

Discrimination Complaint Processing Update

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



January 2002

From the Deputy Assistant Secretary



I want to start 2002, by reemphasizing the importance of making every effort to prevent and reduce discrimination complaints and in doing so, create an “Employer of Choice Environment” within the Department of Veterans Affairs (VA). We can do this by focusing on creating a workplace where employees are appreciated, respected, treated fairly, and valued for their contributions.

The first step in the complaint process is resolving complaints as early as possible. Having the disputants sit down and discuss openly and honestly, the issues at hand, is usually the most effective method in resolving complaints at the earliest stage. When complaints are filed with the Office of Resolution Management (ORM), we encourage the use of mediation and Alternative Dispute Resolution (ADR) as a means of early resolution throughout the complaint process.

On page 5, under the heading “EEOC Chair Outlines 5-Point Plan of Action,” Equal Employment Opportunity Commission (EEOC) Chair Cari Dominguez, talks about EEOC’s efforts to help federal agencies become “model employers.” I believe this to be an essential goal for VA. The EEOC’s five-part plan starts with “PROACTIVE PREVENTION.” Prevention reduces the need for complaint investigations. When prevention and early resolution do not result in settlement of the dispute, we in ORM will continue processing complaints fairly, expeditiously and completely.

As we enter the new year, I ask that you share with me your thoughts on how we can improve the services we provide to you. We will work with you to find solutions to the issues that are most important to you. I look forward to a great year in 2002. We will share all we learn concerning complaints, their causes, and solutions to help in the creation of an employer of choice environment. We owe that to all we serve: our nation’s veterans, their families, and our employees.

*/s/
James S. Jones*

Management Intervention in Employment/EEO Complaints at Providence VA Medical Center (The Employment Intervention Team)

November 2001

We think the Providence VAMC EEO intervention team is a “best practice” which other VA facilities should hear about.

Soon after assignment as Director of the VA Medical Center, Providence, Rhode Island, Vincent Ng determined that the facility’s process for managing employee complaints was in need of his attention. It appeared that many issues that could have been resolved had become formal Equal Employment Opportunity (EEO) complaints due to the absence of timely coordinated action.

Employee complaints may be handled through various informal and formal mechanisms. Informal counseling or local mediation (Alternate Dispute Resolution-ADR) addresses most issues effectively. In the absence of effective supervisory, management or ADR systems, complaints more often become formal, and thus more difficult and expensive to resolve.

The key to the Providence model is top management’s willingness to move toward complaint resolution. It was first necessary, however, to establish a system for addressing complaints.

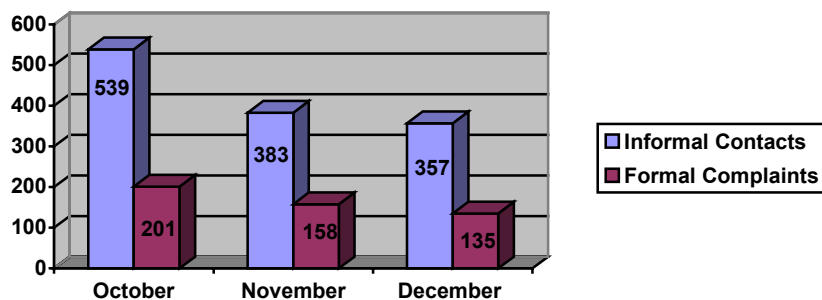
- a. Providence’s VA Medical Center Director, with the assistance of Regional Counsel, Edward Lukey and his staff, established the following process:
 - Bi-weekly meetings are held to review the status of all formal and informal existing and potential EEO complaints. Participants include the Director, Chief of Human Resources, VA Attorney, and the facility EEO Coordinator and ADR Coordinator. The group discusses possible resolution of complaints, including identification of those that might benefit from mediation.
 - The result has been an on-going dialogue between VA stakeholders in the EEO process. These meetings provide the best opportunity to settle or resolve cases before they reach the formal stage, or as early in the complaint process as possible.
- b. Strengthening of the EEO Coordinator position which reports to the Director.
- c. Strengthening of the ADR program by assigning an administrative coordinator and including that person in the bi-weekly planning sessions to assure ADR is offered consistently as an early option.
- d. Including EEO/ADR discussions in supervisors’ town meetings and all employee town meetings. Presentation of trends and the bases of complaints are used to suggest prevention and resolution approaches.
- e. Including EEO/ADR data in reports to facility management and committees.

The emphasis placed on this process by the Medical Center Director has contributed to an organizational culture that values employee concerns, guides supervisory development and encourages conflict resolution as soon as possible and at the lowest level possible. The result has been a dramatic drop in new formal EEO complaints at the Providence VA Medical Center and a 70% reduction in existing EEO complaints.

(Provided by the Providence VAMC. For more information contact Vincent Ng, Director, VA Medical Center, Providence, Rhode Island,)

Office of Resolution Management (ORM) Workload Data

Each year, complaint activity generally decreases around the holidays. The first quarter of fiscal year 2002 followed that pattern, as seen in the following chart:



Office of Resolution Management (ORM) averaged a 62 percent informal resolution rate during the first quarter of FY 2002. That means 62 percent of individuals who made contact with an Equal Employment Opportunity Counselor did not file a formal complaint.

The number of complaints pending more than 180 days declined by 12 percent during the first quarter. Congratulations to our Leavenworth and Palo Alto Field Offices for having no complaints pending more than 180 days, as of December 31, 2001!

Office of Resolution Management Root Cause Analysis Report

The Office of Resolution Management (ORM) has developed a root cause report designed to identify the possible root causes (reasons) for employees filing Equal Employment Opportunity (EEO) discrimination complaints. The Root Cause Analysis Report is prepared on a quarterly basis and is one of our ongoing efforts to help reduce and eliminate discrimination complaints within VA.

To see the latest ORM Root Cause Analysis go to
http://www.va.gov/ORM/Root_Cause/Index.htm

Breach of ADEA Settlement Agreements

Did you know?



That in Age Discrimination in Employment Act (ADEA) breach of settlement agreements, the complainant's retention of any consideration that they may have received under the settlement agreement does not delay the reinstatement of an ADEA claim against an agency.

Under the ADEA, *Dolores M. Oubre v. Entergy Operations Inc.*, 522 U.S. 422, 118 S. Ct 838 (1998), the Court of Appeals, Seventh Circuit rejected the employer's argument that "Plaintiffs must tender back the consideration received for executing...Severance Agreements" in order to maintain a claim under the ADEA.

The Older Workers Benefit Protection Act (OWBPA) of 1990, as amended by the ADEA, was enacted to make it clear that discrimination on the basis of age, in all forms of employee benefits, is unlawful and to ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief. *S. Rep. No. 263, 101st Cong. 2d Sec. (1990)*. The Courts have stated that applying a tender back requirement in an ADEA breach of settlement agreement would preclude employees from pursuing an ADEA claim, unless they somehow were able to come up with the money given, when allegedly forced to resign. Many discharged employees would lack the resources to return funds received. Therefore, they may be unable to pursue their legal rights. Courts have expressed that if an employee is forced to return the funds received for waiver, an employer may risk noncompliance with the OWBPA's waiver provision, knowing that the complainant may have difficulties repaying the monies.

Recent cases have established that if a complainant prevails on their EEO complaint, any monetary award may be subject to offset of consideration that they have already received from the agency. *Arun C. Baus v. Department of Agriculture*, *Gordon R. England v. Department of Navy Appeal No. 01A06004 (7/17/01)* *Lillian F. Sandle v. Department of Veterans Affairs, Appeal No. 01994141 (8/2/00)*.



On the other hand...

For reinstatement of a non-ADEA breach of settlement agreement, a complainant is required to return any monetary benefits, including compensatory damages, before their complaint can be reinstated to status quo ante, prior to signing of the agreement. *Armour v. Department of Defense, EEOC Appeal No. 01965593 (6/24/97)*; *Komiskey v. Department of the*

Army EEOC Appeal No. 01955696 (9/5/99); Mohammad E. Akberzie, M.D., v. Department of Health and Human Service Appeal No. 01983230 (6/14/01)
(Joan Hanson, Chief, Office of Policy and Compliance)

For more information on the Age Discrimination in Employment Act of 1967 (ADEA) go to <http://www.eeoc.gov/laws/adea.html>.

EEOC Chair Outlines 5-Point Plan of Action

"If the federal government is to truly become a model EEO employer, I firmly believe that EEOC must include the federal sector program as an integral component of our law enforcement efforts," said EEOC Chair Cari M. Dominguez in remarks prepared for the Public Administration Forum (PAF) "EEO Law Trends & Update" seminar and presented by Carlton Hadden, Director of the EEOC's Office of Federal Operations.

The EEOC has developed a 5-Point Plan of Action to achieve the agency's goals in a more collaborative and partner-like manner with all stakeholders. The plan is as follows:

- 1. Proactive Prevention:** Involves outreach, education and technical assistance. Efforts include a 16-hour EEO Training Course for all managers and supervisors of the Environmental Protection Agency.
- 2. Proficient Resolution:** Agencies, complainants and federal unions have complained that it takes too long to process a complaint through the federal sector process. The EEOC has a goal to process complaints faster, better and cheaper, and increase use of technology.
- 3. Strategic Enforcement and Litigation:** The EEOC will continue its approach to create a seamless operation between all federal sector programs by using the Comprehensive Enforcement Program (CEP). For example, the agency will begin analyzing data in a more meaningful way to look for employment trends and how and where discrimination is occurring.
- 4. Promote and Expand the Mediation Program:** The EEOC has had success with its private sector mediation program and would like to see the same kind of results in the federal sector. The EEOC is developing a Federal Sector ADR page for its Web site to assist employees, dispute resolution professionals, and agencies. In addition, the Chair issued a memorandum to EEOC supervisors and managers directing them to use mediation to try to resolve the agency's own internal EEO complaints.
- 5. Practice What We Preach and Make EEOC a Great Place to Work:** The agency aims to create a model workplace within the Commission.
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Social Security Administration Settles Racial Discrimination Suit

In a case involving a substantial monetary settlement for a large class of plaintiffs without litigation, the Social Security Administration has agreed to pay nearly \$7.75 million to settle a racial discrimination complaint by some 2,200 black male employees at the agency's Baltimore headquarters. The case arose out of a class-action complaint that three African-American employees filed in November 1995 with the Equal Employment Opportunity Commission. They alleged SSA engaged in discriminatory practices against its black male workers regarding promotion decisions, appraisals, salaries and bonuses and disciplinary actions. The settlement, which has no admission of guilt, requires the agency to establish an oversight committee on equal opportunity that will monitor competitive promotions and awards. The seven-member committee will appoint employees as nonvoting members of the agency panels that assess promotion applications. The black men who worked at the agency headquarters or the central operations office since 1987 will receive shares of the total settlement amount, with \$1.4 million going for legal fees and other costs. At a news conference in Washington last Tuesday announcing the settlement, Paul Barnes, the deputy Social Security commissioner for human resources, noted that over 40 percent of the employees are members of minorities and that 27 percent of the SSA work force is African-American. *(Reprinted with permission of Federal Employees News Digest)*

Case Law:



Supreme Court Rules on Disability Law

A worker with limitations involving manual tasks that affect his or her ability to perform a specific job is covered by the Americans with Disabilities Act (ADA) only if the impairments also affect activities central to one's daily life, such as performing household chores, bathing, and brushing one's teeth, ruled the U.S. Supreme Court.

In this case, *Toyota Motor Mfg. KY v. Williams*, the Supreme Court interpreted the ADA's definition of a "qualified disabled employee." The ADA requires employers to make reasonable accommodations for qualified disabled employees, or those who have, or are regarded as having, a mental or physical impairment which significantly limits one or more of the worker's major life activities. In the unanimous decision reversing the U.S. Court of Appeals for the Sixth Circuit, the U.S. Supreme Court stated that the central inquiry when addressing the major life activity of performing manual tasks is whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the variety of tasks associated with a particular job.

In the case, a worker at an auto assembly line plant sued her employer under the ADA for failing to accommodate her disability. The employee was unable to perform all of the manual tasks required by her job after she developed carpal tunnel syndrome. The company refused to eliminate some of the manual tasks and subsequently fired the employee when she didn't show up for work. The Court found that the employee was not entitled to the protection of the ADA because her impairment had not substantially limited any major life activity, since the employee was able to perform the manual tasks of her daily life. **TOYOTA MOTOR MFG. KY. INC. v. WILLIAMS** (U.S. Supreme Court, No. 00-1089, January 8, 2002).
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Case Law:



Supervisor's Plan to Non-Competitively Promote Employees Fails, Results In Obstruction of Competition Complaints

One manager learned a tough lesson about the meaning behind the expression, "the best laid plans*."

Even though a manager with the Department of Housing and Urban Development did not intend to harm employees, his plan to non-competitively promote three GS-12 employees failed, which caused the employees to lose their chance to apply for GS-13 vacancies in the department.

The three employees filed complaints with the Office of Special Counsel (OSC) for obstruction of competition. They alleged that their supervisor told them not to apply for announced GS-13 vacancies because he would promote them through another method. The supervisor then hired three GS-13 level employees to fill the vacancies, but unsuccessfully attempted to non-competitively promote the three GS-12 employees by upgrading their job duties.

The OSC's investigation revealed that the supervisor's goal was to increase his staff size while avoiding having to go through the vacancy announcement process for the vacant GS-12 positions. The OSC settled the complaints with the agency, awarding the complainants retroactive promotions, back pay, interest, and other benefits, and the former supervisor received a letter of reprimand.

It is a prohibited personnel practice to willfully obstruct any individual from competing for federal civil service employment.

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Why Employees Stay

Employees stay because of pay. Not true, according to research findings from the Corporate Leadership Council. In fact, pay was the LEAST important reason cited by employees as to why they continue to work for a particular company.

Employees surveyed gave the following reasons why they remained in their organizations: Career growth, learning and development, exciting work and challenging, meaningful work, making a difference and a contribution, working with great people, being part of a team, having a good boss, recognition for work well done, autonomy and control over one's work, flexible work hours and dress code, and fair pay and benefits. (From the OPM Hand book, "Human Resources Flexibilities and Authorities in the Federal Government," published by the Office of Merit Systems Effectiveness, Center for HR Innovation.)

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Prohibited Personal Practices

Adapted from section 2302 (b) of title 5 U.S.C.

- Illegally discriminate for or against any employee/applicant.
- Solicit or consider improper employment recommendations.
- Coerce an employee's political activity.
- Obstruct a person's right to compete for employment.
- Influence any person to withdraw from competition for a position.
- Give unauthorized preference or improper advantage.
- Employ or promote a relative.
- Retaliate against a whistleblower, whether an employee or applicant.
- Retaliate against employees or applicants for filing an appeal.
- Unlawfully discriminate for off duty conduct.
- Knowingly violate veteran's preference requirements.
- Violate any law, rule, or regulation that implements or directly concerns the merit principles.

If you would like additional information concerning recent EEOC changes, adverse inference, discrimination law, rights and responsibilities, and ORM responsibilities and procedures, please access ORM's Website on the Intranet <http://vaww.va.gov/orm>, or the Internet <http://www.va.gov/orm>

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 or by fax at (202) 501-2885.

