Discrimination Complaint Processing Update

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

April 2002

From the Deputy Assistant Secretary

In this issue, you will see an article written by Charles R. Delobe, Director, Office of Employment Discrimination Complaint Adjudication. This article, based on events at a VA facility, illustrates the necessity for managers to take action as soon as they become aware of inappropriate behavior on the part of their employees.

By the very nature of the executive's position, immediate action is required and expected. By inference, when an executive does not act when he or she becomes aware of inappropriate behavior, others may believe the executive supports this activity. No executive can afford to have others believe he or she supports wrong doing on the part of their employees. A failure to act can be seen, as a de facto acknowledgement that the executive condones the behavior, or worst, is willing to allow this type of behavior to occur without doing anything about it.

In the battle to reduce discriminatory activities and discrimination complaints, we are our organization's most valuable asset. Our action, or inaction, sets the tone for the organization.

Keep in mind the last paragraph of Mr. Delobe's article, which in essence says, when we know of inappropriate behavior or wrongdoing we must act. As shown in this article, failure to act has consequences for the affected employee and the organization. Prevention and early intervention are two key tools to address work place disputes.

/s/
James S. Jones

Articles in this month's edition include:

(THE FOLLOWING ARTICLE, WRITTEN BY CHARLES R. DELOBE, DIRECTOR, OFFICE OF EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION (OEDCA), WILL APPEAR IN THE SPRING 2002 EDITION OF THE "OEDCA DIGEST.")

WHITE EMPLOYEE AND AFRICAN-AMERICAN WORKERS WITH WHOM HE ASSOCIATED SUBJECTED TO RACIAL HARASSMENT

In a recent, highly publicized case, OEDCA accepted and fully implemented an EEOC administrative judge's finding that a white employee at a VA hospital had been subjected to race-based harassment because of his association with Black coworkers.

The complainant was a carpenter and maintenance mechanic. Over a period of two years, he had been assigned the position of acting work leader for three independent projects. In connection with these projects, he was assigned crews of Compensated Work Therapy (CWT) workers, most of whom were African American. The CWT workers were veteran-patients who, as part of their therapy, worked on the projects for nominal wages. While directing their work on these projects, he befriended and supported the black CWT workers, teaching them carpentry skills and assisting them in getting their GEDs.

The complainant remained assigned to the carpentry shop, where he was supervised by a white male, and was required to return to the carpentry shop on a daily basis throughout the course of the projects. While there, he was often called "n….. lover" and other racially derogatory names by his white coworkers. These coworkers also brought racist audio and videotapes to the shop, and frequently used the "N" word and other racial slurs and epithets when referring to the black workers under his supervision. He also experienced threats of physical violence by a white employee of the carpentry shop because of his association with the Black workers.

The complainant and several of the CWT workers met with the project manager to express their concern over the racial hostility in the carpentry shop. The complainant also spoke with two service chiefs regarding the problem. However, other than meeting with the offending employees and later issuing a memo stating that racial harassment would not be tolerated, management officials did nothing to correct the problem.

When the nursing home project ended, the complainant was required to return to the carpentry shop, despite his request to be assigned elsewhere because of the racially hostile environment and concerns over his safety. The day after he returned, a physical altercation took place between one of the carpentry shop employees and the complainant, resulting in the

issuance of reprimands to the complainant, three white coworkers, and the complainant's supervisor. All reprimands, except for the complainant's, were later downgraded to admonishments.

Within days of the altercation in the shop, the complainant left work upon the advice of his physician. He did not return for a period of approximately six months. Upon his return, he was reassigned to a position as a driver, where he complained of several other incidents of racial harassment. The other employees of the carpentry shop, as well as the supervisor, remained in their positions with the shop.

The EEOC administrative judge and OEDCA found persuasive evidence to support the testimony of the complainant and his black coworkers regarding the racial hostility in the carpentry shop. Moreover, the VA was found liable for the harassment because the complainant's immediate supervisor was aware of the problem and took no corrective action. In addition, higher-level management officials either did nothing when informed of the problem, or their attempts to address the problem were ineffective or inappropriate. OEDCA's Final Order directed the Department to pay the complainant $48,369.41 in attorney's fees and $144,549.56 in compensatory damages. It also directed the Department to take appropriate corrective action with respect to the workers and supervisors involved, and to take whatever other actions are necessary to ensure that violations similar to those found in this case do not recur.

From a legal standpoint, the lesson of this case is simple. Failure by management officials to take prompt, appropriate, and effective action as soon as they become aware of a hostile environment will surely result in the Department being held liable.

(The following is an article that appeared in **cyberFEDS** at www.feds.com)

Profile: EEOC's Hadden is confident the EEO system is on the Mend

By Drew Long, Washington Bureau

WASHINGTON (March 18) -- The public sector equal employment opportunity system is one of the most heavily used and frequently maligned processes in the federal government. Civil rights advocates and federal employees often cite the amount of time it takes to process EEO complaints and the general lack of accountability when the process finally does work.

On a snowy Saturday in January, Carlton Hadden sat before 200 frustrated and angry federal workers listening to these charges and more. As director of the Equal Employment Opportunity Commission's Office of Federal Operations, Hadden was their target.

For over an hour, he listened to the problems the workers had faced, either with their managers or in the EEO system. Some audience members wanted to know why their complaints take months or years to process. Others simply jeered.

During the conference, called by the NAACP Federal Sector Task Force, the group handed out its Interim Report III, claiming, among other things, that "The federal EEO system is in shambles and in need of major surgery."

This was not Hadden's first appearance at the task force's national summit meeting, nor is it likely to be his last. Hadden said he understands the employee's frustrations with the EEO system and the commission, but does not believe the government's EEO system is "in shambles."

Comparatively good shape

"The federal sector EEO system is in very good shape compared to how it was 10 years ago in the early 1990s," Hadden told *cyber*FEDS® in a recent interview. In fact, the system is in better shape than it was three years ago. In January 1999, the number of EEOC appeals had peaked at 11,918, with thousands of additional cases working their way through the agencies.

Soon after, the EEOC implemented a number of system changes and began to reduce the imposing caseload. In addition to requiring agencies to implement alternative dispute resolution programs, the EEOC gave its administrative judges authority to make final decisions, improved its data collection and implemented additional training and outreach programs.

By the close of FY 2001, the EEOC's Office of Federal Operations reduced the number of appeals pending by 37 percent to 7,536.

Despite the success of reducing the appeals load, Hadden acknowledged that it still takes "entirely too long" for a case to move through the system. While the EEOC has taken steps to improve its case processing, much of the delay still

occurs at the agency level, he said. "We certainly have the ability to address [the issue of timely case processing]," Hadden said. "We do have oversight authority of the EEO system in regard to agencies."

To that end, Hadden said, the EEOC has pushed agencies to engage in ADR programs, encourage management participation when mediation is an option and complete EEO investigations within the mandated 180 days.

Hadden said the glut of EEO cases is not entirely the result of an inefficient system. In some cases, employees take advantage of the system to resolve communication or personality problems with their managers.

Hadden said it is "a little easier" to file an EEO complaint in the federal sector than the private sector. As a result, the EEO complaint process has become a means to resolve differences that do not necessarily belong in the system. In FY 1999, the last year for which statistics are available, agencies dismissed 9,903 complaints, many for lack of merit.

New regulations on the handling of complaints were issued with the revision of 29 CFR part 1614, which went into effect in November 1999. Further statistics compiled under the new system will be released within the next few months, according to the EEOC.

Productivity loss

Although many complaints were without merit and were dismissed, the complainants nevertheless used agencies' time and resources. Cases dismissed are the quickest out of the system, but they still took an average of 204 days to process in FY 1999.

"The incentives are there to deal with EEO complaints," Hadden said. "Disputes take time. And whenever you have a dispute in the workplace, it takes away from productivity."

Because of the potential for wasted time and energy, Hadden said, managers should take the initiative to resolve the issue quickly and informally rather than force a disgruntled employee into the EEO system. "Most good managers want to get in there and deal with the issue," Hadden said. "Managers who work with their employees and staff should not have many problems."

However, many managers "personalize the complaints" filed by their employees and become resistant to dealing with the issue informally. To avoid this situation, managers need to learn to communicate more effectively and remain open to workers' concerns.

"What we really haven't dealt with is that we are a society of many different cultures and people," Hadden said. "That's not to say there isn't going to be conflict, but we need to have dialogue. It's not always easy."

Office of Resolution Management (ORM) Web-based Tracking System Update

Public Law 105-114, dated November 21, 1997, states that at the end of each calendar quarter, the Assistant Secretary for Human Resources and Administration shall submit to the Committees on Veterans Affairs of the Senate and House of Representatives, a report summarizing the employment discrimination complaints filed against senior management officials. This report applies to complaints filed against individuals on the basis of "such individuals' personal conduct and shall not apply in the case of complaints filed solely on the basis of such individuals' positions as officials of the Department". The Office of Resolution Management defines personal conduct as "the act or action directly committed by the senior manager that affects the terms or conditions of an individual's employment".

There is a need to change how we input the senior manager's information in the ORM Web- based Tracking System. The senior manager's information is located in the informal case log screen under "Responsible Management Official (RMO)" information. The Web-based Tracking System Manual, page 3-3, provides instructions that, " if the management official is a GS-15 or above, check the senior manager's box".

Errors have been found in the Quarterly Senior Managers Report as a result of the input of inaccurate data identifying senior managers.
For example, the Chief of Pharmacy Service and the Chief of Dental Service are listed as senior management officials. In some cases senior management officials whose personal conduct was not directly involved in a case have been listed in the report.

All EEO counselors and other individuals involved in updating the RMO screen are required to check the senior manager's box only if the RMO's title is listed below, and if the senior management official's personal conduct was directly involved in the case as defined above.

The following positions within the Department of Veterans Affairs are covered by Public Law 105-114:

The Secretary
The Deputy Secretary
The Under Secretary for Health
The Under Secretary for Benefits
Each Assistant Secretary for Veterans Affairs
Each Deputy Assistant Secretary for Veterans Affairs
The Director of National Cemetery System
The General Counsel

The Chairman of the Board of Contract Appeals
The Chairman of the Board of Veterans' Appeals
Directors, Associate Directors, Chiefs of Staff, and the *Associate Director for Patient Care Services, of each medical center of the Department (includes Regional Offices)
Each program director of the Central Office of the Department of Veterans Affairs

The integration of VA Health Systems created an "Associate Director for Patient Care Services" position. The Public Law does not include this position because it was created subsequent to the Law. This position must also be reported in the senior manager's report if the official's personal conduct was directly involved in a case.

The Office of Policy and Compliance is planning to enhance the Web-based tracking system and will refine the RMO screen to make it more user friendly when generating a report.
(For more information on ORM's Web-based Tracking System, please contact Joan Hanson, Chief, Office of Policy and Compliance, at (202) 501-2680)

(The following is an excerpt from an EEOC news release dated March 28, 2002)

FEDERAL AGENCIES LAUNCH JOINT MEDIATION INITIATIVE

EEOC and Postal Service Enter First-Ever Partnership on Alternative Dispute Resolution

WASHINGTON - Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission (EEOC), today announced the implementation of an Alternative Dispute Resolution (ADR) program with the U.S. Postal Service (USPS) to improve the processing of discrimination complaints by Postal workers nationwide. Under the initiative, virtually all requests for hearings before EEOC administrative judges involving bias cases against the Postal Service will first go through mediation.

"I am enthusiastic about this innovative partnership," said Chair Dominguez. "This is a creative use of a powerful tool - mediation - to settle differences in a timely, cost-effective, and mutually satisfactory way. Introducing mediation at this stage of the process is a win-win."

Anthony J. Vegliante, Vice President for Labor Relations at the U.S. Postal Service, said: "Mediation at the hearing stage provides another opportunity to empower parties to a dispute to recognize each other's points of view and to be recognized. Working with the EEOC on this initiative is something that we do gladly and with a commitment to further improve our process for the benefit of all our employees."

Under the nationwide program, EEOC administrative judges will issue a Mediation Order to the parties and provide a copy to the local USPS ADR coordinator. Receipt of the Mediation Order will serve to notify the Postal Service ADR staff of the need to schedule the case for mediation. USPS will provide an expert external mediator to conduct the mediation session, which will typically be completed within 90 days of issuance of the Mediation Order. The role of the mediator is to facilitate discussions and assist the parties in resolving the dispute.

Reaching an agreement is strictly voluntary on the part of participants. The mediator has no authority to mandate a resolution of the case and will inform the EEOC administrative judge of the outcome within 10 days of the mediation, as well as provide a copy of any resulting settlement agreement. If a mediated resolution is not reached, an EEOC administrative judge will proceed to process the complaint in accordance with the federal sector regulations (29 C.F.R. Part 1614).

Cases that will be excluded from the program include class and systemic complaints, those involving Equal Pay Act claims, and cases involving conduct by the complainant of a criminal nature (such as Postal Service "inspector" cases). In addition, in rare circumstances, EEOC administrative judges may determine that good cause exists for not requiring the parties to participate in mediation.

The program has already been phased into EEOC field office hearing units in Florida, Pennsylvania, Michigan, Indiana, and parts of Texas. Full implementation at all EEOC field offices nationwide is expected by January 2003. EEOC projects that approximately 3,500 complaints per year against USPS will be processed through the mediation program once fully implemented.

The Office of the Deputy Secretary for Resolution Management publishes *Discrimination Complaint Processing Update* quarterly. Please E-mail Terry Washington, External Affairs Program Analyst or Tyrone Eddins, External Affairs Program Manager, to submit recommendations, suggestions, or comments on the information presented in this newsletter. We can be reached at (202) 501-2800, by fax at (202) 501-2885 or by E-mail. Back issues of this newsletter are available at *http://vaww.va.gov/orm/Updates.htm* . Additional information on ORM is available at our Web site *http://vaww.va.gov/orm*.