees and will protect a fellow manager against whom an EEO complaint is filed, the reality is that such "conspiracies" are very hard to prove and may not be as likely to occur as some employees think. As stated above, managers may be subject to discipline up to and including termination for violating EEO laws. Also, although it may not be public knowledge to employees, agencies do discipline managers found to have engaged in, or conspired to protect other managers who have engaged in, discrimination or unlawful reprisal. If you think your agency will not impartially consider whether a manager should be disciplined for unlawful discrimination, you should consider contacting the Office of Special Counsel, an independent federal agency that has the authority to seek to have agency managers disciplined for violations of the merit system principles, including those principles against prohibited personnel practices like unlawful discrimination.

Also, in certain circumstances, federal agencies can be held responsible for their managers' discriminatory harassment of employees if the agency fails to adequately prevent or promptly stop such harassment. Hence, in those circumstances, managers actually have an incentive not to act in concert to discriminate or otherwise to protect a fellow manager against whom a complaint is filed.

Notwithstanding, as discussed above and in more detail below, retaliation against employees who file EEO complaints is not uncommon in the federal government. A large number of the complaints received each year by the EEOC allege retaliation as the basis for the complaint. EEO retaliation can be devastating to an employee and his or her organization. Given that, one should always factor possible reprisal into the equation when considering whether to file an EEO complaint. With that said, EEO reprisal may be easier to prove and result in a larger award of monetary damages for pain and suffering than the underlying discrimination that led to the first complaint by an employee that caused the reprisal.

5. Every complainant who files an EEO complaint gets \$300,000 in damages.

Under the Civil Rights Act (CRA) of 1991, federal employees who file successful EEO complaints are entitled to an award of compensatory damages in a proven amount not to exceed \$300,000. Since the passage of the 1991 CRA, some employees have succumbed to the myth that every complainant who files an EEO complaint gets \$300,000 in damages. The reality, however, could not be more opposite than that myth. In fact, most filed EEO complaints are unsuccessful

or fail to result in significant damages awards. Since 1991, the EEOC has awarded \$300,000 to very few federal sector EEO complainants. It is true that the amounts awarded by the EEOC have risen over time. Discrimination cases involving allegations with clear merit and severe damages to the complainant often settle for confidential amounts of money, it is rare that a federal agency would agree to pay an individual complainant \$300,000 to settle a claim because that is the worst case scenario for an agency assuming the complainant successfully litigates the case all the way to a final EEOC or appellate court decision, which could be years away and is unlikely to occur.

The reality is that damages have to be proven in a successful discrimination case and it is hard to get a six-figure award. If you do not prove the underlying discrimination or reprisal, you do not receive any compensatory damages. It should also be remembered that the dollar value of a compensatory damages award is supposed to reflect payment in an amount equal to the amount of pain and suffering and other harm actually proven by the employee to have been caused by the government's discrimination. Punitive damages (monetary awards aimed at punishing a defendant found to have engaged in unlawful discrimination) are not awardable against the federal government. Thus, the "win the lottery" mentality applicable to a certain extent in the private sector does not apply to EEO complaints against the federal government.

Finally, although it is true to some extent that juries in court discrimination cases tend to award higher damages amounts to successful plaintiffs than does the EEOC, it is also true that most discrimination cases filed in federal court never get to the jury because they are dismissed or summarily decided by the judge in favor of the employer before the case is submitted to the jury. Also, successful jury verdicts can be reduced by the judge and are subject to be reversed by an appellate court. Hence, the vast majority of EEO complaints do not result in the complainant being awarded \$300,000 in damages.

6. It is weak to make a settlement offer or participate in mediation.

Another myth to which some EEO complainants and their representatives subscribe is that it is weak to make a settlement offer or participate in an alternative dispute resolution (ADR) process, such as mediation. The reality is that EEO complaints can take upwards of five to six years to fully litigate to completion and can cost complainants large amounts in attorneys fees to prosecute. Meanwhile, the complainant is either still working for the agency in the same difficult environment that caused the complaint to be filed in the first place or may be unemployed altogether, depending on the nature of the case. Furthermore, it is always the complainant's burden to prove the alleged discrimination in any case, which is not an easy thing to do especially given the fact that few EEO cases involve direct or "smoking gun" evidence of discrimination and it is likely that the alleged discriminating official will not admit that he or she acted with an intent to discriminate against the complainant.

Most EEO complaints must be proven through circumstantial evidence and all that is required of the agency is that it articulates one or more legitimate nondiscriminatory reasons for its actions

toward the complainant. Coupled with the sheer volume of EEO complaints in the EEOC and court systems and the perceived hostility toward such claims by certain federal judges, it makes perfect sense for an employee to engage in settlement negotiations and ADR early and throughout the case.

When considering whether to engage in settlement negotiations or ADR, one should keep in mind that it is best for all parties if a case can resolve itself early. Also, when engaging in settlement negotiations or ADR, a complainant can always reject a settlement position taken by the agency and there is no requirement to actually reach a settlement in any case. Also, ADR is built into the administrative EEO process and is sometimes required in federal court. Hence, there is no stigma in asking for ADR or participating in it. Given the inherent risks of any EEO complaint for the complainant, a settlement wherein he or she gets some of the relief sought in the complaint is often better than risking everything on the outcome of a trial or EEOC proceeding. Also, settlement often helps the parties repair their employment relationship, which may have become damaged. The bottom line is that settlement negotiations and ADR are well worth the time and effort that should be devoted to them if you are an employee who has filed an EEO complaint.

7. Agencies always settle EEO complaints.

Many a complainant has asserted that their agency always settles EEO complaints, so it will settle their complaint if it is filed. The reality is that, although some agencies have the reputation for always settling EEO cases, that reputation is not necessarily deserved or true. Complainants should never count on a case settling and should go into a complaint expecting to have to litigate it all the way and win to obtain the relief they seek. If a complainant is not prepared to litigate it all the way or cannot see how he or she will be able to prove discrimination, they should generally not file the complaint in the first place. As previously stated, complainants should usually attempt to settle their cases during the process, but they should be prepared to litigate should the agency not settle on terms acceptable to them. Remember too that the risks of an EEO complaint, including the length of time it takes to litigate the complaint (it can be a long haul) and the burden of proving discrimination, always fall disproportionately on the side of the complainant. Agencies realize that and may be less likely to settle an EEO complaint because of that reality than they would to settle a case where the burden of proof rests with the agency.

8. It is emotionally easy to make the decision to file and pursue an EEO complaint.

Nothing is easy about the EEO process, emotionally or otherwise. One of the hardest things a person can decide to do is file an EEO complaint against his/her employer. This is especially true if the complainant is a manager.

As citizens of the United States, we all want to believe that our government officials would not engage in unlawful employment discrimination. Also, federal employees are schooled in the notion that employment decisions in the federal government are supposed to be based upon merit

principles not, for example, on the color of a person's skin or his or her gender. Knowing also, however unfortunately, that reprisal often results from alleging discrimination, federal employees as a whole are understandably reluctant to file EEO complaints. Thus, agencies should not be so quick to allege that an employee's choice to file an EEO complaint was an easy one. In most cases it was not.

9. Managers do not care if an EEO complaint is filed against them by a subordinate.

It is generally a myth to say that federal managers do not care if an EEO complaint is filed against them by a subordinate. Some federal managers care a great deal about such complaints. Just as it is difficult for an employee to decide to file an EEO complaint, it is disconcerting on a personal level to most managers against whom an EEO complaint is filed to think that the complainant believes the manager discriminated against the complainant. Most federal managers are conscientious and are federal managers because they want to be in public service and ensure that federal laws are enforced not broken. Most managers also believe that they manage their subordinates fairly, based on merit principles. To face an allegation that one has violated federal law by discriminating against someone based upon, for example, their race, gender, or disability can be a sobering and emotionally difficult experience for any manager.

Notwithstanding a manager's personal reaction to an allegation that they have engaged in unlawful discrimination, the various EEO laws and 5 U.S.C. § 2302(b) make retaliating against the subordinate who complained equally unlawful. The effect of an EEO complaint and the application of the anti-retaliation provisions of the law create a very awkward situation for the accused manager. They have an obligation to manage the complainant unemotionally, as if no complaint had been filed, all the while knowing full well that a complaint has been filed. Hence the inherent difficulty of being a manager.

10. There is no such thing as reprisal for filing an EEO complaint.

Unfortunately, as described above, the notion that there is no such thing as reprisal for filing an EEO complaint is also a myth. Reprisal is as true a reality in the federal government as it is in many other employer environments. As discussed above, it is difficult for a manager alleged to have engaged in discrimination not to have an emotional reaction to such an allegation, regardless of its merit. Despite the prohibitions in the law against reprisal, some managers just cannot resist the emotional reaction to use their inherent power to harm subordinates who complain about them. (Remember, such a complaint can do significant harm to a manager's career). Nevertheless, it should be clearly understood that any such reprisal is equally unlawful and potentially career ending for the manager involved.

To avoid the appearance of reprisal, federal managers and supervisors should make sure that they handle personnel matters related to the complaining subordinate in the same way they handle such matters with similarly situated employees who have not filed complaints. Accused managers should not unreasonably increase, decrease, or otherwise change the terms, conditions, or duties of the complaining employee's job. Finally, accused managers should consult with human relations and their own supervisors as to how to properly manage the complaining employee.

The Complaint Process

If you are a federal employee and you feel that you have been discriminated against related to a term or condition of your federal employment because of your race, color, national origin, religion, age, disability, and/or prior EEO activity, the EEOC's regulations at 29 C.F.R. Part 1614, which apply to all federal agencies, provide the process and deadlines by which your complaint must be handled. You can find those regulations and the management directives that implement them on the EEOC's webpage at www.eeoc.gov.

Basically, the EEOC's regulations require that you initiate an informal complaint by contacting an EEO counselor at your agency within 45 days of when you knew or should have known that you were being discriminated against. Thereafter, EEO counseling is set to last for 30 days or up to 90 days if you elect, as you usually should, to seek ADR in the informal process. Once counseling is over, the counselor will give you a written notice of the right to file a formal EEO complaint in writing. You have 15 calendar days to then file your written formal complaint with the agency.

If the complaint is accepted by the agency for processing, an investigator will be assigned to interview you and the other relevant witnesses in the case, and to gather documents from you and the agency. The agency's investigation is to be finished within 180 calendar days from the date on which your formal complaint was filed. If you amend the complaint during the investigation, the Agency has 180 days from the last amendment or 360 days from the filing of the first complaint to finish the investigation.

When the investigation is over you will receive a report of investigation (ROI). Once you receive the ROI, you have 30 calendar days to then request an EEOC hearing, file a complaint in federal court, or seek to have the Agency issue a final decision in the complaint. If you request an EEOC hearing or file in federal court, you'll have the right to engage in discovery, which is the process by which you and the agency can ask each other written questions or depose each other and other witnesses in person under oath to flesh out the evidence in the case.

Once discovery is over, the agency will likely move for summary judgment, which is a request to have the judge issue a decision against you even before a hearing on the facts occurs, on the grounds that you have not proven your case. You will have to respond in detail in writing to the defendant's motion, attempting to present all evidence and explanation as to why you've been unlawfully discriminated against. If you are successful, the case will go to trial or hearing. If you win there, you will get an

opportunity to prove damages. The losing party has the right to appeal in writing either to the EEOC's Office of Federal Operations or the appellate court.

The final decision or settlement agreement in the case is enforceable at the EEOC or in court. In total, the process outlined above can take upwards of five years or more to complete. During the process, you have the right to be represented by an attorney if you so choose.

The Pros and Cons of Filing a Complaint

EEO complaints have many pros and cons for complaining employees. In addition to those outlined above, an EEO complaint can be an effective way to stop discrimination because it provides for a full investigation, discovery, and trial before a ruling body other than the defendant agency. To that extent, an EEO complaint is different from an administrative grievance and even a union grievance taken to arbitration in that there is usually no discovery in grievances or arbitrations. However, EEO complaints are difficult to prove, contentious, and often very time consuming and expensive.

For employees who are complaining about a suspension of 15 days or a more serious disciplinary action, they may file and appeal to the Merit Systems Protection Board (MSPB) as an alternative to filing an EEO complaint. However, the MSPB and labor arbitrators have not traditionally often found discrimination, although both have the authority to consider such claims.

Absent a successful claim of discrimination, an employee is not entitled to an award of compensatory damages due to a federal employment dispute. Also, filing a complaint of discrimination may foreclose filing a grievance over the same issue and vice versa. Finally, the Office of Special Counsel (OSC) has jurisdiction to investigate and seek corrective action on claims of whistleblower reprisal and other non-discrimination based prohibited personnel practice complaints. There is no deadline for contacting OSC. Out of pocket expenses, but not compensatory damages, are awardable in successful whistleblower complaints, which may ultimately be decided by the MSPB.

Attorneys fees may be awarded in successful EEO complaints, MSPB appeals, OSC complaints, and union grievance arbitrations but not in administrative grievances, unless the administrative grievance results in a back pay award. Finally, the Office of Personnel Management (OPM) has the authority to adjudicate claims for overtime pay and grade level classification complaints. Attorneys fees and compensatory damages may not be awardable in those OPM complaints. The patchwork of federal complaint processes is complicated. Before embarking on any one or more of these processes, many of which include short deadlines, it may be a good idea to consult with an attorney.

Conclusion

The federal government's EEO complaint process is a complicated and sometimes mysterious process for federal employees. Notwithstanding, an EEO complaint may be the most effective way for an employee to protect his or her employment rights and to improve his or her work place environment. It is important for EEO complainants and agency officials to understand the pros and cons of the EEO process, so that complaints can be resolved fairly and as fast as possible. Finally, the EEO process is just one of the many employment complaint processes applicable to federal employees. Understanding how those various processes will help you protect your rights in the federal workplace is important for all federal employees. Hopefully, this handbook has given you a start in the right direction.

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