

CHAPTER 25

SENIOR OFFICER LEGAL ORIENTATION

EQUAL EMPLOYMENT OPPORTUNITY

I. INTRODUCTION.....	1
II. EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT.....	1
III. EQUAL EMPLOYMENT OPPORTUNITY AGENCIES.....	2
IV. THEORIES OF DISCRIMINATION AND METHODS OF PROOF.	3
V. THE EEO COMPLAINT PROCESS.....	6
VI. CONCLUSION.....	11

OUTLINE OF INSTRUCTION

I. INTRODUCTION.

II. EQUAL EMPLOYMENT OPPORTUNITY (EEO) IN THE FEDERAL GOVERNMENT.

A. Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e - 2000e-17, prohibits:

1. Basis: discrimination on basis of race, color, religion, sex, or national origin in connection with any personnel action; retaliation or reprisal for having engaged in protected activity.
2. Persons covered: applicants for employment, employees, and former employees.
3. Issues: fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect person.

B. Age Discrimination in Employment Act, 29 U.S.C. § 633a, prohibits:

1. Basis: discrimination on basis of age 40 and over; retaliation or reprisal for having engaged in protected activity.
2. Persons covered: applicants for employment, employees, and former employees.
3. Issues: fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages.

C. Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 790-794, and modified by the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213:

1. Basis: discrimination on the basis of handicapping condition (disability); failure to reasonably accommodate qualified handicapped.
 2. Persons covered: applicants for employment, employees, and former employees.
 3. Issue: test applicant to screen out handicapped; fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages, or be denied "reasonable accommodation" if accommodation does not impose undue hardship on agency.
- D. The Equal Pay Act (29 U.S.C. § 206(d)) requires equal pay for equal work.
- E. The Civil Rights Act of 1991, Pub. L. No. 102-166 (codified at scattered sections of 42 U.S.C.).
1. Under Section 102 of the Act, compensatory damages, but not punitive damages, of up to \$300,000 may be recovered from the federal government.
 2. Also, under Section 102 of the Act, where plaintiff seeks compensatory damages, either party may demand trial by jury and the court shall not inform the jury of the damage limitations.

III. EQUAL EMPLOYMENT OPPORTUNITY AGENCIES

- A. Equal Employment Opportunity Commission (EEOC).
- B. Merit Systems Protection Board (MSPB).
- C. Department of Defense Civilian Personnel Management Service (CPMS), Office of Complaint Investigations (OCI).
- D. Army Equal Employment Opportunity & Civil Rights Office (EEOCRO).

IV. THEORIES OF DISCRIMINATION AND METHODS OF PROOF.

A. Disparate treatment.

1. Definition: "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."
2. Proof of discriminatory motive essential.
3. Harassment/hostile work environment.
4. Burden of proof in cases involving circumstantial evidence of discrimination. The shifting burdens.
 - a. Plaintiff's prima facie case.
 - (1) Member of protected class.
 - (2) Employment action taken.
 - (3) Complainant treated differently than similarly situated member of another class.
 - b. Defendant's burden of going forward.
 - (1) Articulate legitimate non-discriminatory reason for the employment action.
 - (2) Bona fide occupational qualification.
 - c. Plaintiff's rebuttal.
 - (1) Discriminatory reason for action is more likely.
 - (2) Employer's explanation unworthy of belief (pretext).
 - d. Ultimate burden of proof remains with plaintiff.

B. Retaliation and reprisal.

1. Elements.

a. Individual engaged in protected activity. 42 U.S.C. § 2000e-3.

(1) Opposition clause.

(2) Participation clause.

b. Adverse employment action taken against the employee.

c. Causal connection between protected activity and personnel action. An inference that a causal connection exists will arise where the individual shows that employer was aware of the protected activity and the adverse action follows the protected activity closely in time.

2. Employer defenses.

a. Legitimate, non-retaliatory reasons for action.

b. Decision to take action made before protected activity.

c. Lack of knowledge of prior protected activity.

d. Prolonged period of time between protected activity and adverse action.

C. "Mixed Motive" discrimination cases. Both proper and improper motives involved in personnel action. Once the employee proves discrimination contributed to action, the employer must prove by clear and convincing evidence that it would have taken the same employment action absent the prohibited discrimination.

D. Reasonable accommodation (for disability).

1. Plaintiff's prima facie case: Demonstrate that plaintiff is "qualified disabled person." 29 C.F.R. § 1614.203.
 - a. Disabled person - has or is treated as having a physical or mental impairment that substantially limits one or more major life activity.
 - b. Can perform essential functions of position, with/without reasonable accommodation.
 - c. Performance will not endanger health or safety of subject employee or others.

2. Defenses.
 - a. Plaintiff not "qualified" handicapped.
 - b. The accommodation would impose an undue hardship on agency's operation.
 - c. Agency is not obligated to try every possible accommodation regardless of its likelihood of success.

3. Miscellaneous handicap issues.
 - a. Alcoholism and drug dependence as disabling conditions.
 - b. Accommodating the alcoholic or drug addict. No more "Last chance agreements". *Kimble v. Navy*, 70 M.S.P.R. 617 (1996).
 - c. Reassignment as reasonable accommodation. Reassignment is an accommodation of *last resort*.

- (1) New Rule Broadens Reassignment Job Search: The EEOC amended its regulations (May 2002) to align the federal sector reassignment rule with the Americans With Disabilities Act (ADA) standard. New rule: reassignment is to funded vacant position in same department. Department = Army. Reassignment job searches must now be Army-wide.

V. THE EEO COMPLAINT PROCESS.

A. Administrative Complaint Procedures--Nonmixed Cases.

1. References. 29 C.F.R. Part 1614; AR 690-600 (currently under revision).
2. Complaint process.
 - a. Informal stage: Employee contacts EEO Counselor.
 - (1) Timing--within 45 days of matter of which complained. 29 C.F.R. § 1614.105(a).
 - (a) Commencement of 45-day period.
 - (i) Personnel action--effective date of action.
 - (ii) Event not constituting a personnel action--date individual knew or reasonably should have known of discriminatory event.
 - (2) Counselor actions. 29 C.F.R. § 1614.105.
 - (a) Initial interview.
 - (i) Advise complainant.

(ii) Gather facts from complainant.

(iii) Identify agency witnesses, if any.

(b) Counselor inquiry, including interview with witnesses.

(c) Final interview.

(i) Time--within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. In addition, the 30-day period would be automatically extended to 90 days if the agency has a precomplaint dispute resolution program and the employee agrees to participate in it. 29 C.F.R. § 1614.105(d)-(f).

(ii) Notice of right to file formal complaint.

(d) Final report.

(e) Identity of complainant. EEO Counselor does not reveal without complainant's consent. 29 C.F.R. § 1614.105(g).

b. Formal stage.

(1) Written complaint to EEO Officer. 29 C.F.R. § 1614.106(b).

(a) Timing--within 15 days of final interview with EEO Counselor.

(b) After acceptance, the agency may dismiss the complaint for a variety of reasons, to include:

- (i) Complainant files suit in federal court.
 - (ii) Complainant fails to prosecute or the issue is moot.
 - (iii) Complainant did not meet time limits.
 - (iv) Complaint has already been raised using the grievance procedure or in appeal to the Merit Systems Protection Board.
 - (v) Complainant is found to be abusing the EEO process.
- (c) Investigation. Series of interviews or a fact-finding conference resulting in a report of investigation (ROI). AR 690-600, para. 2-9. Agencies must complete the investigation within 180 days of the filing of the complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.106(e) and 1614.108(e). Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods to develop a record. Agencies are encouraged to incorporate alternative dispute resolution (ADR) techniques. 29 C.F.R. § 1614.108(b).
- (d) Complainant decides on course of action -- within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).
- (i) Request a final agency decision from the agency head based on the record.
 - (ii) Request a hearing and decision from administrative judge from EEOC.

- (iii) File suit in federal District Court if no final agency decision has yet issued and 180 days has elapsed since filing complaint.
 - (2) EEOC hearing. 29 C.F.R. § 1614.109.
 - (a) Hearing procedures.
 - (i) Evidence. 29 C.F.R. § 1614.109(f).
Documentary and testimonial.
 - (ii) Witnesses. Direct evidence, not unduly repetitious, under oath.
 - (iii) Alternatives to testimony. Written statements (sworn), video teleconference, phone testimony.
 - (b) Record of hearing. 29 C.F.R. § 1614.109(h).
Agency pays for verbatim transcripts.
 - (c) Decisions. 29 C.F.R. § 1614.109(i). The administrative judge (AJ) must issue a decision on the complaint within 180 days of the request for hearing.
- c. Final orders. The agency must issue a final order within 40 days after receiving the administrative judge's decision and hearing file. The order must state whether or not the agency will fully implement the decision. If the order states that the agency will not, the agency must file an appeal with the EEOC at the same time as it issues its final order (within 40 days of receiving judge's decision). 29 C.F.R. § 1614.110, § 1614.401.
- d. Complainant's Appeal to EEOC. An appeal of the final agency order must be filed with the EEOC within 30 days. 29 C.F.R. § 1614.401, § 1614.402.

- e. Remedial actions.
 - (1) Nondiscriminatory placement.
 - (2) Back pay.
 - (3) Compensatory damages up to \$300,000.
 - (4) Fees and costs.

- f. Miscellaneous issues in the administrative complaint process. 29 C.F.R. § 1614.605.
 - (1) Representation. Complainants have the right to be accompanied, represented, and advised by a representative of their choice at any stage of the EEO complaint process.

 - (2) Official time. Complainants get reasonable amount of official time to prepare and attend. Witnesses are in duty status when testifying (as required by administrative judge). If Complainant's representative is Federal employee (i.e., union rep), the representative gets reasonable amount of official time to prepare, but if representation conflicts with work duties, representative may be disqualified. 29 C.F.R. § 1614.605(c). The agency does not have to change work schedules or incur overtime wages for Complainant's or the representative's preparation time.

B. Civil Action in U.S. District Court.

- 1. Employees may obtain judicial review of final administrative decisions by filing suit in Federal district court within 90 days of receipt of the final agency or EEOC decision.

NOTE: The Civil Rights Act of 1991 permits Federal employees who prove intentional discrimination (*i.e.*, disparate treatment) to recover up to \$300,000 in compensatory damages for future pecuniary losses, emotional

pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life. This is in addition to the "make whole" remedies already available (*e.g.*, back pay). The Civil Rights Act of 1991 also authorizes Federal employees to demand a jury trial in district court.

2. Judicial Review of Claims of Discrimination Involving Personnel Actions Not Appealable to MSPB ("Pure" Discrimination Claims).
 - a. Actions reviewable: Suit is limited to claims of discrimination raised administratively and claims like or reasonably related to claims raised administratively.
 - b. Proper defendant - The head of the agency (*e.g.*, Secretary of the Army) is the only proper defendant.
 - c. Scope of Review - Trial de novo on claims raised administratively.
 - d. Standard of Review - Plaintiff must prove discrimination by a preponderance of the evidence.

VI. CONCLUSION.