

Discrimination Complaint Processing Update

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



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EEO Investigations – What you should know?

The Office of Resolution Management (ORM) may use one of *four* different types of investigative techniques to conduct an investigation into an allegation of employment discrimination. The technique used depends on the complexity of the case, availability of witnesses, age of the case, and the most expeditious manner in which the investigation can occur. EEOC requires that Federal agencies conduct the investigation within 180 days of the date the complainant filed a formal complaint of employment discrimination. The techniques are:

On-Site Investigation. This is the most common form of investigation VA uses. The investigator arranges to visit the VA facility, interviews witnesses by use of a tape recorder or court reporter, obtains the transcribed affidavits and any additional documents relevant to the claim(s) of discrimination. Once the investigator completes the on-site, he or she returns to his or her job location and prepares the investigative report.

Desk (Telephone) Investigation.

The investigator, using a tape recorder or court reporter, accomplishes the investigation from his or her job location. He or she obtains documents, interviews witnesses by teleconference, obtains the affidavits after they are transcribed, and prepares the investigative report.

Fact-Finding Conference.

The fact-finding conference combines the best features of the traditional on-site investigation with those of a hearing. It also permits investigators to more efficiently conduct evidence gathering, and to play a greater role in settlement efforts. Under the direction of the investigator, the complainant, the complainant's representative, the responding management official and the agency's representative are all present during the entire fact-finding conference. During this quasi-hearing conference, all parties are given an opportunity to make a statement prior to being questioned by the investigator. Each side is given a limited opportunity to question the other's evidence. Generally, fact-finding conferences last less than one day.



Videoconferencing Investigation.

This newest technology is only available in 4 of the 12 ORM Field Offices. The 4 offices are Little Rock, Arkansas; Los Angeles, California; Washington, DC; and Bay Pines, Florida. There is little difference in how the investigator conducts this type of investigation compared to an on-site investigation. The difference is the face-to-face investigation occurs by videoconference. ORM is piloting this type of investigation at the 4 sites mentioned above. We will analyze the success of this

technique in the spring of FY 2000. This is a highly efficient and cost effective technique. If the analysis reveals substantial cost savings, this technology will be available at each ORM field office.

In November 1999, I discussed the changes the Equal Employment Opportunity Commission (EEOC) made to discrimination complaint processing. In the investigative stage, there is one major change that we must now follow: *Investigators can no longer make a recommended finding.*

How Does EEOC and the Office of Employment Discrimination Complaint Adjudication (OEDCA) analyze cases?

In the investigative stage, ORM Investigators, or contract investigators, must fully analyze all of the evidence needed for EEOC and OEDCA to issue a decision. There are several theories used for analyzing cases of discrimination. They include, among others, the disparate or adverse impact theory, the harassment theory, and the failure to make reasonable accommodation theory. Each of these theories provides an analytical framework under which the evidence in most cases can be evaluated to determine whether discrimination occurred.

Disparate Treatment. This theory is the most common and involves an allegation of intentional discrimination. The primary issue in these cases is the motivation of the supervisor or official who took the disputed personnel action. This theory applies to all bases of discrimination, including race, color, sex, national origin, religion, age, disability, and reprisal. Two types of evidence may be used to prove intentional discrimination under the disparate treatment theory. One involves circumstantial evidence of motive and the other involves direct evidence of motive. If direct evidence is found, a finding of discrimination is justified solely on the basis of that evidence. That is, if the evidence is relevant, credible and reliable. Such cases are rare. In most cases, the evidence is circumstantial and requires the application of a 3-step formula or the application





of a 3-step evidentiary analysis (prima facie, burden of articulation, and proof of pretext). Allegations of disparate treatment are fact-intensive cases. Examples of such cases would include claims that allege nonpromotion because of the complainant's age, or that a disciplinary action was taken because of the complainant's race, or that the denial of a leave request was due to the complainant's gender. In these cases, development of a factual record is of primary importance.

Harassment or Hostile Environment. This theory focuses on the work environment itself. The central question in a harassment case is whether the conduct of the alleged perpetrator has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment because of a person's race, color, sex, national origin, religion, age, disability or participation in EEO protected activity. This theory is to be distinguished from that category of sexual harassment allegations in which the employee alleges that submission to or rejection of unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature was used as a basis for a personnel action or other employment decision.

Reasonable Accommodation. This theory generally does not involve an intent to discriminate, but rather, the failure of an employer to accommodate either the religious beliefs and practices of an employee or the needs of a qualified individual with a disability.

Adverse or Disparate Impact. Like reasonable accommodation, this theory generally does not involve an intent to discriminate. Instead, it typically involves a specific policy or practice of the employer applied to all employees, which is neutral and nondiscriminatory on its face, but which has an adverse or disparate impact on a particular group. Even if there is not discriminatory intent, the complainant will prevail if the policy or practice falls more harshly on one group than another, and the employer is unable to prove job-relatedness or business necessity.

Should you desire more information about the EEO investigative process, or the complete EEO process, Ernest Hadley publishes, annually, "A Guide to Federal Sector Equal Employment Law and Practice." Additionally, EEOC's Management Directive 110 explains the complete EEO discrimination complaint process. You may obtain a copy of this publication directly from EEOC on its website, www.eeoc.gov.

ROOT CAUSE ANALYSIS

At the end of each quarter, ORM publishes a Root Cause Quarterly Digest. The intent of the digest is to educate managers and employees about claims of discrimination that were dismissed because they failed to state a claim





acceptable for EEO complaint processing. Such cases generally involved perceptions of discrimination by employees, applicants for employment, or former employees. However, while the cases were not appropriate for the EEO complaint process, there remained an underlying issue that caused the employee to elevate the issue to the discrimination complaint process. In general, of the 600 inquiries ORM averages each month, a number of issues can be easily and successfully resolved early on. Generally, resolution of these issues does not involve monetary settlement. For example, some of the claims that ORM dismiss involves lack of communication, lack of knowledge about rules and regulations, lack of supervisory training, and lack of information about human resources management policies, regulations, and procedures. In cases involving supervisory employees, the failure to inform employees, respond to employee issues, or to ensure meaningful communications with employees often lead to perceptions that they are being treated differently. In some cases, employees used the EEO process to get the supervisor's attention. In other cases, the appropriate avenue for the claims was the negotiated grievance procedure. The Root Cause report is available on ORM webpage: vawww.va.gov/orm.

EEOC HEARINGS

Recently, ORM obtained information that EEOC District Offices are experiencing an eighteen-month to two-year delay in scheduling hearings. We believe that such delays will occur more frequently as EEOC Districts shift to fully implementing the new regulations. Presently, VA has 960 cases pending.

COST PER COMPLAINT STUDY

Tracking the true cost of discrimination complaint processing is critical to ORM's budgeting and performance measurement efforts. Previous efforts to calculate processing costs yielded estimates of \$20,000 to \$40,000 per complaint, but these estimates did not include all applicable indirect costs. ORM's Cost Per Complaint Study will expand the newest ORM estimate of \$40,000 to \$70,000 by identifying claims processing activities, and their costs, that both directly and indirectly support discrimination complaint processing. This study will allow ORM to develop more accurate estimates of the resources required to process a complaint, and to break down the total cost by activity, processing stage, VA organization, and type of complaint. Additionally, the study will support encouraging facilities to fully implement alternative dispute resolution techniques, which is cost efficient. On December 8, 1999, EEOC officials met with ORM officials on partnering with ORM on this initiative as EEOC often receives Congressional, GAO, and other inquiries about complaint processing costs. EEOC will provide data on costs for the hearing and appellate stage. Within VA, the Office of General Counsel and the Office of Employment Discrimination Complaint Adjudication are assisting in this effort.





ORM's WORKLOAD – AT A GLANCE

During ORM's first full year of operation, we focused on accurately capturing complaint workload, continuously educating VA employees on the new complaint process, and reducing the time it takes to process complaints of employment discrimination. As of October 30, 1999, ORM's inventory of active formal complaints was 3,986 cases at various stages of the EEO complaint process, i.e., pending acceptability, investigation, advisement of rights, hearing, or final agency decision.

ORM received 8,195 informal contacts at the pre-complaint (counseling) stage. Of these, ORM successfully resolved 65%. At the formal complaint stage, ORM accomplished making 2,019 procedural final agency decisions, investigated 1,451 complaints of employment discrimination, and prepared 960 cases for Equal Employment Opportunity Commission (EEOC) hearings. Overall, the average processing time dropped significantly from 452 days upon ORM's inception to 282 days.

ORM's Fiscal Year 2000 goals are: (1) to further ensure the timely and accurate processing of complaints by having each ORM field office process complaints within 180 days; (2) to further educate employees, to include executives, on the meaning of discrimination and employees' rights and responsibilities; (3) to ensure that employees, management and labor officials have a full appreciation for what is and is not appropriate for the complaint process; and (4) to ensure confidentiality, fairness, integrity and trust in the process. In Booz-Allen and Hamilton's independent assessment dated April 30, 1999, it found that ORM is in full compliance of the Public Law and that employees are fully supportive of ORM's existence. Employees noted that they have high expectations of ORM to process complaints in a fair, timely and highly effective manner. We will do our best to meet these expectations.

*“Honoring and serving our Nation's veterans
by promoting an environment that is free of discrimination”*

Happy Holidays!

