

# Discrimination Complaint Processing Update

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



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November 1999

## EEOC Implements New Regulations Affecting How Agencies Process Complaints of Employment Discrimination

The U. S. Equal Employment Opportunity Commission (EEOC) published its final regulations on processing discrimination complaints in the Federal sector, 29 CFR Part 1614, Federal Register, Volume 64, Number 132, pages 37643-37661. EEOC issued the new regulations as part of its ongoing effort to improve the effectiveness of its operations and to streamline the Federal sector complaint process, which is too long and contains too many layers of review. *The regulations are effective November 9, 1999.*

### Highlights of the New Regulations

- **Expanded Role of Alternative Dispute Resolution (ADR)**

Consistent with its commitment to the use of ADR in its private sector programs, EEOC will require agencies to establish or make available an ADR program during the pre-complaint process (counseling) and the formal complaint process.

VA will have substantial flexibility in how we structure our ADR programs so long as they incorporate principles of confidentiality, neutrality, voluntariness, and enforceability. ADR may function as an alternative to counseling.

- **Dismissal is appropriate only when dismissing the entire complaint**

Under the previous rule, the Office of Resolution Management (ORM) could dismiss portions of a complaint that failed to state a claim, has not been counseled, is duplicative, is untimely, is the basis of a civil action, or is moot. Under the new rule, ORM can dismiss only an entire complaint, not portions thereof. If ORM believes that one or more of the issues in a complaint, but not the whole complaint, should be dismissed, ORM must notify the complainant of the reasons, and place a copy of the notice in the complaint file. Complainants cannot appeal this action.

- **Request for an EEOC Hearing**

Under the previous rule, to request a hearing, a complainant made the request to ORM who then forwarded the request to EEOC. Under the new rule, the complainant must send a written request for a hearing directly to the EEOC office identified in ORM's acknowledgment letter, and a copy to ORM. Within 15 days of the complainant's request, ORM must forward the complaint file to the EEOC office.

- **Agencies will no longer have the Authority to Reverse or Modify EEOC Administrative Judges Decisions**

Under the previous rule, Administrative Judges (AJ) issued recommended decisions regarding whether VA violated the law. VA was then free to reverse or modify the AJ's recommended decision. The final regulation provides that AJ decisions will be submitted to VA's Office of Employment Discrimination Complaint Adjudication (OEDCA) for final action. However, OEDCA will not have the opportunity to rewrite the AJ decisions. Rather, OEDCA will issue an order providing only whether or not VA will fully implement the AJ decision. If we choose not to implement the AJ decision, VA must simultaneously file an appeal with the EEOC. VA will have 40 days to determine whether or not to implement the AJ decision and, if we choose not to implement the decision, another 20 days to file their brief on appeal. This

corresponds to the 60-day period that VA previously had to review an AJ decision and issue a final decision.

- **Effect on VA if we choose not to implement the AJ decision and appeals**

If the AJ decision involved restoration of the complaining party into a job, VA must comply with the order pending the appeal. We may refuse to return the individual to his or her job if we determine that the individual's presence in the workplace would be unduly disruptive. If this occurs however, VA must provide pay and benefits until the appeal is completed. We are not required to pay any other monetary benefit ordered by the AJ pending the outcome of the appeal but must pay interest on such sum if the complaining party ultimately prevails.

- **Standard of review EEOC will apply on appeal**

On appeal, EEOC will review legal issues and factual findings by VA under a de novo (presenting a matter anew, afresh) standard while using a substantial evidence standard to review AJ findings of fact. It is appropriate to provide a deferential standard of review to the factual findings by AJ's who are independent decision-makers and had the opportunity to directly evaluate the credibility of witnesses.

- **Fragmentation of Cases**

A significant problem in the current system arises from the fragmentation of cases (fragmentation—breaking cases down into their constituent parts and then processing the parts separately) which substantially adds to the number of cases and the overall burden in the discrimination complaint process. Fragmentation also makes it more difficult to prove some cases, such as harassment, which are dependent on a “critical mass” of facts. The final regulation includes a number of provisions to address this problem:

**Partial dismissals:** The regulations eliminate interlocutory appeals from partial dismissals. Instead, the case will continue to be processed and appeals will be preserved until the rest of the case is ready for appeal.

**No more remands:** AJ's will no longer remand issues to VA for counseling or other processing. Once a case is before an AJ, the AJ is fully responsible for processing it.

**Amendment of complaints:** Complainants will have greater rights to amend their complaints with “like and related” claims. Independent claims brought by the same complaining party will be consolidated for processing so they will be handled together.

**Spin off complaints:** The new regulations add a provision providing for the dismissal of spin-off complaints (spin-offs are complaints about the processing of existing complaints). EEOC provides instead

that complaints about existing complaints should be brought up as part of the original complaint.

- **Changes to Class Complaints**

Under the prior rule, only a tiny number of class cases were brought within the administrative system. Most class cases were either diverted into the Federal courts or they were simply not brought at all. The new rule includes several reforms to the treatment of class actions which will make it more feasible for class claims to be brought and resolved in the administrative system. A class complainant may now move for class certification at any reasonable point in the process, usually no later the conclusion of discovery. This recognizes that complaining parties do not have access to discovery until they are before an AJ and therefore may not have sufficient information when they file their case to determine whether or not class issues are raised. AJ decisions regarding class certification will be treated the same way as other AJ decisions. VA will take final action on certification by issuing a final order, and, if it does not fully implement the AJ decision, appealing to EEOC. AJ's will review class settlements under the same “fair and reasonable” standard which Federal judges use to review class settlements.

- **Agencies can not dismiss complaints for failure to accept a certified offer of full relief**

The regulation eliminates the provision that permitted VA to dismiss complaints for failure to accept a certified offer of full relief. This provision had not been used very much since the introduction of damages, short of a hearing, made it virtually impossible to determine when an offer of damages constitutes an offer for full relief.

- **EEOC encourages complainants to consider settlement offers**



The regulations create a new offer of resolution procedure, based on the offer of judgment rule in the *Federal Rules of Civil Procedure*, to encourage settlement. Under this procedure, VA may make offers of resolution, which are settlement offers, to complaining parties. If the complaining party does not accept the offer and ultimately obtains no more relief than what was offered, no attorney's fees or costs will be payable for work done after the offer was not accepted.

- **EEOC revises Management Directive 110**

On November 3, 1999, EEOC issued revisions to its Management Directive 110 to assist both agencies and Federal employees better understand their rights and responsibilities. The revised

Management Directive is on the Office of General Counsel's (OGC) website. The address for the site is (<http://152.125.42.70/guideeee>).

- **VA can dismiss cases clearly showing "abuse of the EEO complaint process"**

EEOC decided to include this dismissal provision in its regulation with additional language defining abuse of process as "a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination" and setting forth the factors found in Commission decisions. EEOC reiterates that dismissing complaints for abuse of process should be done only on rare occasions because of the strong policy in favor of preserving complainants' EEO rights whenever possible. Evaluating complaints for dismissal for abuse of process requires careful deliberation and application of strict criteria. ORM must analyze whether a complainant's behavior evidences an ulterior purpose to abuse the EEO process. Improper purposes would include circumventing other administrative processes such as the labor-management dispute process; retaliating against the agency's in-house administrative machinery; or overburdening the EEO complaint system, which is designed to protect individuals from discriminatory practices.



Evidence of numerous complaint filings, in and of itself, is an insufficient basis for making a finding of abuse of process. However, as stated in the regulation, evidence of multiple complaint filings combined with the subject matter of the complaints (such as frivolous, similar

or identical allegations; lack of specificity in the allegations; and allegations involving matters previously resolved) may be considered in determining whether a complainant has engaged in a pattern of abuse of the EEO process.

### **Complainants to Receive New Notices of Rights and Responsibilities**

Under the new regulations, EEOC requires ORM to advise each complainant of his or her rights and responsibilities under the new regulations. On November 8, 1999, ORM began advising complainants of the following:

- a. Prior to filing a formal complaint, the complainant has the right to anonymity.
- b. Have the right to representation throughout the complaint process including the counseling stage. The EEO Counselor is not an advocate for either the aggrieved person or the Department of Veterans Affairs (VA).
- c. Have the right to choose between Alternative Dispute Resolution (ADR) or EEO counseling, where VA agrees to offer ADR. The EEOC's new regulations require that VA establish or make available an ADR program beginning January 1, 2000.
- d. May be required to choose between a negotiated grievance procedure and the EEO complaint procedure.
- e. May be required to choose between the EEO complaint procedure and an appeal to the Merit System Protection Board (MSPB). Consult an EEO Counselor for clarification.
- f. May be required to file a complaint within 15 calendar days of receipt of the Counselor's notice of right to file a formal complaint in the event that the complainant wishes to file a formal complaint at the conclusion of counseling or ADR.
- g. May file a notice of intent to sue and file a lawsuit under the Age Discrimination Employment Act (ADEA) instead of an administrative complaint of age discrimination when age is alleged as a basis for discrimination, pursuant to §1614.201(a).
- h. Have the right to go directly to an U.S. District Court on claims of sex-based wage discrimination under the Equal Pay Act even though such claims are also cognizable under Title VII.
- i. Have the right to request a hearing before an EEOC Administrative Judge (except in a mixed case) after completion of the investigation or 180 calendar days from the filing of a formal complaint, whichever comes first. After November 9, 1999, ***the request must be made directly to the***

**appropriate EEOC office, and the complainant must notify the responding agency of the hearing request.** Consult the EEO Counselor for information on where a request for a hearing and notice to the agency should be sent.

- j. Have the right to an immediate final decision after an investigation by the Office of Resolution Management (ORM) in accordance with §1614.108(f).
- k. Have the right to go to U.S. District Court 180 calendar days after filing a formal complaint if no final action has been taken on the complaint, or 180 days after filing an appeal if no decision has been issued on the appeal.
- l. Must mitigate damages, i.e. must look for other appropriate employment and must seek treatment for any injury claimed.
- m. Must keep VA and EEOC informed of his or her current mailing address and serve copies of hearing request and appeal papers on VA.
- n. Where counseling is selected, the complainant has the right to receive in writing within 30 calendar days of the first counseling contact (unless the complainant agrees in writing to an extension) a notice terminating counseling and informing the complainant of:
  - (1) the right to file a formal individual or class complaint within 15 calendar days of receipt of the notice,
  - (2) the appropriate official with whom to file a formal complaint, and
  - (3) the duty to immediately inform VA if the complainant retains counsel or a representative.
- o. Where the complainant agrees to participate in an established ADR program, the written notice terminating the counseling period will be issued upon completion of the dispute resolution process or within ninety (90) calendar days of the first contact with the EEO Counselor, whichever is earlier.
- p. Only claims raised at the counseling stage or claims that are like or related to them may be the subject of a formal complaint, or an amendment to a complaint after it has been filed.
- q. Rejection of a VA offer of resolution made pursuant to §1614.109(c) may limit the amount of attorney's fees or costs the complainant can recover.
- r. If the complainant filed two or more complaints, VA **must** consolidate them after appropriate notice §1614.606. When a complaint has been consolidated with one or more earlier complaints, ORM shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days of the filing of the first complaint.

## **Adverse Inference**

Recent decisions issued by the Equal Employment Opportunity Commission (EEOC) indicate that an agency's failure to provide the requested evidence is more and more often leading to adverse consequences. According to EEOC regulations, if a party to an Equal Employment Opportunity (EEO) complaint fails to respond – without good cause – to requests for documents, records, comparative data statistics, affidavits or witnesses, the decision-maker may:

- Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
- Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
- Exclude other evidence offered by the party failing to produce the requested information or witness;
- Issue a decision fully or partially in favor of the opposing party; or
- Take such other actions, as it deems appropriate.

Although these regulations apply both to agencies and complaining employees, as a practical matter, they have been applied almost exclusively against agencies

because we have control over most of the documents, records, and witnesses that are required for the full adjudication of a claim of discrimination. In a recent case, *Johnson vs. US Postal Service (USPS)* (99 FEOR 1138), an EEOC Administrative Judge (AJ) drew an adverse inference when USPS failed to produce two members of its selection committee at a hearing. The Commission further agreed with the AJ's conclusion that USPS failed to articulate a legitimate, nondiscriminatory reason for not selecting Johnson. Accordingly, it ordered USPS to offer Johnson the position with back pay and benefits.

VA can take steps to avoid the application of adverse inferences. Some examples include:

- Development of a record-keeping system with safeguards against the inadvertent destruction of evidence that could be relevant in explaining personnel decisions;
- Ensuring that EEO investigators and others involved in the processing of complaints receive the requested information and ensuring witnesses are available to cooperate in the investigation;
- Organization of incoming EEO complaints so that relevant documents and witnesses can be identified soon after a complaint is filed, and
- Thorough review of a complaint file before it is sent to the next stage in processing.

If crucial documents are not available, an agency that displays a genuine effort with regard to the production of evidence may avoid an adverse inference by showing a good cause for the absence of the document. In light of the recent increase in adverse inferences, if a VA facility cannot produce crucial documents, it may want to resolve

the case and provide the complainant with make-whole relief.

If you have questions concerning adverse inference, you should contact your servicing Office of Resolution Management Field Office or your nearest Office of Regional Counsel.

If you would like additional information concerning the recent EEOC changes, adverse inference, discrimination law, rights and responsibilities, and ORM responsibilities and procedures, please access ORM's website on the Intranet [vawww.va.gov/orm](http://vawww.va.gov/orm), or the Internet [www.va.gov/orm](http://www.va.gov/orm).

### ***Upcoming Broadcasts***

ORM will be airing a series of satellite broadcasts over the course of the next several months on the new regulations. Trainers include Mr. Paul Hutter, Assistant Regional Counsel; Mr. Charles Delobe, Director of OEDCA; Ms. Karen Clegg, Associate Director, OEDCA; and Mr. Ed Pokornicky, Staff Attorney in the Office of General Counsel.

On November 19<sup>th</sup>, ORM will air a two-hour training program on "Reasonable Accommodation." Human Resources Officers, EEO Program Managers, Union officials, and supervisors should participate in the broadcast.