Guide to the EEO Complaint Process

September 2005

This publication was produced for review by the United States Agency for International Development. It was prepared by C² Technologies, Inc.

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INTRODUCTION

The responsibility for processing complaints of discrimination lies with the Director, Office of Equal Opportunity Programs (EOP). However, all U.S. Agency for International Development (USAID) employees need to be aware of their rights and responsibilities under the complaint process. In addition, employees have certain obligations under the process, such as active involvement in attempts at resolution/settlement, including Alternative Dispute Resolution (ADR), cooperation in EEO counseling, investigation and, possibly, participation in an Equal Employment Opportunity Commission (EEOC) hearing.

The Federal complaint process is divided into two parts: the informal stage, during which EEO counseling occurs; and, the formal stage, during which investigation and adjudication occur. The informal stage begins when an aggrieved person[1] (an employee[2], former employee or applicant for employment who has a concern about an employment action or event s/he believes may have been discriminatory) brings that concern to the attention of an EEO Counselor. The EEO Counselor has the primary responsibility to interface with the aggrieved person during the informal process on the matters at issue. Counseling ends with the issuance of a Notice of The Right to File a formal complaint of discrimination. Not everyone who seeks EEO counseling will file a formal complaint. However, once a formal complaint is filed, the formal stage of the process begins. It continues until the complaint has been processed through the investigative and adjudicative stages and is closed out. The informal stage of the process is limited to **90 calendar days** or less; however, the formal complaint process can continue for years, as there are appeal options a complainant may use, including filing in Federal District Court.

[1] During the informal stage of the process, the individual bringing the concern is referred to as the "aggrieved person." Once s/he files a formal EEO complaint, s/he is referred to as the "complainant."

[2] Personal Service Contractors (PSCs) are included in the definition of employee. However, Foreign Service Nationals (FSNs) are not. FSNs are not eligible to participate in the USAID EEO discrimination complaint process.

Section 1: INFORMAL COMPLAINT PROCESS

THE EEO COUNSELOR

At USAID, EEO Counselors are collateral duty counselors. A collateral duty EEO Counselor reports through his/her normal chain of command for job-related duties and responsibilities, but reports to the Office of Equal Opportunity Programs (EOP) Counseling Coordinator in relation to all EEO counseling functions. Managers who supervise a collateral duty EEO Counselor are responsible for assuring the Counselor has the opportunity to perform counseling functions in a timely manner. The EEO Counselor is not required to provide any information to his/her supervisor as to the name of the aggrieved person or the nature of the matters being counseled. In fact, an aggrieved person has the right to remain anonymous during the EEO counseling process. However, the collateral duty EEO Counselor is required to arrange time away from regularly assigned duties to carry out EEO counseling duties. USAID policy encourages managers to cooperate fully with the EEO Counselor but recognizes there are instances in which work pressures preclude an individual counselor from being available for EEO services. Managers are encouraged to accommodate the process whenever possible.

EEO Counselors shall not serve as representatives either for aggrieved persons (complainants, if a formal complaint is filed) or for USAID. Both the fact and the appearance of an EEO Counselor's impartiality in the counseling process are critical to the integrity of the process. For example, should an aggrieved person request the EEO Counselor attend a meeting the aggrieved person has arranged with a management official about the matters at issue, the EEO Counselor may attend, but **must explain** both to the aggrieved person and to all others present in such a meeting that the EEO Counselor is there as an observer only. Managers should not attempt to pressure EEO Counselors to give express opinions as to the validity of the complaint or to extract information from the EEO Counselor about the aggrieved person, should the aggrieved person elect to remain anonymous during the counseling stage.

An EEO Counselor may not counsel anyone who works in the same chain of command as the Counselor.

REQUIRED FIRST STEP

Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, sexual orientation, national origin, age, physical or mental disability, and/or in retaliation for having participated in activity protected under various civil rights statutes, must consult an EEO Counselor as a first step in the EEO process. Further, the aggrieved person must seek EEO counseling within **45 calendar days** of the date of the alleged discriminatory event, the date the aggrieved person became aware of the event, or in the case of a personnel action, the date the personnel action took effect. USAID/EOP will extend the **45 calendar day** time limit to permit timely contact when:

- the aggrieved person shows s/he was not notified of the time limits and was not otherwise aware of them; ***or***
- s/he did not know and reasonably should not have known the matter or personnel action occurred; ***or***
- despite due diligence, s/he was prevented by circumstances beyond his/her control from contacting a counselor within the time limits; ***or***
- other reasons considered sufficient by USAID or EEOC are found to exist. All time limits in Title 29 Code of Federal Regulations, Part 1614 (29CFR1614) are subject to waiver, estoppel, and equitable tolling. Where these exceptions are invoked, EOP should be consulted for guidance.

Although the counseling process may be extended in certain circumstances, regulations establish a **30 calendar day** time frame in which to complete the EEO counseling process.

The EEO counseling process is designed to present an opportunity to resolve the aggrieved person's concerns without the complaint going further. However, the process recognizes that EEO counseling will not always be successful in resolving the aggrieved person's concerns, and therefore, the counseling process must also include a limited fact-finding aspect. The fact-finding done at the informal complaint stage serves many purposes. First, it establishes a base for resolution, for developing a record from which jurisdictional matters may be determined, and for identifying the claims raised during counseling so that a proper determination can be made as to the claims accepted for processing. Second, it establishes the specific protected class, the basis or bases for the complaint, and determines whether timeliness and other requirements are met. Finally, it provides basic information to facilitate the investigation of a formal complaint if filed, such as identifying some of the individuals involved in the matters that form the basis of the complaint. When an individual files a formal complaint, the EOP Director makes a decision to accept or dismiss the complaint based on the information contained in the formal complaint document and the EEO Counselor's report.

The EEO Counselor has six clearly defined duties that must be performed for each completed counseling action. The six duties are:

1. Advise the aggrieved person about the EEO process under 29CFR1614, including rights and responsibilities, and possible election requirements, i.e., in certain instances, the aggrieved person may elect to pursue his/her complaint either through the EEO process, the negotiated grievance system, or through filing an appeal with the Merit Systems Protection Board (MSPB);
2. Identify the claim(s) and basis(es) that are of concern to the aggrieved person and that may potentially be raised in a formal complaint;
3. Conduct a limited fact-finding inquiry for the purposes of furnishing information for settlement efforts and determining jurisdictional and other questions, if a formal complaint is filed;

4. Seek a resolution of the matter at the lowest possible level;
5. Document the resolution if one is achieved or advise the aggrieved person of his/her right to file a formal discrimination complaint if resolution fails; and,
6. Prepare a report sufficient to determine that required counseling actions have been taken and resolve any jurisdictional questions that may arise, if a formal complaint is filed.

Managers involved in the matters that gave rise to the informal complaint and managers who have the authority to grant resolution are to cooperate with the Counselor in the performance of his/her duties in regard to fact-finding and resolution.

THE FACT-FINDING PROCESS

The EEO Counselor conducts fact-finding by talking with the aggrieved person, witnesses with direct knowledge of the matters of concern, personnel in the Office of Human Resources (depending on the nature of the claims), and the managers involved in the employment decision(s) that form the basis of the complaint, [i.e., failure to promote, adverse or disciplinary action, performance rating, award, training, reassignment, termination, harassment (sexual and non-sexual), etc.], and by reviewing relevant documents.

Managers involved in the matters at issue in the informal complaint and managers and others in the Office of Human Resources are required to make available to the EEO Counselor any documentation and/or statistical information s/he requests. The EEO Counselor may make copies of such documents, as needed, to effectively complete the EEO counseling record. When reviewing Agency documentation, an EEO Counselor must observe USAID rules concerning the handling and use of these documents. S/he may request access only to those official documents pertinent to attempt an informal resolution of the informal complaint.

The EEO Counselor's initial interview is with the aggrieved person. In that initial interview, the EEO Counselor attempts to determine the specific matters of concern, the date(s) the complained of action(s) occurred, the discriminatory basis or bases alleged, and the reason for delay in seeking counseling (if any). S/he also provides the aggrieved person with detailed information on the EEO process and in particular the rights and responsibilities of the aggrieved person in the EEO process. S/he goes over a checklist with the aggrieved person, has the aggrieved person initial each item on the checklist as it is covered, and sign the checklist at the bottom. The EEO Counselor provides the aggrieved person with a copy of the checklist and retains a signed copy for inclusion in the EEO Counselor's report.

Although an aggrieved person or a manager directly involved in the decisions or acts at issue may suggest witnesses to the EEO Counselor, the EEO Counselor will limit interviews to those persons who appear to have direct knowledge of the matters at issue in the informal complaint or other matters that may have a bearing on the motivation of the manager taking the complained of action.

The EEO Counselor will interview the manager or managers directly involved in the matters that gave rise to the informal complaint. In this interview, managers are expected to explain their rationales for the acts, or failures to act, that gave rise to the complaint. For example, in an informal complaint over a non-selection, the EEO Counselor will ask the selecting official such questions as, "What were you looking for in a candidate?" "What criteria did you use in making your selection?" "Please compare the aggrieved person's qualifications against those criteria with the qualifications of the person(s) you selected and explain why you considered the selected candidate better qualified." The EEO Counselor does not officially investigate the complaint, attempt to verify statements, or attempt to prove or disprove discrimination. However, having information about the reasons for the actions taken, or the failures to act, that led to the informal complaint helps the EEO Counselor work with the aggrieved person to determine a resolution that is acceptable to both management and the aggrieved person.

The EEO Counselor also reviews relevant documentation, such as portions of the merit staffing file in an informal complaint over non-selection. For example, s/he may compare the qualifications as described in the vacancy announcement with the qualifications of the aggrieved person and the selectee as revealed in their respective applications. S/he may also look at selections by the same supervisor over the 2 years prior to the informal complaint to determine if there appears to be a pattern to selections; i.e., whether all selections are of members of the same protected groups and whether any selections were of members of the aggrieved person's protected group(s).

During the course of EEO counseling, the EEO Counselor will communicate with the aggrieved person regarding the information gathered in fact-finding and progress toward resolution. Although the EEO Counselor will not attempt to dissuade an aggrieved person from filing a formal complaint, the EEO Counselor will make the aggrieved person aware of facts as revealed by records reviewed, information obtained in interviews, and explain the bearing of the information on the aggrieved person's claims of discrimination. For example, if the aggrieved person is a white female who is claiming discrimination in a non-selection based on her race and sex and the selected candidate is a white female, the EEO Counselor will explain to the aggrieved person that she has not established she was treated differently (less favorably) than others not of her protected group(s), since a member of her protected group(s) was selected for the desired position. That information itself may be persuasive, and the aggrieved person may be satisfied that she was not discriminated against and not pursue the complaint beyond the counseling stage. However, an aggrieved person, nonetheless, may elect to file a formal complaint.

OPPORTUNITY FOR RESOLUTION

A primary goal of the pre-complaint stage of the EEO process is to resolve the aggrieved person's concerns informally early in the process. Early resolution to the satisfaction of all the parties is cost effective, both in terms of saving the cost of investigation and adjudication at the formal stage, and in terms of ending any negative feelings or disruption in the work environment where the complaint arose. One of the uses for facts developed in

fact-finding is to further resolution and develop a basis for the terms to be included in any settlement agreement.

While in fact-finding the EEO Counselor interviews the manager or managers who made the employment decisions that led the aggrieved person to enter EEO counseling, the counselor may find it necessary to go higher in the management chain to reach the level manager with the authority to grant the relief requested by the aggrieved person to resolve the complaint. Although ultimately the specific relief agreed on may differ from that initially requested by the aggrieved person, the resolution attempts still must involve the level official who can grant the requested relief.

Managers should view the counseling process as an opportunity to resolve an employee's concerns, and if the relief requested by the aggrieved person is not viable for whatever reason, the manager should consider alternatives that might be viable. Managers appropriately assist the counseling process by developing reasonable resolution alternatives that are in the best interest of the government and of the aggrieved person. Managers are encouraged to resolve EEO complaints at any point in the process at which both parties can agree on terms. Resolution is not an admission of discriminatory intent in the matters at issue in the complaint. Rather, resolution to the satisfaction of both parties is viewed positively as good management practice.

A matter is considered resolved when the parties involved agree to a resolution of the problem and sign a resolution (settlement) agreement, thereby avoiding the filing of a formal complaint. All resolution agreements must be reduced to writing and signed by the Complainant and the Director, EOP, at a minimum. Certain types of relief, such as those involving changing a personnel action or involving payment of monies, may only be authorized by the Director, EOP. A resolution agreement is not official until the Director, EOP, signs it. Managers involved in the attempt at resolution should work with the EEO Counselor to move the proposed resolution through the management chain to those persons who have the authority to grant the specific resolution.

The resolution agreement must be in writing, and it must clearly state what each party agrees to do to resolve the matter. Nothing should be assumed by either party to be obviously implied by the agreement. If something is part of the agreement, it must be written into the agreement. All parties involved in resolution agreements should read the written agreement carefully to assure that all matters agreed to have been reduced to writing, are clearly stated in the agreement, and that the agreement accurately reflects the specifics of the agreement, as well as captures the intent.

Where time frames may reasonably be included in the terms of the agreement (i.e., when the relief will be granted), they should be in writing in the agreement. An example is "*[The aggrieved person's name]* will be reinstated to a position as a GS-11 Program Analyst in USAID headquarters within six months of the signing of this agreement, with all back pay and benefits that would have accrued had there been no break in service."

The regulatory time frame for EEO counseling is **30 calendar days**. If it appears that resolution may be attainable if additional time were allocated, the EEO Counselor may ask

the aggrieved person if s/he would like to extend the counseling period for up to an additional **60 calendar days**. If the aggrieved person agrees and signs a request to extend, the Director, EOP, has the authority to grant the extension. If the EEO Counselor is not successful in achieving resolution within the time allotted, s/he will conduct a final interview with the aggrieved person, going over the information gathered in the fact-finding, the attempts at resolution, and the timeframes and requirements associated with the filing of a formal complaint, should the aggrieved person choose to file.

If the EEO Counselor is successful in achieving resolution, the signing of the resolution agreement concludes the informal process, and the aggrieved person as part of the resolution agrees not to file a formal complaint on the matter(s) resolved in the agreement.

In some instances, formal mediation may be the more effective avenue to resolution. For that purpose, USAID offers Alternative Dispute Resolution (ADR) in certain EEO complaints.[3] If the aggrieved person is willing to participate in ADR, the EEO Counselor may refer the informal complaint to the Director, EOP, for participation in the ADR program, except that certain types of claims (class action/disparate impact, security clearances, and reductions-in-force) and certain employment categories (applicants for employment and other non-USAID employees) are not eligible to participate in USAID's ADR Program. The Director, EOP, makes the decision regarding whether an informal complaint can then be referred for mediation through ADR. In an informal complaint approved for participation in ADR, the EOP Complaints Adjudication staff is responsible for coordination and monitoring of the ADR process, and the EEO Counselor no longer participates in the process. Managers who are directly involved in the matters at issue in the informal complaint are required to participate in the mediation process when ADR is approved for the informal complaint.

When the aggrieved person elects to participate in USAID's ADR program, the ADR period may extend the informal complaint process for up to **90 calendar days**. If the matter has not been resolved before the **90th calendar day**, the informal complaint is reassigned to the EEO Counselor, who then conducts the final interview and issues the aggrieved person the notice of the right to file a formal complaint. From the date the aggrieved person receives the notice, s/he has **15 calendar days** in which to file a formal complaint.

During the final interview with the aggrieved person, the EEO Counselor should discuss what occurred during the EEO counseling process in terms of attempts at resolution. The EEO Counselor must not indicate whether s/he believes the discrimination complaint has merit. Since EEO counseling inquiries are conducted informally and do not involve sworn testimony or extensive documentation, the Counselor: (1) cannot make findings on the claim of discrimination; and, (2) should not imply to the aggrieved person that his/her interpretation of the claims of the case constitutes an official finding of USAID on the claim of discrimination. The EEO Counselor should explain the attempts at resolution

[3] ADR is available both at the pre-complaint stage and the formal complaint stage of the EEO process.

without quoting the individuals involved or including in the narrative counseling report any remarks that might be inflammatory. In order to facilitate resolution attempts, all parties involved in resolution must be free to explore all avenues of relief. Offers and statements made by parties will not be used against either party if resolution attempts fail.

MANAGEMENT SUPPORT OF THE EEO COUNSELOR

Managers and supervisors are to provide full and complete support and cooperation to the EEO Counselor and to the informal counseling process. This includes both providing information to the EEO Counselor and also to assisting the EEO Counselor's efforts to resolve the complaint at the counseling level. Since the EEO Counselor has **30 calendar days** in which to resolve the matter(s) at issue, managers and other persons with whom the counselor has need to speak about the claims in the informal complaint are to make themselves available in a timely fashion. Failure of management officials to cooperate with the counseling process does not stop the process from going forward or prevent the employee who has entered counseling from filing a formal complaint of discrimination.

Managers and supervisors, Human Resources personnel, and other USAID employees are to provide the EEO Counselor access to official records as necessary to assist him/her in the informal resolution of the matters at issue. This includes official personnel records and any other relevant records. Again, every effort should be made to provide access as quickly as possible in order to facilitate the counseling and resolution process.

COUNSELING OF CLASS COMPLAINTS

There are critical differences between an individual complaint and a class or class action complaint. A **class** is defined as a group of employees, former employees, or applicants for employment who are alleged to have been adversely affected by an agency personnel policy or practice that discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, and/or mental or physical disability. Class complaints are intended to address widespread practices or personnel policies that are discriminatory. The class agent is a class member who acts for the class during the processing of the class complaint. The class agent must fairly and adequately protect the interests of the entire class. For a class agent to allege that s/he has been discriminated against as an individual is not enough to justify the inference that a personnel policy or a practice is discriminatory. The class agent must show there is a connection between his/her individual concerns and that of the class as a whole. There are specially trained individuals who may act as EEO Counselors on class action complaints. While in individual complaints the aggrieved person seeks out an EEO Counselor, a class agent must contact EOP for the assignment of a Counselor.

The regulatory requirements for class complaints at 29CFR1614.204 provide a different structure for class complaints than for individual complaints. For class complaints, there is a three-stage process. The <u>first</u> stage is the establishment of a class complaint. At this stage, the class agent is required to seek counseling by contacting EOP for the assignment of an EEO Counselor trained to counsel class complaints. The <u>second</u> stage is a

determination on the merits of the class complaint. The third stage is the determination of the claims for relief of the individual class members. The second and third stages are the responsibility of an Equal Employment Opportunity Commission (EEOC) Administrative Judge.

In order to have the class certified by an Administrative Judge and be able to proceed as a class complaint, the class agent must provide sufficient information to show that the following requirements are met:

1. The class must be so numerous that a consolidated complaint of the members of the class is not practical. There is no specific minimum of persons that must be in a class in order for it to meet the numerosity requirement. The Administrative Judge will also consider such factors as geographic distribution of the class, the ease with which class members may be identified, the nature of the practice or personnel policy alleged to have been discriminatory, and the size of each class member's claim.

2. The class agent must show that there are questions of fact that are common to the class. The Administrative Judge considers whether the practice at issue affects the whole class or only a few employees, the degree to which a practice is limited to a smaller organizational unit as opposed to being a widespread practice, and the uniformity of the membership of the class, in terms of the likelihood that the treatment of the members of the class involves common questions of fact.

3. The class agent must show that his or her claims are typical of the claims of the proposed class that the agent wants to represent. To meet the criteria of typicality, the class agent must possess the same interest and suffer the same injury as the members of the proposed class.

4. The agent must show to the satisfaction of the EEOC Administrative Judge that the agent and his or her representative will fairly and adequately protect the interests of the class. In order to show that representation is adequate, the class representative should have no conflicts with the interests of the class and should have sufficient legal training and experience to pursue the claim or designate an attorney with the requisite skills and experience. This may mean that the agent or representative chosen by the agent has actually represented someone in a class action and is knowledgeable of legal theories and procedures. If adequacy of representation is the only requirement not met, the Administrative Judge may allow time for the agent to obtain representation that meets the criteria.

The class agent has the responsibility for proving that these criteria are met. All four of the criteria must be met, or the Administrative Judge will recommend that the class complaint be rejected. Class agents have the right to obtain from USAID information relevant to the question of class certification. Class agents also will be permitted reasonable access to and/or use of Agency facilities, such as copiers, telephones, word processors, etc., for the preparation of the case, as long as there is no undue disruption of

Agency operations. Prior approval from a supervisor must be obtained before government equipment can be used for this purpose. Questions on this point are to be referred to the Director, EOP.

EEO STATUTES AND REGULATIONS

The important anti-discrimination laws and regulations are:

Title VII of the Civil Rights Act of 1964, as amended

Title VII prohibits discrimination based on race, color, religion, sex, or national origin. It also prohibits reprisal or retaliation for participating in the discrimination complaint process or for opposing any employment practice made unlawful under Title VII. Title VII also clarifies the employment decisions based on pregnancy are a form of sex discrimination. (A person filing a complaint under Title VII is protected from the Agency taking retaliatory actions because the employee alleged discrimination).

Age Discrimination in Employment Act of 1967, as amended (ADEA)

The ADEA prohibits discrimination in employment on the basis of age (40 years or older to age 70). Unlike Title VII and the Rehabilitation Act, the ADEA allows persons claiming age discrimination to go directly to court without going through an agency's administrative complaint procedures. If, however, a complainant chooses to file an administrative complaint, s/he must exhaust administrative remedies before proceeding to court. As with Title VII complaints, a complainant exhausts administrative remedies **180 calendar days** after filing a formal complaint, or **180 calendar days** after filing an appeal with the EEOC if the EEOC has not issued a decision. Since the statute of limitations in ADEA cases is not consistently applied by the courts, an aggrieved person wishing to bypass the administrative process should initiate the civil action as soon as possible after the expiration of the 30-day waiting period following the notice of intent to sue.

Fair Labor Standards Act of 1938, as amended [Equal Pay Act (EPA) of 1963]

The EPA found in Volume 29 United States Code, at Section 206(d), is an amendment to the Fair Labor Standards Act. The Act prohibits employers from paying employees of one sex less than those of the opposite sex who perform equal work, and pay is defined as including both wages and fringe benefits.[4] Equal work means that the jobs being compared require equal skill, effort, and responsibility and are performed under similar working conditions.

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[4] Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statues simultaneously. Equal Pay Act (EPA) complaints are processed under Part 1614. In the alternative, an EPA complainant may go directly to U.S. District Court on the EPA claim.

An employee may file an Equal Pay Act complaint directly with the EEOC District Office, should s/he choose to do so. In that event, the EEOC is responsible for investigating the complaint. If an Equal Pay Act claim is filed with EEOC against USAID, EEOC will ask USAID to submit a written defense to the charge. The complainant then has the opportunity to rebut USAID's written defense. Based on the results of this preliminary inquiry, the EEOC will decide whether to conduct an on-site inquiry, which includes the examination of records. Should the EEOC District Office determine a violation of the Equal Pay Act has occurred, the District Director issues an enforcement order. All affected employees are then notified.

Equal pay complaints may also be filed under Title VII. The regulations state that any violation of the EPA in which the jurisdictional requirements are met is also a violation under Title VII. Title VII also accepts types of violations not actionable under the Equal Pay Act. EEO complaints that include claims that fall under the Equal Pay Act will be processed according to 29CFR1614, just as any other complaint of discrimination. In Equal Pay Act complaints filed under Title VII, the complainant must establish a *prima facie* case of discrimination. The complainant must show facts that, if they remain unexplained, would reasonably give rise to an inference of discrimination. Once a *prima facie* case has been established, it becomes management's responsibility to demonstrate that there were legitimate, non-discriminatory reasons for its actions. In an EEO complaint of equal pay violation, an agency has the responsibility of proving by a preponderance of the evidence that the wage and/or fringe benefit differential is a result of one of the following: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex, such as a classification system.

Rehabilitation Act of 1973, as amended

The Rehabilitation Act prohibits discrimination on the basis of mental and physical disability. Under certain circumstances, it requires an agency to offer to reassign an individual with a disability to a vacant funded position as an obligation under the affirmative action requirement of the Act. It requires that agencies make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability unless the Agency can demonstrate that the accommodations would impose an undue hardship on the operation of its program. The Civil Rights Act of 1991 provided a "good faith" defense to claims of failure to make reasonable accommodation. When an employer can show that, in consultation with an individual with a disability, s/he has made a good faith effort at reasonable accommodation, the employer may avoid the award of compensatory damages. Relief in the form of "make whole" damages could still be awarded.

29 Code of Federal Regulations, Part 1614 – Federal Sector Equal Employment Opportunity

The regulations governing the processing of Federal sector discrimination complaints are contained in Title 29 of the Code of Federal Regulations Part 1614. The regulations set out the Agency's obligations.

Civil Rights Act of 1991

The Civil Rights Act of 1991 strengthens some remedies for intentional discrimination, confirms statutory authority, and provides statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964. The Act allows the payment of up to $300,000 in compensatory damages to victims of intentional discrimination for such things as emotional pain, suffering, and future economic loss, but does not require such award. Claims for compensatory damages are reviewed on a case by case basis. Compensatory damages are to compensate for loss, and therefore, the loss must be proven. Complainants will be expected to support their claims with documentation proving the cost. The Act also contains provision for the payment of punitive damages. However, the Federal government is specifically exempted from this provision. Damages do not apply to adverse impact cases, nor are they available under the Americans with Disabilities Act (ADA) if the employer can show it made a good faith effort to find a reasonable accommodation that would not impose an undue hardship.

Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR)

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) was passed by the Congress "to require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws; to require that each Federal agency post quarterly on its public web site, certain statistical data relating to Federal sector equal employment opportunity complaints filed with such agency; and for other purposes". The Act applies to Federal employees, former Federal employees, and applicants for Federal employment under any of the following statutes: Title VII of the 1964 Civil Rights Act; the Age Discrimination in Employment Act of 1967, as amended; the Rehabilitation Act of 1973, as amended; the Fair Labor Standards Act of 1938, as amended; and, the Whistleblower Protection Act. The No FEAR Act also has provisions for Agency reimbursement to the General Fund of the Treasury for amounts paid from the Fund as a result of violations of discrimination or whistleblower protection laws; written notification to employees of their rights and protections under applicable discrimination and whistleblower protection laws; and management and employee training on their rights and protections.

THEORIES OF DISCRIMINATION

The theories most frequently applicable to EEO complaints are; disparate treatment and disparate impact.

Disparate Treatment

The disparate treatment theory of discrimination is the one most often used in individual complaints of discrimination. In a formal complaint of discrimination in which the complainant alleges disparate treatment, the complainant must show by a preponderance of the evidence that s/he was treated differently than others similar in situation to him/her because of his or her race, religion, color, national origin, sex, age, sexual orientation, or physical or mental disability, or in reprisal for prior participation in any of the activities protected under Title VII of the Civil Rights Act of 1964, as amended. Protected activities include participating in the EEO process in any way and speaking out against acts the complainant believes to be discriminatory. In order to counter the argument of disparate treatment, the Agency must show that there was some legitimate, nondiscriminatory reason for the action taken that is alleged to be discriminatory, and that others similar in situation to complainant were treated the same as complainant. The complainant will have an opportunity to present direct or circumstantial evidence in order to show the Agency's reason(s) are pretextual.

Disparate Impact

A claim of disparate impact is not that the Agency deliberately discriminated against the individual filing the complaint, but that a facially neutral Agency policy or practice disproportionately affects the complainant and others in his/her protected group(s). As with claims of disparate treatment, the complainant must allege discrimination based on membership in a protected group, such as on the basis of race, religion, color, national origin, sex, sexual orientation,[5] age, physical or mental disability, and/or prior participation in any of the activities protected under Title VII of the Civil Rights Act of 1964, as amended. In order to counter the argument of disparate impact, the Agency must show that the employment criteria or policy has a manifest relationship to the employment in question and is a business necessity required for the safe and efficient operation of the Agency. To demonstrate pretext, the complainant must be able to show there are other criteria or practices that would achieve the same agency goal or necessity but without disparate impact on the protected group.

COVERED BASIS(ES)

In order to have a complaint accepted for investigation, the aggrieved person must allege s/he has been discriminated against on the basis of race, color, sex, sexual orientation,

[5] Although USAID recognizes sexual orientation as a complaint basis, there is no statutory right to appeal a decision in a claim of sexual orientation discrimination to the EEOC or to Federal District Court.

religion, national origin, age (over 40), physical or mental disability and/or in retaliation for having participated in activity protected by the various civil rights statutes.

Race

Race as a basis is dependent on the individual's membership in a specific race or mixture of races. Since every individual is a member of a race or mixture of races, every individual is protected from discrimination on the basis of race. Therefore, it is unlawful to discriminate against any employee or applicant for employment regarding any term, condition or privilege of employment i.e., hiring, promotion, compensation, training, awards, termination, etc. This includes both intentional discrimination and any neutral job policies, which are not job related, which disproportionately exclude employees and/or applicants for employment. Likewise, it is prohibited by law to make employment decisions that are based on stereotypes and assumptions about the abilities/traits of certain racial groups.

Title VII also prohibits denial of equal employment opportunity because of marriage to or association with individuals of a different race; membership/association with ethnic organizations; or attendance in schools or places of worship associated with or linked to ethnic groups. In a matter of non-selection, for example, a person who alleges discrimination on the basis of race has established a *prima facie* case when it is shown the complainant applied and was qualified for the position and the person selected is of a different race than the complainant.

Color

Most often, a person who alleges color as a basis does so intending color to be synonymous with race. In fact, color as a basis of discrimination refers to differentiation in skin color. In a matter of non-selection, for example, a person who alleges discrimination on the basis of color has established a *prima facie* case when it is shown the complainant applied and was qualified for the position and the person selected is a different skin color than the complainant, even though both may be of the same race. In the counseling of complaints based on color, the EEO Counselor is to explain to the aggrieved person the difference between color as a basis and race as a basis. When the aggrieved person elects to include color as a basis, a specific description of the skin color should be used, such as light tan or dark brown. The term "Black" as color should be used only when it is an accurate descriptor of the individual's skin color. When the EEO Counselor includes comparative information in the counseling report on skin color, it should be such that the reader can understand the complainant's skin color in comparison to the comparator employee's skin color. "My skin color is a tawny brown; I am lighter in color than (the aggrieved person)."

Religion

Title VII prohibits discrimination based on religious beliefs and places a duty on the employer to accommodate religious beliefs and practices, unless such accommodation would place an undue burden on the employer.

In regard to allegations of failure to accommodate religious beliefs, the EEOC has adopted the following standard,

> "To establish a *prima facie* case of failure by the agency to accommodate appellant's religion, appellant must show that: (1) he has a bona fide religious belief that conflicts with an agency policy; (2) he informed the agency of his belief; and (3) he was penalized in some way because of the conflict. *Protos v. Volksvagon of America, Inc.*, 797 F.2d 129, 133 (3rd Cir. 1986). Once appellant establishes a *prima facie* case, the burden shifts to the agency to produce evidence showing that it cannot reasonably accommodate appellant without incurring undue hardship or that appellant has been accommodated. *Protos*, 797 F.2d at 134. In *TransWorld Airlines, Inc. v. Hardison*, 432 US 63 (1977), the Supreme Court found that accommodations which create more than *de minimus* monetary or efficiency costs cause undue hardship."

Marital Status

EEO statutes or regulations, *per se*, do not cover marital status. However, if a person of one race believes himself/herself to have been discriminated against because of marriage to a person of another race, the aggrieved person may file on the basis of race. Equally, if a married female believes she has been denied employment that is available to married men, she may file on the basis of sex and address the difference in treatment between married women and married men.

Sex

Gender

Title VII prohibits discrimination based on gender (male or female). A person may claim harassment based on gender and refer to incidents that are entirely unrelated to sexual harassment. An example of harassment based on gender is a series of actions that treat the aggrieved person differently than others not of the same gender. An example of sexual harassment is the soliciting of sexual favors in return for promotion. In order to establish a *prima facie* case, the complaint must show s/he applied for and was qualified for the position and that the person selected is of a different gender than the complainant.

Sexual Harassment

Sexual harassment is properly treated as a subcategory of sex discrimination. There are two types of sexual harassment. In the hostile or offensive work environment type, the issue is whether the agency has created or allowed to be created an environment that is so offensive or hostile as to affect the terms, conditions or privileges of employment. In the "*quid pro quo*" type, the issue is whether an adverse employment action was taken as a result of rejection of sexual advances. Sexual harassment is prohibited regardless of the sexual preference or orientation of the person alleged to have committed the harassing actions. Males

and females have equal protection against sexual harassment, and it should be remembered that sexual harassment may occur without economic injury to the victim. The failure of economic injury to occur does not preclude the establishment of injury to the party through the adverse affect of the work environment. Sexual harassment by a male against another male or by a female against another female is still sexual harassment.

Sexual Orientation

Title VII is not interpreted as providing protection against discrimination on the basis of sexual orientation. However, regardless of sexual orientation, every individual is protected from discrimination based on gender, and sexual harassment by a member of the same sex is still a covered action. USAID accepts claims of discrimination on the basis of sexual orientation. However, the claims may be pursued at the administrative level only within the Agency; that is, there is not a statutory right of appeal to the EEOC.

Age

As it applies to the Federal government, the Age Discrimination in Employment Act of 1967 (ADEA) provides protection to persons over age 40. Section 633a of the Act is the only section, other than the basic parameters of the Act's coverage, which relates to the Federal government. While in complaints involving other bases, the aggrieved person must first exhaust administrative remedies, the aggrieved person may pursue matters of age discrimination directly in Federal court, without exhausting administrative remedies. However, if an aggrieved person elects to pursue the matter in the administrative process initially, that process must be exhausted before the matter can then be raised in Federal court. If the aggrieved person elects to pursue the matter in Federal court without first participating in and exhausting the administrative remedies, s/he must give the EEOC at least **30 calendar days advance notice** of the intent to file a complaint in U.S. District Court. The notice must be given within **180 calendar days** of the alleged discrimination.

In the event such a complaint was filed against USAID, EEOC would notify USAID. USAID would then conduct an inquiry into the allegations of age discrimination and would also make good faith efforts to resolve the complaint.

The compensatory damage provision of the Civil Rights Act of 1991 does not apply to cases under the ADEA. There is no right to a jury trial in an ADEA action in Federal District Court.

Although the EEOC interprets the election of the administrative process to extend the time in which the aggrieved person may file a civil action, the courts in some jurisdictions take the position that, since the administrative process is optional, pursuing the administrative process does not extend the time limits. In those jurisdictions, it is possible that the time limits for filing in court could expire while the aggrieved person is pursuing the complaint in the administrative process. Another difference in complaints based on age concerns the

recovery of attorney fees. The ADEA does not permit recovery of attorney fees in the administrative process.

It should be noted that age is considered relative, rather than an absolute. While only persons **over age 40** are covered under the act, the mere fact that the person considered by the complainant to have been treated more favorably is over age 40 is not sufficient to prevent the establishment of a *prima facie* case. Disparity in age is considered, and the disparity must be considered "significant." However, there is no specific difference in age that has been established as the criterion. The probative value of the disparity increases with the increase in age difference. However, in any instance, the aggrieved person must be alleging a difference in treatment between himself/herself and employee(s) who are younger.

There is no requirement under the ADEA that the employer accommodate an employee because of his or her age. Accommodation for physical or mental disability falls under the purview of the Rehabilitation Act of 1973.

Disability

Definitions

The Rehabilitation Act of 1973 prohibits discrimination against qualified individuals with disabilities. An individual with a disability is one who: "(1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such impairment." Major life activities are functions such, as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. A disability recognized as compensable by the Department of Veterans Affairs may or may not qualify as an "individual with a disability" under the meaning of the Act.

"Physical or mental impairment" is defined as: (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Qualified Individual With a Disability

A "qualified individual with a disability" is defined as a person: (1) who satisfies the requisite skill, experience, education and other job related requirements of the position that s/he holds or seeks; and (2) is able to perform the essential functions of the position with or without reasonable accommodation.

Limitation of Major Life Activity

When the complainant demonstrates that his/her impairment limits the major life activities of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working, the EEOC has not required the complainant to demonstrate the impairment limits his/her employability. However, in the instance of other impairments, the complainant is required to demonstrate the impairment does limit a major life activity **and** is a significant barrier in a field of work in order to be considered a disability.

Performance of Essential Functions

In addition to establishing that s/he is a qualified individual with a disability within the meaning of the Rehabilitation Act, the individual must demonstrate that s/he is capable of performing the **essential** functions of the job, with or without reasonable accommodation

Medical Evidence

The burden is on the employee to establish that he/she is a "qualified individual with a disability." When a disability and/or need for reasonable accommodation is not obvious, USAID may require that the employee provide reasonable medical documentation that specifically relates the condition to the performance of the functions of the job. The medical document must describes the nature, severity, and duration of the individual's impairment; the activity or activities that the impairment limits; the extent to which the impairment limits the individual's ability to perform the activity or activities; and/or why the individual requires reasonable accommodation or the particular reasonable accommodation requested, as well as how the reasonable accommodation will assist the individual to apply for a job, perform the essential functions of the job, or enjoy a benefit of the workplace.

Reasonable Accommodation

Once an employee has established that s/he is a "qualified individual with a disability," USAID has an obligation to provide reasonable accommodation, unless the required accommodation would place an undue hardship on the Agency. This means USAID must review options that would result in reasonable accommodation and, if the decision is made that reasonable accommodation will not be provided, be able to demonstrate the options would create an undue hardship on the Agency. "Undue hardship" is determined on a case-by-case basis. Reasonable accommodation includes, but is not limited to: making facilities readily accessible to and usable by individuals with disabilities; job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices; the provision of qualified readers and interpreters; reassignment to a vacant position, etc.

In determining whether an accommodation is reasonable, USAID must consider the overall size of USAID's program with respect to the number of employees, number and type of facilities, and size of the budget; the type of Agency operation, including the composition and structure of USAID's workforce; and, the nature and cost of the accommodation.

Not all EEO matters involving an individual with a disability as complainant are concerned with reasonable accommodation. Many qualified individuals with disabilities do not require any accommodation on the part of USAID in order to perform the essential functions of their jobs. Individuals with disabilities are equally protected from disparate treatment on the basis of their disabling conditions.

Temporary Disabilities

Although the Rehabilitation Act was not intended to cover minor, temporary disabilities, the fact that the disability is temporary is insufficient to preclude a person from qualifying as an individual with a disability. The person must still establish s/he suffers from an impairment that affects a major life function. A mild or moderate impairment that interferes with a person's ability to perform a particular job but does not limit significantly the ability to perform other jobs, does not meet the criteria.

When a person meets the criteria for "qualified individual with disability" due to a temporary disability, USAID has the same obligations in regard to reasonable accommodation, just as though the condition were permanent. However, when the temporary disability abates, so does USAID's obligation to provide reasonable accommodation.

Intermittent Disabilities

A disability being intermittent (i.e., not present all the time) is not sufficient in and of itself to prevent the individual from qualifying as a "qualified individual with a disability." In some instances, a disability being intermittent may be sufficient to prevent the criteria from being met. Also, in those instances in which there is no pattern to the coming and going of the disabling condition, that may be sufficient to preclude an agency providing reasonable accommodation. Each instance must be examined on its own merits.

Past Disability

An employee may fall within the definition of qualified individual with a disability if s/he has a record of a disabling condition that substantially limits one or more major life activity. An individual may not be discriminated against in employment because of a past disability that is no longer present. For example, if an individual previously had an episode of mental illness but is no longer suffering from that

illness, an agency may not refuse to hire the person on the basis that the person was previously disabled.

Disabled Veterans

The fact that an individual may have been determined by the Department of Veterans Affairs to suffer from a service connected disability does not automatically designate the individual as a "qualified individual with a disability" under the meaning of the Act. A disabled veteran is subject to the same requirements as any other individual in terms of establishing that s/he is a "qualified individual with a disability."

Special preference for veterans determined to have a 30 percent or greater percentile of disability is established under other legislation. An agency may use its 30 percent hiring authority to place a qualified disabled veteran into a position prior to reviewing other applications. Veterans' preference is limited to the initial hire and does not come into play in subsequent merit staffing actions in which a veteran may compete. Veterans' preference is considered in Reductions-In-Force (RIF) situations, however.

National Origin

A claim of discrimination based on national origin may be made based on ethnicity, as well as on having been born in another country. National origin as a basis in allegations of discrimination may refer to an individual's or his/her ancestor's place of origin; because an individual has the physical, cultural or linguistic characteristics of a national origin group. The following, which are considered to be grounded in one's national origin considerations, may also be considered as relevant to the basis of national origin:

1. marriage or association with persons of a national origin group;
2. membership in or close association with an organization identified with or seeking to promote the interests of national origin groups;
3. attendance or participation in schools, churches, temples or mosques generally used by persons of a national origin group; and,
4. because of an individual's name or spouse's name is associated with a national origin group.

USAID has an obligation to provide a workplace free of harassment on the basis of national origin. 29CFR1606.8 (b) defines such harassment as, "Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) has the purpose of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities." The harassment must be sufficiently pervasive as to alter the conditions of employment and create an abusive working environment.

Reprisal

Freedom from Restraint, Interference, Coercion, and Reprisal

It is unlawful to restrain, interfere, coerce, or discriminate against complainants, their representatives, witnesses, directors or deputy directors of EEO, EEO managers or officers, counselors, or any other agency officials with responsibility for processing discrimination complaints, because of involvement with a discrimination charge during any stage of the complaint or because an individual entered EEO counseling; filed a charge of discrimination; responded to an EEO Counselor during the counseling process; testified, assisted, or participated in any manner with an investigation, proceeding or hearing; or because of any opposition to an unlawful employment practice.

Review of Reprisal Claims

A person who claims reprisal may have the claim reviewed as an individual complaint of discrimination.

When a complainant claims reprisal in connection with the filing of a prior discrimination complaint and the prior complaint is in process at USAID when the claim is made, the complainant may ask USAID to consolidate the reprisal claim with the prior complaint, even though it does not appear to be like or otherwise related. If the prior complaint is at the hearing stage of the complaint process, the complainant may ask the Administrative Judge to consolidate the claim with the complaint at the hearing. USAID or the Administrative Judge may grant the request provided the request is made within **45 calendar days** of: (1) the act that forms the basis of the claim; (2) the effective date of the alleged discriminatory personnel action; or (3) the date the complainant knew or reasonably should have known that the alleged act of reprisal occurred.

Sustaining a Claim of Reprisal

In order to sustain a claim of reprisal based on participation in activities protected under Title VII, the complainant must show that:

1. s/he participated in a protected activity;
2. management was aware of the participation;
3. s/he suffered an adverse employment action subsequent to the participation; and,
4. the adverse employment action followed the participation in protected activity in such a time frame that a connection between the two actions may be inferred.

Section 2: FORMAL COMPLAINT PROCESS

FILING, RECEIPT, AND ACCEPTANCE OF FORMAL COMPLAINTS

Where the informal process began when the individual sought EEO counseling, the formal complaint process begins when the complainant[6] files a formal complaint with EOP. Either the complainant or his/her representative must sign the formal complaint, and it must identify the complainant, provide contact numbers and addresses for the complainant (or the representative, if represented), identify the organizational unit where the complainant claims the discrimination occurred, define the bases of discrimination alleged and define the specific acts or failures to act the complainant contends were discriminatory. The complainant must file the formal complaint within **15 calendar days** of receiving a **Notice of the Right to File a Formal Complaint** from the EEO Counselor, or the formal complaint may be dismissed as untimely. The claims filed in the formal complaint must be the same as or like or related to the claims that were raised in EEO counseling. The complaint may be submitted to EOP by mail or delivered in person.

The complainant is responsible for keeping EOP advised of his/her current address and/or telephone number. Failure to do so may result in EOP dismissing the complaint in its entirety.

REPRESENTATION

The complainant has the right to be accompanied, represented and advised by a representative of his/her choice at any stage of a complaint. If the individual selected by the complainant as a representative has a role in the complaint, such as witness, the individual is not permitted to serve in both roles. The individual may be either a witness or a representative, but not both. Also, EOP officials, EEO Counselors, and employees of the Office of General Counsel are prohibited from representing Agency complainants.

A complainant may choose to have an attorney as a representative. However, even if the complainant prevails in his/her complaint, USAID will not award the complainant attorney fees for services rendered during the informal stage of the complaint process. If the complainant prevails, the Agency may award the complainant reasonable attorney's fees or costs incurred in the processing of complaints alleging discrimination based on race, color, religion, sex, sexual orientation, national origin, physical or mental disability, or reprisal. However, the Age Discrimination in Employment Act (ADEA) does not allow for payment of attorney fees or costs charged during the administrative process for complaints alleging age discrimination. Attorney fees may be recovered under the ADEA in a civil suit in Federal District Court, if the complainant prevails.

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[6] During the informal process, the individual bringing the claim of discrimination is called the "aggrieved person." Once the individual files a formal complaint, the individual becomes the "complainant."

DEFINING THE CLAIM(S) AND BASIS(ES)

In the formal complaint, the complainant must describe the alleged discriminatory acts or failures to act and the bases of alleged discrimination. The description must be clear and specific and the claim and bases must meet criteria established in 29CFR1614.103[7]. If the claims made in the complaint are so vague or general that no specific claims can be defined for investigation, EOP will attempt to clarify them. In those instances in which the claims cannot otherwise be clarified, EOP notifies the complainant in writing of those matters about which clarification is required. The complainant then has **15 calendar days** from the date of receipt of EOP's letter in which to provide the additional information required.

If the complainant is unable or refuses to furnish the necessary information within a reasonable period of time, claim(s) in the complaint or the complaint in its entirety must be dismissed. However, this may be done only after EOP has sent the complainant a written request that includes a notice of the proposed dismissal, a request the complainant provide certain required information or otherwise proceed with the complaint, and the complainant has failed to satisfy the request within **15 calendar days** of his/her receipt of the written request.

ACKNOWLEDGMENT OF RECEIPT AND ASSIGNMENT OF CASE NUMBER

Any USAID employee or applicant for employment with USAID may file an EEO complaint with the Agency. Political appointees and personal service contractors (PSCs) are included in the definition of "employee." Foreign Service Nationals (FSNs) are not covered under Title VII.

Within 48 hours of its receipt of the formal EEO complaint, EOP issues the complainant written acknowledgement. The letter of acknowledgment, also called a Notice of Receipt, informs the complainant of the date on which the complaint was officially filed. If the complaint is mailed, the date of filing is the postmark date, not the date the Agency received the complaint. The acknowledgement letter provides the complainant information about the formal process, including the complainant's rights and responsibilities. The letter also includes information on the complainant's right to appeal the dismissal of all or a portion of a complaint and of USAID's responsibility to conduct a complete and fair investigation of the complaint within **180 calendar days** of the date of filing, unless the parties agree in writing to extend the period.

[7] Complaints of discrimination covered by this part are (1) individual and class complaints of employment discrimination and retaliation prohibited by Title VII of the Civil Rights Act, as amended (i.e., discrimination on the basis of race, color, religion, sex and national origin), or the ADEA (i.e., discrimination on the basis of age [at least age 40], or the Rehabilitation Act, i.e., discrimination on the basis of mental or physical disability), or the Equal Pay Act (i.e., sex-based wage discrimination).

After review of the formal complaint and the counselor's report, the Agency will notify the complainant in writing of the claim(s) accepted for processing and/or, if appropriate, that the complaint or a portion thereof, is dismissed. The letter of acceptance also provides information on the formal complaint process, and offers the complainant **15 calendar days** in which to provide additional information, if the complainant feels the accepted claims as defined do not accurately reflect his/her complaint.

DISMISSAL OF A COMPLAINT OR CLAIM(S) WITHIN A COMPLAINT

If a formal complaint does not meet regulatory requirements, it must be dismissed.

REASONS FOR DISMISSAL

To conserve program resources and program integrity, EOP processes certain complaint dismissals expeditiously. Following are the types of dismissals that are made early in the administrative process:

EOP shall dismiss a complaint:

1. that has not been brought to the attention of an EEO Counselor and is not like or related to a matter that was brought to the attention of a counselor;
2. that was not brought to the attention of an EEO Counselor within **45 calendar days** of the event or within **45 calendar days** of the effective date of the personnel action, and the complainant did not show that the **45 calendar day** contact period should be extended. In order for the time frame to be extended, the complainant must show s/he was not notified of the time limits and was not otherwise aware of them, or did not know and reasonably could not have known the act or personnel action occurred or that despite due diligence was prevented by circumstances beyond his/her control from contacting a counselor within the time limits, or for other reasons considered sufficient by the Agency or the EEOC;
3. that refers to a situation over which the Agency has no jurisdiction;
4. that is not based on the complainant's race, color, religion, sex, sexual orientation[8], age, national origin, physical or mental disability, and/or reprisal. Complaints of discrimination based on age are accepted only if the complainant was at least 40 years of age when the alleged discriminatory action occurred;
5. that sets forth matters identical to those in a previous complaint filed by the same complainant and that has been, or is being, processed;

[8] Sexual orientation is not a basis covered by statutes; it is covered by USAID policy.

6. that alleges the Agency is proposing to take action that may be discriminatory. (If the individual alleges, however, that the preliminary step of proposing the action was part of a pattern of harassment for a prohibited reason, the complaint cannot be dismissed on the basis that it is a proposed action because it has already affected the employee.);

7. that is the basis of a pending civil action in a U.S. District Court in which the complainant is a party;

8. that is not timely filed: that is, it was not filed within **15 calendar days** of the receipt of the Notice of Right to File[9] and the complainant has not shown s/he was prevented by circumstances beyond his/her control from filing a complaint within the required time frame or for other reasons considered sufficient by the Agency or the EEOC;

9. that sets forth matters that also form the basis of an appeal filed before the Merit Systems Protection Board (MSPB) by the same complainant;

10. that the complaint is moot. For example, full relief has been granted prior to the filing of the formal complaint;

11. that the complainant failed to prosecute (An agency may dismiss an allegation or a complaint for failure to prosecute only after it provides the complainant with a written request, that includes a notice of the proposed cancellation, to provide certain information or otherwise proceed with the complaint, and the complainant has failed to satisfy the request within **15 calendar days** of its receipt. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information is available.);

12. where a complainant refuses within **30 calendar days** of receipt of an offer of settlement to accept an offer of full relief in adjustment of the complaint, provided that the Director, EOP, or a designee has certified in writing that the Agency's written offer of relief constitutes full relief and given notice that failure to accept within **30 calendar days** would result in the dismissal of the complaint;

13. that fails to state a claim (i.e., harm to some term or condition of the complainant's employment);

14. that alleges dissatisfaction with the processing of a previously filed complaint;

15. where EOP determines, after strictly applying the criteria set forth in EEOC decisions, that the complaint is part of a clear pattern of misuse[10] of the EEO

[9] Notice of The Right to File a formal discrimination complaint.

[10] A clear pattern of misuse of the EEO process requires evidence of multiple complaint filings and allegations that are similar or identical, lack specificity or involve matters previously resolved, or evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system. A complainant may seek review by an administrative judge of such a dismissal if a hearing

process for a purpose other than the prevention and elimination of employment discrimination;

16. where the complainant has raised the claim in a negotiated grievance procedure that permits allegations of discrimination; or

A complaint may be dismissed in whole or in part. If part of a complaint is dismissed, the remainder of the complaint will be processed according to the requirements of 29CFR1614 and Agency guidelines.

The dismissal or cancellation of a complaint may not be based on evaluation of the merit(s) of the claim(s).

When one or more claims in the formal complaint are dismissed, the letter of acceptance will constitute a final agency decision on those claims and notify the complainant of his/her appeal rights on the dismissal.

The dismissed claims, which will not be investigated, are not appealable until after the investigation of the accepted claims is completed, or after **180 calendar days** have passed since the complaint was filed and the investigation has not been completed.

CONSOLIDATION AND JOINT PROCESSING OF COMPLAINTS

EOP may consolidate for processing discrimination complaints filed by two or more complainants relating to the same or similar claim(s), but only with the written consent of the affected complainants. EOP will notify the complainants in writing when complaints are consolidated for processing. In consolidated complaints of this type, each complainant receives a separate Report of Investigation, even though only one investigation may have been conducted. Similarly, each complainant is entitled to receive a separate Final Agency Decision. However, only one EEOC hearing is conducted on the consolidated complaints. A complainant may withdraw his/her complaint at any time during the process, but this does not affect the processing of the remaining complaints of other complainants consolidated for processing.

Two or more complaints filed by a single complainant may be consolidated for processing by the Agency. This may be done at the investigative stage, where two or more complaints filed by the same complainant may be investigated simultaneously. In that instance, a single Report of Investigation is issued, covering the complaints that have been consolidated. Two or more complaints filed by the same complainant may be consolidated for processing after the investigation of one or more of those complaints. If complaints are consolidated before investigation, a single Report of Investigation is issued. If the complaints are investigated individually and later consolidated for processing, each investigation will result in a separate Report of Investigation. Consolidation of complaints

is requested on the remainder of the complaint, but it is not appealable until final action is taken on the remainder of the complaint.

for processing may occur after investigation, but prior to an EEOC hearing, in conjunction with an EEOC hearing, or if a civil action is filed, when the parameters of the civil action are defined. EOP notifies the complainant in writing when complaints have been consolidated for processing.

INVESTIGATION OF A FORMAL COMPLAINT

Both USAID and the complainant have responsibilities in the investigation of a complaint of discrimination. The Director, EOP, ensures that: (1) all accepted claims are investigated; (2) all employees of the Agency cooperate in the investigation; and (3) witness testimony is given under oath or affirmation and without a promise that the information will be kept confidential. The Director, EOP, also ensures that individual complaints are promptly and thoroughly investigated, and that final decisions are issued in a timely manner.

Agency employees, including managers, who are called to give testimony in a complaint are required to make themselves available to give testimony as soon as possible after the investigator makes initial contact with them to set an appointment. Agency employees, including managers, are to provide any documentation or information the investigator requests and to do so promptly, as EEO regulations provide strict time requirements on investigation of formal complaints.

The complainant must cooperate in the investigation and keep the Agency informed of his/her current address. Cooperation with the investigation includes making oneself available for interview, providing requested documentation, and responding to other requests from the investigator in a timely manner, such as the review and return of one's affidavit and/or addenda.

ASSIGNMENT OF FORMAL COMPLAINTS FOR INVESTIGATION

EOP provides for prompt investigation of the complaint, and typically uses contract investigators. The Director, EOP, issues a letter authorizing the investigator to conduct an investigation into the merits of the formal discrimination complaint. The letter authorizes the investigator to investigate all aspects of the complaint, to require all employees of the Agency to cooperate with the investigator, and to require Agency employees having any direct knowledge to provide testimony and/or documentation to the file.

Managers in the organizational unit in which the complaint arose must provide all appropriate assistance to the investigator. This assistance may include, but is not limited to: making available requested documents and statistical information, making witnesses available, making available private interview space and a telephone if needed, making available photocopying facilities, and bringing the weight of his/her office to bear on employees who do not cooperate with an EEO investigator.

PURPOSES OF THE INVESTIGATION

The purposes of the investigation are: (1) to gather facts on which to base a determination regarding whether there has been a violation of a provision of any of the relevant statutes,[11] and (2) if a violation is found, to have a sufficient factual basis from which to fashion an appropriate remedy.

The investigation must include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's protected group as compared to the treatment of similarly situated groups outside of the complainant's protected groups, and any policies and/or practices that may constitute or appear to constitute discrimination, even though the complainant may not have expressly cited them.

THE ROLE OF THE INVESTIGATOR

The role of the investigator is to discover and to collect factual information concerning the claims in the complaint under investigation and to prepare a Report of Investigation. The investigation is an official review into claims of discrimination raised in that complaint. The investigative process is non-adversarial, and the investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence.

The EEO regulations authorize the investigator to administer oaths and to require that statements of witnesses be under oath or affirmation, without a pledge of confidence, and to require Agency employees having any knowledge of the matter at issue in the complaint to furnish testimony under oath or affirmation, without a pledge of confidence.

The EEO investigator not only is, but also maintains the appearance of being, objective, thorough, and unbiased. S/he must be neutral in approach to factual development. The investigator is not an advocate for any of the parties or interests and does not develop allegiances to them. The investigator conducts himself/herself in a friendly and professional way to all involved parties. In addition, the following rules are observed:

1. The person assigned to investigate typically does not occupy a position in USAID.
2. Generally, the investigator is a contractor and s/he has not been hired by, and is not obligated to the person(s) involved in the matter(s) giving rise to the complaint.

[11]The EEOC enforces: 1) section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 USC e-16; 2) sections 501 and 505 of the Rehabilitation Act of 1973, as amended, 2 USC 791 and 794a; 3) section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 USC633a; and 4) the Equal Pay Act, Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29USC. 296(d).

3. In some instances, USAID is prohibited from using its usual investigative resources. In such cases the Agency uses alternatives, such as other outside sources, i.e. investigators from other Federal agencies. Such situations include, but are not limited to, a potential conflict of interest (e.g., complainant is an employee on the EOP staff and names an EOP management official as the person taking the wrongful action).

METHOD OF INVESTIGATION

Statement of Claims Accepted

Before the investigation begins, EOP gives the investigator a copy of the acceptance letter containing a statement of the claims accepted for investigation. The accepted claims establish the framework for the investigation. During the course of the investigation, a complainant may seek to amend the complaint by adding one or more claims that are like or related to the claims listed in the acceptance letter. When that occurs, the complainant must give EOP a written statement of the claims s/he wants to add to the complaint in process. The Director, EOP, may accept one or more of these claims or reject one or more of these claims as an amendment to the existing complaint. To be accepted as an amendment to an existing complaint, the claims must be like or related to the claims under investigation. If the amending claim is not like or related to the accepted claims in the complaint, EOP may refer the complainant to EEO counseling on the non-related claims. Under certain circumstances, one or all of the new claims may be dismissed.

A Variety of Fact-Finding Techniques Allowed

An investigator may use any of a variety of fact-finding models, such as the interview or the fact-finding conference; and, a variety of devices, such as requests for information, position statements, exchange of letters or memoranda, interrogatories, and affidavits. Regardless of the technique used, all USAID employees <u>are required</u> to cooperate fully in the investigation. This includes responding promptly to any requests for information or documentation, making appointments as necessary with the investigator to give testimony, and prompt review and signature of affidavits or declarations. This cooperation is necessary in order for USAID to meet the regulatory time requirements for complaints processing.

EVIDENCE

As a part of the investigation, the investigator gathers testimonial and documentary evidence from a variety of sources, including the complainant, witnesses, management officials involved in the matters that gave rise to the complaint, and the Office of Human Resources (M/HR). The investigator also may require an individual providing documentary evidence to provide information detailing the meaning of the document, its relevance to the accepted claims in the complaint, the original source and the authenticity of the document. Just as a complainant is responsible for presenting his/her complaint and providing supporting evidence, management officials are responsible for assuring that the record is complete from management's point of view. This is accomplished by providing

full and complete testimony, providing any available supporting documentation, and identifying witnesses with direct knowledge. If a management official has documentation to support his/her position in response to the complainant's discrimination claims, s/he should be prepared to provide it to the investigator at the time of giving testimony.

In order to support findings and, ultimately, final decisions on the merits of the claims in the complaint, evidence collected should be material to the complaint, relevant to the claim(s) raised in the complaint, and as reliable as possible.

Material Evidence

Evidence is "material" when it relates to one or more of the claims raised in the complaint or raised by the Agency's answer to it. To determine whether evidence is material, one must look to the allegations of discriminatory conduct and resultant harm contained in the complaint and the Agency's answers to the allegations. If the evidence relates to one or more of those matters, then it relates to matters at issue, and it is material.

Relevant Evidence

Evidence is "relevant" if it tends to prove or disprove a material claim raised in a complaint. Relevancy and materiality are often used interchangeably. Generally, relevance is the more important concept in an investigation. If evidence is not relevant, whether it is material is of little consequence. A test of relevance is to ask, "What does this evidence tend to prove?" If the answer is that it tends to prove or disprove a proposition that is related to the complaint, then the evidence is relevant.

Reliable Evidence

Evidence is "reliable" if it is dependable or trustworthy. Evidence should not be ignored because it is of questionable reliability. Such evidence may lead to reliable evidence.

Some factors to consider in determining whether testimony is reliable are: whether the witness' testimony is based on his/her own experience and personal knowledge, or based on rumor, hearsay, or innuendo; whether the testimony is a statement of fact or is merely an unsupported conclusion; and whether the witness has an interest in the outcome of the complaint or is otherwise biased. The investigator is required to make note when witness bias is discovered. S/he may do this by placing that information in the witness' affidavit or through an investigator's memorandum to the file included in the Report of Investigation. Examples of potential for witness bias are: 1) Favorable feelings toward a party based on a mutual alliance, family ties, or close friendship; 2) hostility to a party, because of a past disagreement; and 3) self-interest in the outcome of the complaint. The investigator then attempts to corroborate the testimony, either through additional witnesses or through documentation. The weight accorded the evidence gained

from potentially biased witnesses is governed by the degree to which it can be determined that the bias colored the testimony.

Some factors considered in determining whether documents are reliable are: 1) whether they were prepared in response to the investigation or whether they are maintained in the ordinary course of business; 2) whether they are obtained from the custodian of such records or the author of the document; 3) whether they are copies or original documents; and, 4) whether the documents are signed and/or dated. However, a manager may, in response to a claim of discrimination, review relevant material in the Agency's records and prepare a summary based on that information. The manager should then provide the summary and a copy of the source documentation. If the source documentation is too voluminous to provide, the manager may have a disinterested third party review the documentation and the manager's summary and give a statement swearing or attesting the summary is a true and accurate reflection of the material summarized.

Types of Evidence

There are many types of evidence that can be obtained on the claims raised in an EEO complaint. The three basic types of evidence are circumstantial evidence (e.g. comparative evidence or other evidence giving rise to an inference of discrimination), direct evidence, and statistical evidence.

Circumstantial/Comparative Evidence

Comparative evidence must be sought in every case alleging disparity in treatment on a basis protected by a law enforced by the EEOC. One of the challenges of developing comparative evidence is gathering sufficient evidence to determine whether the comparators are similarly situated with respect to the complainant. In general, similarly situated means that the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment in the context of a particular employment decision. It is important to remember that individuals may be similarly situated for one employment decision, but not for another. For example, a female FS-03 Program Officer may be similarly situated to a male GS-14 Civil Engineer in a discrimination case involving the approval of annual leave where the same rules are applied to both by the same supervisor or where both are in the same unit or subject to the same chain of command. The investigator is obligated to find out whether there were indeed persons not specifically identified by the complainant, but similarly situated whose treatment could be compared to the complainant's treatment. For example, in this instance, the investigator would obtain evidence showing annual leave requested by complainant and those for whom the same official approves annual leave, annual leave approved, annual leave requested but denied, and the protected class of the similarly situated coworkers. That is, if the complainant has claimed sex discrimination, then the gender of the similarly situated coworkers would be

obtained in order to show whether males were treated more favorably than females in the granting of annual leave, as alleged by the complainant.

When giving testimony, complainants and managers should be aware of who is similarly situated and draw that to the investigator's attention, as well as any relevant information as to the treatment of similarly situated employees in comparison to the complainant.

Direct Evidence

Direct evidence of discrimination consists of facts that show intentional discrimination caused an adverse action. Direct evidence is relevant in cases involving disparate treatment where the question is whether the employer intentionally treated employees differently because of a protected factor. It is also relevant in cases involving the effect of policies where the question is whether the policy disparately (negatively or adversely) treats all employees in the protected class.

Direct evidence is rare. The statement "I would never hire a woman for that job" is direct evidence of discrimination on the basis of sex in hiring. The statement "I would never select Jane Doe for that job" is not necessarily direct evidence of discrimination, as non-gender related factors may exist making Ms. Doe unsuitable for that particular job. It would be the investigator's responsibility then to determine from the individual making the statement, the rationale behind it. However, some investigators are not as thorough as others. If the investigator reveals to the manager the allegation that s/he made such a statement, the manager should not wait for the investigator to ask his/her intent in making the statement, but should proffer information as to his/her rationale. In fact, a manager should assure s/he has provided all relevant information about the claim, regardless of whether the investigator asks the specific questions to elicit such questions.

Statistical Evidence

The investigator obtains statistical evidence from EOP and M/HR, and evidence given by a survey of the general environment as appropriate. For example, this evidence may be probative when allegations involve comparative treatment of groups, as in an allegation of a pattern or practice of discrimination, or the adverse effect of an agency policy or practice. In order to determine whether participation in promotion actions for a particular protected group falls within an appropriate range, it is necessary to be able to compare participation in promotion actions against representation in the workforce for the relevant organizational unit. However, the size of the population on which the statistical data is presented is key in determining its statistical validity and thereby its probative value. The smaller the number in the compared population, the less certain you are of the results. Still, in a selection action for example, if the complainant has established on the instant non-selection (complainant alleges race discrimination, is White, and the selectee is Black), a record of selection actions by this manager in the past 2 years might

indicate two thirds of the manager's selections were of White candidates. This would be significant information to consider to an overall finding of whether discrimination had occurred.

Sources of Evidence

The EEO investigator only investigates the accepted claims in the complaint. The testimony of all witnesses that will be made a part of the Report of Investigation file, including that of the complainant and management officials, is made under oath or affirmation or penalty of perjury.

The investigator seeks evidence to support or refute both the complainant's claim(s) and management's response(s). This includes both the taking of testimony and the collection of documentary evidence. A complainant may make many allegations that are neither related to the accepted claim(s) nor reflective of actions that might reveal discriminatory motivation. The investigator is not required to investigate sidebar claims or inconsequential allegations.

Typically, EEO Counselors and EEO staff members are not asked to be witnesses in the investigation of a formal complaint. The reason is to avoid compromising their objectivity and/or the appearance that they are taking sides in a complaint matter. However, in those instances in which the individual has direct knowledge of a matter at issue and that information may not successfully be obtained from another source, an EEO Counselor or EEO staff member may be required to give testimony. In that event, s/he is treated as any other witness.

The Complainant

The EEO investigator usually begins the investigation by taking testimony from the complainant in order to get on the record the specifics of the individual's complaint. The EEO investigator gives the complainant an opportunity to provide his/her information on the matters at issue and any documentation s/he may have to support his/her position. The EEO investigator will ask the complainant to identify the documentation as to what it is and what the complainant intends it to show. The EEO investigator will also ask the complainant to suggest persons as witnesses, who have direct knowledge of the matters at issue.

The Agency

EEO is a comparative process. Therefore, it is necessary for the investigator to gather information about the treatment of the complainant and others of his/her protected class in comparison to those not of his/her protected class. Information is gathered through both testimony and documentary evidence.

The EEO investigator makes a written request to USAID offices, such as M/HR, to provide relevant documentation and statistical information. This request is made at the beginning of the investigation. However, as the EEO investigator develops

information during the investigation, s/he may find additional documentation or statistical information is needed and will request it. In addition, the investigator may request documents from individuals directly involved in the complaint. All requests by the investigator for information are to be honored, and the documentation provided as quickly as possible.

The management official(s) with direct knowledge of the matters at issue are required to give testimony. For example, the individual who initiated or enforced the decision about which the complaint was filed will give testimony. In addition, other management officials and complainants may be interviewed. USAID considers the provision of testimony required in an EEO complaint to be an important part of a manager's responsibilities, just as it is with any employee. Management officials are to make themselves available to provide testimony within **5 work days** of the date of initial contact by the investigator to set an appointment for interview.

The EEO investigator may find it necessary to seek follow-up information and may do so in a variety of ways, including further requests for documents or statistics, affidavits, interrogatories, or through a fact finding conference. All employees are to provide full cooperation.

Witnesses

The complainant, management officials, and other witnesses may suggest as witnesses persons who have direct knowledge of the matters at issue in the complaint. The investigator may interview those persons, if in fact s/he determines their testimony is relevant. Witnesses are to make themselves available for interview within **5 work days** of initial contact by the investigator.

In some instances, testimony sufficient to support or refute a matter at issue may have already been obtained before all suggested witnesses have been scheduled for interview and their testimony taken. When that occurs, the investigator will not interview additional witnesses who can provide only the same information as previous witnesses. The investigator will require anyone suggesting a witness to identify not only the name and a contact number of the witness but also the information to which the witness can speak. Witnesses need not be employees of the Agency but should have direct knowledge of the matters at issue for their testimony to be relevant.

WITNESS RIGHTS AND RESPONSIBILITIES

Anyone, including the complainant and management officials, identified in the investigation as a witness is required to give testimony under oath or affirmation and to make himself/herself available to the investigator within **5 work days** of the initial contact to set an appointment for interview. In those instances in which testimony is not signed in the presence of the investigator and returned to him/her at the conclusion of a face to face interview, the witness is required to review, make any necessary modifications and

changes, and sign the affidavit before a notary public or a witness who can attest to the witness' signature and return the affidavit to the investigator within **5 work days** of having received it from the investigator. The witness may fax a copy of the signed statement to the investigator, then send the original by overnight mail or air courier service. Witnesses overseas may simply fax the signed statement and send the original by the usual means of sending mail to the United States.

Interrogatories are to be completed within **10 work days** of receipt from the EEO investigator and returned to the EEO investigator in signed hard copy. The witness should fax a copy of the completed, printed and signed interrogatory to the investigator at the time of completion, then send the signed original as described above.

All Agency employees having knowledge of the matter being investigated are required, when requested by the EEO investigator, to furnish testimony under oath or affirmation without a pledge of confidentiality and to cooperate in every way in the conduct of the investigation. Any employee who refuses to cooperate, or who falsifies or conceals material facts in connection with an investigation, may be subject to disciplinary action. Also, the failure of an Agency witness[12] to cooperate in an EEO investigation may result in the EEOC Administrative Judge taking an adverse inference against the Agency at hearing.

Anyone giving testimony in an EEO complaint has the right to have a representative present during any interviews by the EEO investigator or in the completion of interrogatories. However, a representative may serve only one witness in the complaint. If the representative is an attorney, the witness is responsible for all costs associated with having the attorney present during the interview or the attorney's participation in completing or reviewing an interrogatory. This is true for complainants, management officials, and other witnesses.

All witnesses have a right to receive a copy of their affidavit or interrogatory given in an EEO complaint.

Persons who are not employees of the Federal government cannot be compelled to give testimony or to sign an affidavit. This includes retired Federal employees.

Disclosure of Investigative Material to Witnesses

Witnesses are entitled to receive a copy of his/her own testimony. Witnesses are not entitled to see or have copies of the statements of other witnesses. The complainant must receive a copy of the Report of Investigation containing a copy of testimony and documentation gathered in the investigation and a transcript of the EEOC hearing, if a hearing is held. Other witnesses are not entitled to such access.

[12] Agency witnesses are persons such as the manager(s) who took the actions complained of or persons designated as witnesses who have direct knowledge of the matters at issue in the complaint.

In those instances in which the EEO investigator determines during an investigation that the disclosure of information or documents to a witness is necessary to obtain information from the witness (e.g. to explain more thoroughly the claims in a complaint or to explain a manager's articulated reason for an action in order to develop evidence bearing on that reason) the investigator may make that specific information available to the witness. Typically, investigators provide a copy of the affidavits articulating management's reasons for its actions to the complainant for his/her rebuttal prior to the completion of the investigation.

The management official who was cited by the complainant as responsible for the discriminatory or retaliatory acts or failures to act is required to give testimony. S/he is considered a witness and entitled to no more rights than any other witness. However, should the investigator find it appropriate, s/he may make available to the management official(s) pertinent portions of documents in which the management official has been identified and charged with wrongdoing. This includes such documents as the EEO Counselor's Report, the formal complaint, the complainant's affidavit, and other affidavits in which the official is named. Except for the complainant, the names of the witnesses making such allegations will not be revealed to the management official during the investigation.

The investigator may make other documents available to the management official, or to other witnesses, for the purpose of allowing the witness to refresh his/her memory. An example is the applications of the complainant and the selectee in a complaint of non-selection in a competitive action. Documents provided may be sanitized (i.e., the names of parties identified in the document are blacked out or otherwise removed) to protect the individual's privacy. An investigator should allow a responding management official access to case materials to the extent needed to respond to allegations and give evidence. USAID has the burden of determining what case material may be released in accordance with the Privacy Act.

Managers responding as selecting officials in a non-selection complaint should review the merit staffing file before giving testimony. Proposing and deciding officials in adverse and disciplinary actions should review the evidence supporting the specifications/charges that led to the disciplinary action prior to giving testimony. For performance-based complaints, the manager may have a "documentation" file on performance that would be helpful to review or documentation of complainant's work and that of comparative employees.

TRAVEL EXPENSES

Witness Employed by the Federal Government

When EOP, EEOC officials or EEO investigators require or authorize the presence of a witness, the witness shall be in an official duty status and is entitled to travel expenses as necessary, even if the witness is employed at an agency other than the one in which the complaint arises. The current employing agency of a Federal employee must initially authorize and pay the employee's travel expenses; the agency where the complaint arose must reimburse the employing agency. See Decision of the Comptroller General, Matter

of John Booth - Travel Expenses of Witness - Agency Responsible, File: B-235845, 69 Comp. Gen. 269 (1990).

Complainant, Applicant, or Representative not Employed by the Federal Government

USAID is not responsible for paying the travel expenses of an "outside" complainant or applicant. Although the complainant, who, for purposes of his/her complaint is a witness, may once have been employed by the Agency against whom s/he complains, the termination of the employment status with the Federal government also terminates any Federal obligation to pay travel expenses associated with prosecution of the complaint. See Decision of the Comptroller General, Matter of: Expenses of Outside Applicant complainant to Travel to Agency EEO Hearing, File: B-202845, 61 Comp. Gen. 654(1982).

Agency Employees Serving as Representatives for an EEOC Hearing

An agency employee who serves as an EEOC representative is entitled to receive compensation for time and mileage expenses incurred for travel to an EEOC hearing. If the Administrative Judge sets a hearing site that is outside the local commuting area of the Agency's organizational component where the complaint arose, the Agency must bear all reasonable travel expenses of complainant's authorized representatives, except that an agency does not have the authority to pay the travel expenses of the complainant's representatives if they are not Federal employees.

OFFICIAL TIME

According to regulation, a complainant is entitled to a representative of his/her choice during pre-complaint counseling and at all stages of the complaint process. Both the complainant and the representative, if they are Agency employees, are entitled [if otherwise on duty] to a reasonable amount of official time to present the complaint and to respond to agency requests for information. Witnesses who are Federal employees, regardless of whether they are employed by the Agency in which the complaint arose or some other federal agency, are considered in a duty status when their presence is authorized or required by EEOC or by USAID officials in connection with the complaint.

USAID's Procedures for Requesting Official Time

The complainant and the representative are required to request official time to his/her immediate supervisor in advance of using it. If time cannot be granted for the period identified in the request, managers are required to work with the complainant and/or the representative to make time available as soon as possible, while not interfering with the workload of the unit or USAID's mission.

If the manager denies the official time requested, either in whole or in part, the manager must provide the complainant a written statement giving the reason for the denial. In addition, if at the informal stage, the manager is to provide a copy of the statement to the

EEO Counselor for inclusion in the Counselor's Report or, if at the investigative stage, to the EEO investigator for inclusion in the Report of Investigation.

Reasonable Amount of Official Time

"Reasonable" is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information. The actual number of hours to which the complainant (and his/her representative, if any) is entitled varies, depending on the nature and complexity of the complaint and considering the agency mission and its need to have its employees available to perform their normal duties on a regular basis. Prior to the complainant's use of such time, the complainant and management should arrive at a mutual understanding as to the amount of official time to be used. If there is a problem in arriving at "reasonable time," the manager should consult EOP for guidance. Commuting time is not considered part of time allotted for EEO purposes.

Meeting and Hearing Time

Since most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with EEOC Administrative Judges, and since complainants and their representatives generally have no control over the length of those meetings and hearings, whatever time is spent in such meetings and hearings is automatically deemed reasonable. Whenever the presence of a complainant and/or his/her representative is required by USAID or an EEOC official in connection with an investigation or hearing on the complaint, both the complainant and the representative are to be granted official time for the duration of those meetings or hearings and are in duty status regardless of their actual tours of duty.

Preparation Time

Since presentation of a complaint involves preparation for meetings and hearings, as well as attendance at such meetings and hearings, complainants and their representatives are also afforded a reasonable amount of official time, as defined above, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time to prepare the formal complaint and any appeals that may be filed with the EEOC, even though no meetings or hearings are involved. However, because contract investigators conduct EEO investigations, large amounts of official time for preparation purposes are not necessary and will not be approved. Consequently, "reasonable," with respect to preparation time (as opposed to time actually spent in meetings and hearings), is generally defined in terms of hours, not in terms of days, weeks, or months. Again, what is reasonable depends on the individual circumstances of each complaint.

Aggregate Time Spent on EEO Matters

The EEOC considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, USAID may restrict

the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative's duty hours in any given month, quarter, or year. These overall restrictions depend on the nature of the position occupied by the representative, the relationship of that position to the mission of the Agency, and the degree of hardship imposed on USAID's mission by the representative's absence from his/her normal duties. The amount of official time afforded an employee for representational activities varies with the circumstances.

Moreover, 29CFR1614.605(c) provides that, in cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the EEOC or the Agency may, after giving the representative an opportunity to respond, disqualify the representative. At all times, the complainant is responsible for proceeding with the complaint, regardless of whether s/he has a designated representative.

The EEOC does not require an agency to provide official time to employee representatives who are representing complainants in cases against other Federal agencies.

Duty Status/Tour of Duty

"Duty status" in relation to the EEO process means the complainant's or representative's normal hours of work. USAID and the EEOC officials will, to the extent practical, schedule meetings and hearings during the complainant's normal working hours and USAID officials must provide official time for complainants and representatives to attend such meetings and hearings.

If meetings and hearings are scheduled outside of the complainant's or the representative's normal work hours, USAID will adjust or rearrange the complainant's or representative's work schedule to coincide with such meetings or hearings, or grant compensatory time or official time to allow an approximately equivalent time off during normal hours of work. The selection of the appropriate method for making the complainant or representative available in any individual circumstance shall be within USAID's discretion.

Witnesses, who are Federal employees, regardless of their tour of duty and whether they are employed by the agency where the complaint arose or another Federal agency, must be in a duty status when their presence is authorized or required by the EEOC or USAID officials in connection with an EEO complaint.

Complainant's Use of Government Property

Since the filing of an EEO complaint is a personal matter, the complainant must obtain the supervisor's authorization in order to use any government property in the processing of the complaint; the supervisor may obtain guidance from EOP. The same is true in regard to the use of government property by the complainant's representative. That includes computers, photocopiers, telephone, and fax machines, as well as any other government property.

Contractor's Use of Government Property

The EEO investigator is allowed certain use of government property; use of the telephone, photocopiers, and private interview space must be provided as needed. An investigator may be allowed the use of word processing equipment, typewriters, and equipment of like nature, as appropriate. Reasonableness of the requested use is the criteria for determining whether to grant the request. Guidance may be obtained from EOP as to whether a request should be granted.

TIME FRAMES

The maximum overall time allowed for an agency to process a complaint at the formal stage is **180 calendar days** from the filing of the complaint or **180 calendar days** from the date the complaint was amended to add claims, not to exceed **360 calendar days** from the filing of the initial complaint. The target time frame for completing the investigation is **60 calendar days** from the date the investigator receives the complaint file and letter of authorization.

A new basis may be added during the course of the investigation. Doing so does not extend the **180 calendar days** processing time. Should a complainant wish to add a basis, s/he should do so early in the investigation and advise EOP. Also, an investigator may add a basis, if there appears to be merit. When a new basis is added during the course of the investigation, the investigator is required to develop evidence on the additional basis.

A complainant may seek to amend a complaint during the investigative phase of the formal complaint process. The complaint may be amended only with claims like or related to those previously accepted and only with permission of the Director, EOP. Amendment of a complaint will extend the **180 calendar day** period by providing another **180 calendar days** from the date of the last amendment, not to exceed a total of **360 calendar days** from the date of filing of the original complaint.

REPORT OF INVESTIGATION

Contents of the Report of Investigation

The Report of Investigation includes: a copy of the formal complaint; the counseling report; communication between EOP and the complainant (and/or the complainant's representative) concerning the processing of the complaint; affidavits or statements of the complainant and witnesses; copies (or extracts) of records, policy statements, or regulations of the Agency; and, statistical information. When a manager gives testimony in a complaint and provides documentation to the investigator to support that testimony, the documentation is also included in the Report of Investigation. However, documentation concerning the substance of attempts to resolve the complaint during informal counseling or during any alternative dispute resolution procedure is not included in the Report of Investigation.

Availability of the Report of Investigation

The complainant and his/her representative are each entitled to a copy of the Report of Investigation when the investigation is completed. Management officials and witnesses are not entitled to a copy of the Report of Investigation.

Comparative Data

The Report of Investigation must contain a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of the complainant's group (as identified by the complainant) as compared to the treatment of employees not in complainant's group within the organizational segment in which the alleged discrimination occurred, and any policies or practices related to the work situation that may appear to constitute discrimination. Comparative data shall be limited to the 2 year period prior to the action at issue.

Managers giving testimony in a formal complaint should bear in mind that EEO is a comparative process. For example, if a Caucasian complainant claims race discrimination in a non-selection action, the manager who made the selection decision should be prepared to compare the complainant's qualifications with those of the selected candidate, explaining why the selected candidate was a better choice than the complainant. If the manager has made other selections within the past 2 years and those selections have included Caucasians, it would be relevant for the manager to include that information in his/her affidavit.

Burdens of Proof

In general, Federal agencies have adopted the standard of shifting the burden to go forward developed by the Supreme Court in the case of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), which is to be applied in making determinations regarding alleged discriminatory treatment for most individual complaints of discrimination. Under the *McDonnell Douglas* standard, the complainant has the initial burden of establishing a *prima facie*[13] case of discrimination to the extent that, were the *prima facie* case not rebutted, the inference may be made that there was discrimination. To meet this burden, the complainant must show that:

1. he/she belongs to a "protected" group;
2. he/she applied and was qualified for a position for which the employer had solicited applicants;
3. despite his/her qualifications, he/she was not selected; and,

[13] **Prima facie** is a Latin expression meaning "at first sight," and generally represents evidence that is sufficient, if not rebutted, to prove a particular proposition of fact. In employment discrimination complaints, it is that evidence which a complainant must first present to establish/prove that s/he has been discriminated against . The evidentiary requirements for establishing a prima facie will vary according to the theory of discrimination being used, i.e. disparate treatment, disparate impact, and/or retaliation.

4. the employer selected another applicant that was not a member of his/her protected group.

This is not a rigid standard, but may vary according to the nature of the action giving rise to the complaint. However, the standard does contain basic elements that must be met. The establishment of these elements is not sufficient in and of itself to support a finding of discrimination; rather, it provides the framework of a *prima facie* case, allowing an inference of discrimination.

The burden of proof considerations set down in *McDonnell Douglas v. Green* also apply to retaliation cases. *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 545 F.2d 222 (1976), provides general guidelines in establishing a *prima facie* case of retaliation. It must be shown that :

1. the complainant engaged in a protected activity[14];
2. the employer was aware of the protected activity;
3. the complainant subsequently was adversely affected by an action of the employer; and,
4. the action in question followed this protected activity within such a period of time that a retaliatory motivation may be inferred.

These are the general considerations bearing on the analysis of these particular charges to determine if the facts warrant findings of reprisal. Once a *prima facie* case of discrimination has been established, management has the obligation of articulating some non-discriminatory rationale for its actions. *Furnco Construction Corp. v. Waters*,

438 U.S. 567 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). "Articulation" of a legitimate reason, in this sense, is the mere statement, supported by some evidence, that management had a non-discriminatory basis for its action(s) affecting the complainant. This will result in a finding of no discrimination unless the reasons given are shown to be mere pretext for discrimination.

The final burden is on the complainant to demonstrate that the reasons given by management for its action are pretextual. This burden may be met by direct evidence of discriminatory intent or by indirect evidence of past practices. In order for the complainant to sustain allegations of discrimination based on a protected class, s/he must demonstrate by a preponderance of the evidence that management's articulation is a mere pretext for discrimination. Three categories of evidence can be used to show pretext: (1) direct evidence of discrimination, such as discriminatory statements or admissions; (2) comparative evidence; and (3) statistics.

[14] Participation in protected activity includes protesting alleged discrimination, entering the EEO process, filing an EEO complaint, being a witness in an EEO complaint, being a witness in an informal complaint, functioning as an EEO Counselor, working as a member of EOP staff, etc.

Harassment complaints are analyzed somewhat differently than disparate treatment complaints. In order to establish a case of a harassment resulting in a hostile work environment, the complainant must prove by a preponderance of the evidence that:

1. s/he belongs to a protected class;
2. s/he was subjected to a series of adverse actions or other conduct or incidents of a negative nature;
3. the harassment complained of was based on the membership in the protected class;
4. the harassment was so severe or pervasive that it affected a term or condition of employment and/or had the purpose or effect of interfering with his/her work environment and/or creating an intimidating, hostile, or offensive work environment.

It is not necessary to show the complainant was harassed to the point of emotional or psychological damage in order to show adverse effect. The standard for determining whether verbal or physical conduct is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a "reasonable person" would find the conduct intimidating, hostile, or abusive.

CONSTRUCTIVE DISCHARGE CLAIMS

A constructive discharge is generally alleged as an extension or result of a hostile work environment or harassment. Constructive discharge can occur where discrimination makes the work environment so hostile that the employee is forced to resign. However, a constructive discharge occurs only "if the employer **deliberately makes an employee's working conditions so intolerable** that the employee is forced into an involuntary resignation." In order to establish a case of constructive discharge, the employee must prove a purposeful effort on the employer's part to force a resignation or that an objective, reasonable person in the same circumstances would have felt compelled to resign.

REVIEW OF THE REPORT OF INVESTIGATION

The Director, EOP, or his/her designee reviews the Report of Investigation to determine whether the information contained in the file is sufficient to reach a proper decision on the complaint. When a contractor conducts the investigation, any request for additional information to be obtained through services of the contractor is made in accordance with the contract between the agency and the contractor.

SANCTIONS FOR FAILURE TO COOPERATE IN AN INVESTIGATION

Regulations require agencies to develop an impartial and appropriate record on which to make findings. The EEOC Administrative Judge and the Office of Federal Operations have regulatory authority to issue sanctions against an agency for its failure to do so.

Additionally, agencies and complainants each have a duty to cooperate with the investigator during an investigation. The EEOC may take sanctions against either party (complainant or USAID) where it fails to comply with the investigator's requests for testimony, documents, records, comparative data, statistics, or the attendance of witnesses. The investigator will make note in the Report of Investigation of any such failure without good cause to cooperate in the investigation.

If the investigator properly advised the party that a failure to comply may result in sanctions, the decision maker (Administrative Judge during the hearing process or USAID where the complainant requests a Final Agency Decision) or the EEOC on appeal may, in appropriate circumstances:

1. 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;
2. consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
3. exclude other evidence offered by the party failing to produce the requested information or witness;
4. issue a decision fully or partially in favor of the opposing party; or
5. take such other actions as it deems appropriate.

SETTLEMENT OF COMPLAINTS

Responsibility and Time Frames

The EEOC encourages agencies to attempt to settle an EEO complaint throughout the EEO process. The first attempt at resolution occurs during the EEO counseling stage. However, there is no requirement that a manager with the authority to settle a complaint must wait for the Counselor to make the necessary contacts and attempt to explore resolution.

As there are certain restrictions on time frames when a complainant has requested an EEO hearing, managers with the authority to authorize appropriate relief and who wish to attempt to resolve the complaint even after a hearing has been requested should contact EOP for guidance and assistance.

The parties may continue to negotiate a settlement, even if the complainant has rejected one or more settlement offer.

Although settlement offers may be made orally and accepted orally by the complainant, the oral agreement must be reduced to writing and signed by the Director, EOP, and the complainant, at a minimum.

NON-COMPLIANCE WITH TERMS OF SETTLEMENT

Disputes over the terms of settlement agreements can, and often do, arise. However, EEOC regulations provide for only the complainant to seek settlement agreement enforcement. In regard to settlement agreement enforcement, 29CFR1614.504 states the complainant must notify the EOP Director, in writing, of the alleged non-compliance within **30 calendar days** of when s/he knew or should have known of the non-compliance. In the notice the complainant may request specific implementation of the terms, or that the complaint be reinstated for further processing from the point processing ceased. The EOP Director must respond in writing to the complainant, informing him/her of what action the Agency has taken to comply with the settlement agreement, or that the Agency does not believe it is in non-compliance. If the complainant is not satisfied with the Agency response s/he may appeal to the EEOC within **30 calendar days** of receipt of the USAID response, or within **35 calendar days** after the notice of non-compliance if USAID has not responded. The complainant must serve a copy of the appeal to the EEOC on the Agency and the Agency may submit a response to the EEOC within **30 calendar days** of receiving complainant's notice of appeal.

The EEOC, if it determines that USAID is in non-compliance, may order compliance or may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts violate the settlement agreement will be processed as separate complaints according to applicable regulations found in 29CFR1614.106 or 29CFR1614.204. Settlement agreements resulting from traditional counseling mediation or the formal complaint process are all subject to enforcement by EEOC.

FINAL AGENCY DECISION WITH A HEARING

After the investigation is completed, EOP sends a copy of the Report of Investigation to the complainant. The package also contains a letter from EOP notifying the complainant of the right to request a Final Agency Decision without an EEOC hearing or an EEOC hearing before an Administrative Judge. The time limitation for the complainant to exercise that option is **30 calendar days** from the receipt of the Report of Investigation. Hearings are governed by 29CFR1614.109.[15]

When the Complainant Requests a Hearing

The hearing is an adjudicatory proceeding that completes the investigation of a complaint by ensuring the parties have a fair and reasonable opportunity to explain and supplement the record and examine and cross-examine witnesses. The complainant must submit the request for hearing directly to the EEOC and provide a copy of the request to the Director, EOP. Upon receipt, the EEOC will: appoint an Administrative Judge who assumes full

[15] In the case of accepted class complaints, an EEOC Administrative Judge will, pursuant to 29CFR1614.204(h), conduct a hearing on the complaint in accordance with 29CFR1614.109(a) through (f).

responsibility for adjudicating the complaint; request the Agency to forward a copy of the complaint file to the Administrative Judge; and, provide necessary information to the complainant and the Agency regarding the hearing. The Administrative Judge overseas the development of the hearing record and adjudicates claims of discrimination and issues, findings, and conclusions.

Generally, the Administrative Judge will conduct a hearing on the merits of a complaint unless:

1. the parties mutually resolve the complaint and the hearing request is withdrawn;
2. the hearing request is otherwise voluntarily withdrawn;
3. the complaint is remanded for failure to prosecute; or
4. the administrative judge determines that some or all material facts are not in genuine dispute and issues an order limiting the scope of the hearing, or if the administrative judge decides to issue findings and conclusions without a hearing as indicated in 29CFR614.109(e)(2) or (3).

Both the complainant and USAID are obligated to obtain and enter into the record any evidence necessary for adjudication.

AGENCY RESPONSIBILITY AT THE HEARING STAGE

Agency Representative at the Hearing

USAID's representative, which is an attorney from the Office of the General Counsel (OGC), is responsible for making any necessary arrangements for the hearing (including arrangements for a court reporter, any necessary documents, and the testimony of expert and other witnesses), for any communications with the Administrative Judge, and for representing USAID at the hearing.

Notice to Witnesses

USAID is responsible for ensuring that all approved witnesses who are Federal employees are notified of the date and time of the hearing and the approximate time that their presence will be required. The OGC notifies by letter all approved witnesses who are Federal employees and who are to attend the hearing of the time and date when it is to take place and the exact location where the hearing will be held. The witnesses also will be notified of their rights and responsibilities as witnesses in the hearing.

Hearings are Closed to the Public

Hearings are a part of the investigative process and access to the hearing room and the record of the hearing is restricted in accordance with the EEOC's regulations and policies and the discretion of the Administrative Judge.

Verbatim Hearing Transcripts and Court Reporters

USAID arranges for and pays for a verbatim transcript of the hearing proceedings pursuant to 29CFR1614.109(f).

The Site of the Hearing

Requests for a hearing must be sent to the EEOC district office having jurisdiction over the agency. The district office for USAID is located at 1801 L Street, NW, Suite 100, Washington, D.C. 20507-1002.

On receipt of a hearing request, the Administrative Judge assigned to hear the complaint determines the site of the hearing. Within his/her discretion, the Administrative Judge is authorized to conduct the hearing in the EEOC district office in an EEOC area or local office, at USAID's organizational component where the complaint arose or at other such location s/he may determine appropriate.

In determining the hearing site, the Administrative Judge may consider factors such as the location of the parties, the location of EEOC district, area and local offices, the number and location of witnesses, the location of records, travel distances for the Administrative Judge, the parties and witnesses, travel costs, the availability of sources of transportation and other factors, as may be appropriate.

ROLE OF THE ADMINISTRATIVE JUDGE

Administrative Judge's Review

When a case is referred for a hearing, the assigned Administrative Judge reviews the file, determines whether additional documentation is necessary, and makes requests of the appropriate party for the production of any additional documentation.

If, after reviewing the file, the Administrative Judge determines that the investigation is inadequate and incomplete due to the Agency's failure to complete the investigation within the time limits set forth in 29CFR1614.108(e), and the Agency has not cooperated in the discovery process as required by 29CFR1614.109(d)(3), the Administrative Judge may take the following actions:

1. Subject the agency to adverse inference findings in favor of the complainant;
2. Consider the matters to which the requested information or testimony pertains to be favorable to the complainant;
3. Exclude other evidence offered by the agency;
4. Permit the complainant to obtain a summary disposition in his/her favor on some or all of the issues without a hearing; or

5. Take other action deemed appropriate, including, but not limited to, requiring the agency to pay any costs incurred by the complainant in taking depositions or in any other form of discovery.

However, before sanctions may be taken, the Administrative Judge must issue an order to the Agency or request the documents, records, comparative data, statistics, or affidavit. This order includes a notice to show cause and, in appropriate circumstances, may provide the Agency with an opportunity to take such action as the Administrative Judge considers necessary to correct deficiencies in the record. The Administrative Judge must allow the Agency reasonable time in which to comply. The order must also state the specific sanctions the Administrative Judge intends to take in the event of noncompliance. Then, the Administrative Judge may take sanctions only if the Agency fails to comply.

Data Requests

If USAID is requested to produce additional documents, it must furnish a copy of those documents to the complainant at the time they are submitted to the Administrative Judge. Similarly, if the complainant is requested to submit additional documents, the Administrative Judge must make the documents available to the Agency for reproduction.

Administrative Judge's Authority

The Administrative Judge has the authority to do the following:

1. Issue decisions on complaints.
2. Administer oaths.
3. Regulate the conduct of hearings.
4. Limit the number of witnesses so as to exclude irrelevant and repetitious evidence.
5. Order discovery or the production of documents and witnesses.
6. Issue protective orders not to disclose information.
7. Exclude any person from the hearing who is disruptive or is a witness so that s/he cannot hear the testimony of other witnesses.
8. Issue decisions without a hearing if there are no material facts at issue.
9. Limit the hearing to the claims in dispute.
10. Impose appropriate sanctions on parties who fail to comply with discovery orders.
11. Calculate compensatory damage awards.
12. Order a medical examination.
13. Calculate and award the amount of attorney's fees or costs.

14. Engage the parties or encourage the parties to engage in settlement discussions.
15. Issue an order determining full relief.
16. Hold a hearing in abeyance.

The Administrative Judge has the authority to impose sanctions on a party (the complainant or the agency) that fails, without good cause, to comply with rulings on requests for information, documents, or admissions, where the information is solely in the control of that party. Similarly, if a party fails to provide an adequate explanation for the failure to respond fully and in a timely manner to a request and the information is solely in the control of that party, the Administrative Judge may impose sanctions. These sanctions include, but are not limited to, the authority to:

1. draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;
2. consider the matters to which the requested information pertains to be established in favor of the opposing party;
3. exclude other evidence offered by the party failing to produce the requested information;
4. enter a decision fully or partially in favor of the opposing party; and,
5. take such other actions as appropriate.

Findings and Conclusions Without a Hearing

On Motion of a Party

A party who believes that some or all material facts are not in genuine dispute may file a motion in support of this contention with the Administrative Judge at a time established by the Administrative Judge. The Administrative Judge shall, in the acknowledgment order, specify a date for filing such a statement and provide for extending that time in certain circumstances. A copy of any such statement must also be served on the opposing party. The opposing party may file a statement in opposition.

After considering the request and the opposing submission, if any, the Administrative Judge may deny the request, order that discovery be permitted on the facts involved, limit the hearing to the claims remaining in dispute (if any), issue findings and conclusions without a hearing, or make such other rulings as are appropriate.

On Administrative Judge's Determination

If the Administrative Judge determines, in the absence of a request from either party, that some or all of the facts are not in genuine dispute, s/he may, after giving notice to the parties and providing them an opportunity to respond, issue an order

limiting the scope of the hearing or issue findings and conclusions without conducting a hearing.

Transmittal of the Findings and Conclusions

At the conclusion of the hearing stage and within **180 calendar days** of a request for a hearing, the Administrative Judge must send the following items to the parties by certified mail.

- The findings and conclusions.
- Copies of the entire record, including the transcript.

The Administrative Judge may, when necessary, release the transcript prior to the issuance of the findings and conclusions (e.g., when the transcript is needed to prepare a post-hearing brief).

The Administrative Judge may issue findings of fact and conclusions of law from the bench after the conclusion of the hearing, in lieu of issuing written findings and conclusions.

DISCOVERY

The purpose of discovery is to enable a party to obtain relevant information for preparation of the party's case. Both parties are entitled to reasonable development of evidence on matters relevant to the claims raised in the complaint, but the Administrative Judge may limit the quantity and timing of discovery. In cases where the investigative record is complete, the Administrative Judge may disapprove discovery requests.

USAID must allow a complainant and his/her representative, if a USAID employee, a reasonable amount of official time to prepare requests for discovery and to respond to discovery requests.

Avoidance of Delay

The discovery instructions that follow are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. The parties are expected to initiate and complete needed discovery with a minimum of intervention by the EEOC's Administrative Judge. The parties are further expected to use discovery judiciously for its intended purpose only.

CONDUCTING THE HEARING

Hearings are recorded and transcribed verbatim. All documents submitted to and accepted by the Administrative Judge at the hearing are made part of the record at the hearing.

PRODUCTION OF WITNESSES AND DOCUMENTS

The Agency must produce any witnesses and/or documents requested by the Administrative Judge unless the agency provides adequate explanation as to why it is administratively impracticable to do so. If the Administrative Judge finds the explanation inadequate, the agency must make the witness or documents available. If the Administrative Judge finds an explanation regarding a witness is adequate, s/he must arrange to obtain the testimony through written interrogatory.

If the Administrative Judge finds that a party has acted in bad faith, s/he may:

1. draw adverse inference that the requested but refused information would have reflected unfavorably on the uncooperative party;
2. consider the matter established in favor of the opposing party;
3. exclude other evidence offered by the party; and/or
4. take other action deemed appropriate.

ADMINISTRATIVE JUDGE'S RECOMMENDED DECISION

The Administrative Judge has the power to grant summary judgment to either party without a hearing. The Administrative Judge may issue a recommended decision without a hearing if s/he determines there are no issues of material fact. S/he must give notice of his/her intention to the parties and allow them **15 calendar days** to respond before issuing a decision.

FINAL AGENCY DECISION

The procedure for developing the Final Agency Decision is the same as in those instances wherein a hearing is not requested, except that the case file also includes the hearing transcript and the Administrative Judge's findings, analysis and recommended decision that may be modified, rejected or accepted by the Agency in making the Final Agency Decision. The decision will be in writing and sent to the complainant within **60 calendar days** of receipt of the hearing transcript and the recommended findings from the Administrative Judge. If no decision is issued within that timeframe, the recommended findings become a final decision binding on the Agency.

ATTORNEY FEES

When the Final Agency Decision or settlement agreement provides for an award of attorney's fees or costs, the amount of award is determined under 29CFR1614.501(e). When the Agency decides not to award full or partial reasonable attorney's fees or costs to the prevailing complainant, it must set forth in its decision the specific reasons for denying the award. The decision letter must inform the complainant of his/her right to appeal the Agency's decision to the EEOC, Office of Federal Operations, within **30 calendar days** after receipt of the decision. The complainant shall also be informed of his or her right to

file a civil action within thirty **30 calendar days** after receipt of the Agency's Final Decision.

NOTIFICATION OF RIGHT TO APPEAL

The decision letter must inform the complainant of the right to appeal the Agency's decision to the EEOC, Office of Federal Operations, and include the applicable time limits. The decision letter must also inform the complainant of the right to file a civil action and of the applicable time limits.

FINAL AGENCY DECISION WITHOUT A HEARING

Requested by the Complainant

If the complainant desires a Final Agency Decision without a hearing, the complainant must notify the Director, EOP, or designee of this desire within **30 calendar days** of receipt of the Report of Investigation. The Director, EOP, is responsible for the preparation of the Final Agency Decision. The Director, EOP, or designee is responsible for issuing the Final Agency Decision to the complainant.

When the complainant requests a final agency decision without a hearing, the decision will be sent to the complainant within **60 calendar days** of the request.

Not Requested by the Complainant

When the complainant does not specifically request a Final Agency Decision without a hearing, the decision will be sent to the complainant within **90 calendar days** of the complainant's receipt of the Report of Investigation. The procedure for preparation of the Final Agency Decision and its issuance is identical to that which occurs when the complainant requests a Final Agency Decision.

Content of Final Agency Decision

The Final Agency Decision is in writing. It reflects the date of issuance and is transmitted to the complainant and his/her representative either by certified mail return receipt requested, or by any other method that enables the Agency to establish the date of the receipt. The decision must set forth:

1. Findings on the merits of each claim in the complaint;
2. Appropriate remedies and relief in accordance with subpart E of part 29CFR1614.501 when discrimination is found;
3. Notice of right to appeal to the EEOC Office of Federal Operations (EEOC Form 573, Notice of Appeal/Petition is attached);

4. If a mixed case, notice of right to appeal to the MSPB (not the EEOC) within **30 calendar days** of receipt of the Agency Final Decision.
5. Notice of right to file a civil action in Federal District Court;
6. The name of the proper defendant in any such lawsuit; and,
7. The applicable time limits for appeals and lawsuits.

REMEDY AND RELIEF

Finding of Discrimination

Where the Director, EOP, or his/her designee concludes that a complaint has merit and thus a finding of discrimination is to be issued, the remedy or remedies included in the Final Agency Decision must be tailored to correct the identified discrimination and to minimize the chance of its recurrence.

Making the Victim Whole

Each identified victim of discrimination is entitled to an immediate, unconditional offer to the place or status s/he would have occupied absent discrimination, or to an equivalent place or status in the agency operation, and to related rights and privileges the victim would have acquired had the discrimination not occurred. If no such place or status exists, the Agency must make the victim whole until a non-discriminatory placement can be accomplished. "As a general rule, when discrimination is found, the appropriate remedy to which the victim of discrimination is entitled is that remedy which as nearly as possible, places him/her in the situation which he/she would have been had the discrimination not occurred."

Remedial Action

USAID is responsible for remedial action when illegal discrimination is found. The Agency will determine, on a case-by-case basis, whether individual employees should be disciplined for any acts found to have been discriminatory for which s/he was responsible.

Back-Pay

The back pay liability under Title VII or the Rehabilitation Act is limited to 2 years prior to the date the discrimination complaint was filed. Interest on back pay must be included in the back pay computation.

Disciplinary Action

The Director, EOP, makes a decision as to whether and what disciplinary action should be taken against a management official responsible for discriminatory acts and makes a recommendation to the Deputy Administrator. If disciplinary action is taken, the management official disciplined has the right to appeal the disciplinary action under the provisions of the relevant USAID Policy and MSPB policy.

Agencies are required, under the provisions of 29CFR1614, to take appropriate disciplinary action against employees who engage in discriminatory practices; and are required, in accordance with the No FEAR Act, to report disciplinary action taken.

Attorney Fees

When the Final Agency Decision or settlement agreement provides for an award of attorney's fees or costs, the amount of award is determined under 29CFR1614.501(e). The decision letter must inform the complainant of the right to appeal the Agency's decision to the EEOC, Office of Federal Operations, within **30 calendar days** after receipt of the decision. The letter also informs the complainant of the right to file a civil action within **30 calendar days** after receipt of the Agency's Notice of Final Decision. The complainant must notify the Agency if an appeal is filed.

Attorney's fees are allowable only for the services of members of the Bar; law clerks and paralegals; and law students under the supervision of members of the Bar. No award is allowable for the services of any employee of the Federal government.

Attorney's fees are allowable only for services performed after the filing of the formal complaint and after the complainant has notified the Agency that s/he is represented by an attorney. Written submissions to USAID signed by the attorney are considered to constitute notice of representation.

When the Agency's decision provides for attorney's fees or costs, the complainant's attorney must submit a verified statement of costs and fees to the Agency's Office of General Counsel within **30 calendar days** of receipt of the decision. Such a verified statement must be accompanied by an affidavit executed by the attorney of record, itemizing the charges for legal services. Both the verified statement and the affidavit must be made a part of the complaint file.

If the complainant, the Agency, and the attorney cannot reach agreement on the amount of attorney's fees and/or costs within **30 calendar days** of receipt of the verified statement and affidavit, the Office of General Counsel must issue a Final Agency Decision on the amount to be paid. The decision must include the specific reasons for the amount of the award. The decision letter must also inform the complainant of the right to appeal the Agency's decision to the EEOC, Office of Federal Operations, within **30 calendar days** after receipt of the decision. Amounts not in dispute must be paid even where disputed amounts are in the appellate process. The appropriate standards for awarding fees are those enunciated in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980), *Evans v. Sheraton Park Hotel*, 563 F.2d 177 (D.C. Cir. 1974) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), or other appropriate laws or decisions.

APPEAL TO THE EEOC

Introduction

29CFR1614.402(a) provides that an appellant must file an appeal to the EEOC **within 30 calendar days** of receipt of the Agency's dismissal or final decision. If an attorney represents the complainant, the 30 day time limit shall begin to run from the date the attorney receives the notice of dismissal or the notice of final decision.

A copy of the appeal must also be filed with the EOP Director.

EEOC prefers that the appellant use EEOC Form 573, Notice of Appeal/Petition. EOP attaches a copy of EEOC Form 573 to all final decisions and dismissals of equal employment complaints.

Persons Who May Appeal

A Complainant May Appeal

- The Agency's Final Decision or the Agency's dismissal of all or a portion of a complaint;
- The Agency's alleged non-compliance with a settlement agreement in accordance with 29CFR1614.504; and/or
- The Agency's Final Decision on attorney's fees.

A Class Agent May Appeal

- A Final Agency Decision on a class complaint, and/or[16]
- A Final Agency Decision on a petition to vacate a settlement agreement in the class action.[17]
- An Agency's alleged non-compliance with a settlement agreement in accordance with 29CFR1614.504
- Agency action related to attorney fees.

[16] Included is a dismissal of a complaint that does not meet the prerequisites of a class complaint as enumerated in section 29CFR1614.204(a)(2) where the decision to dismiss informs the class agent that the complaint is being filed as an individual complaint.

[17] See 29CFR1614.204(g)(4). A petition to vacate a settlement agreement may be filed if the settlement agreement favors only the class agent or is not fair and reasonable. The Agency's Decision on the petition is appealable by the Agency as well as class members.

A Class Member May Appeal

- A Final Agency Decision on a claim for individual relief under a class complaint, and/or
- A Final Agency Decision on a petition to vacate a settlement agreement in a class action.[18]
- An Agency's alleged non-compliance with a settlement agreement in accordance with 29CFR1614.504
- Agency action related to attorney fees.

WHERE TO APPEAL

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

As an alternative to mailing, appeals may be hand-delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
1801 L Street, Suite 100
Washington, D.C. 20507-1002

RIGHT TO FILE A CIVIL SUIT

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under Title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate U.S. District Court:

1. Within **90 calendar days** of receipt of the final decision on an individual or class complaint if no appeal has been filed;
2. After **180 calendar days** from the date of filing a complaint with the Agency if an appeal has not been filed and a final decision has not been issued;
3. Within **90 calendar days** after receipt of the EEOC's final decision on an appeal; or
4. After **180 calendar days** from the date of filing an appeal with the EEOC if there has been no final decision.

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[18] Ibid.

The decision of the Agency shall be the final decision only when it makes a determination on all of issues in the complaint, including whether to award attorney's fees or costs. If a determination to award attorney's fees is made, the decision will not be final until the procedure is followed for determining the amount of the award.

Except in complaints alleging discrimination based on age, the Director, EOP, must notify an employee or applicant of his or her right to file a civil action, and of the 90 day time limit for filing, in any final action on a complaint. EEOC will notify an employee or applicant of his or her right to file a civil action and of the 90 day time limit for filing actions appealed to the Office of Federal Operations (OFO).

The filing of a civil action by an employee or applicant involving a complaint filed under this paragraph terminates processing of that complaint.

RIGHT TO BYPASS ADMINISTRATIVE PROCESS

An employee or applicant who alleges discrimination based on age may elect to bypass the administrative process and file a civil action directly in the appropriate U.S. District Court. The employee or applicant must first file a written notice of intent to file a civil action with the EEOC within **180 calendar days** of the date the alleged discrimination occurred. Once that written notice is filed, the aggrieved person must wait at least **30 calendar days** before filing the civil action in an appropriate U.S. District Court. If the above procedures are not followed, aggrieved persons alleging discrimination based on age must exhaust the administrative remedies before filing a civil action.

CIVIL ACTION: EQUAL PAY ACT

A complainant is authorized under section 16(b) of the Fair Labor Standards Act [29 U.S.C. 216(b)] to file a civil action in court of competent jurisdiction within 2 years or, if the violation is willful, 3 years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to 2 years prior to the date of filing suit, or to 3 years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for civil action.

APPOINTMENT OF ATTORNEY FOR COMPLAINANT

The Agency is required to notify the complainant in writing of the statutory right to request court appointment of counsel for representation in connection with civil actions which arise under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, and the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, et seq. The Agency is required to include the following language in every final decision on complaints that allege discrimination on the basis of race, color, religion, sex, national origin, and/or disability:

> *Within **30 calendar days** of your receipt of the agency's final decision, you have the right to appeal this decision to:*

Equal Employment Opportunity Commission
Office of Federal Operations
PO Box 19848
Washington, D.C. 20036

You also have the right to file a civil action in an appropriate U. S. District Court. If you choose to file a civil action, you may do so:

- *within **90 calendar days** of receipt of this final decision if no appeal has been filed, or*
- *within **90 calendar days** after receipt of the EEOC'*
- *final decision on appeal, or*
- *after **180 calendar days** from the date of filing an appeal with the EEOC if there has been no final decision by the Commission.*

You must name the person who is the official agency head or department head as the defendant. Agency or department means the national organization, and not just the local office, facility, or department in which you might work. Do not name just the agency or department. In your case, you must name (THE NAME AND TITLE OF THE HEAD OF THE AGENCY), (NAME OF THE AGENCY), as the defendant. You must also state the official title of the agency head or department head. Failure to provide the name or official title or the agency head or department head may result in dismissal of your case.

If you decide to file a civil action, under Title VII or under the Rehabilitation Act, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. ***The grant or denial of the request is within the sole discretion of the Court****. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action MUST BE FILED WITHIN **90 CALENDAR DAYS** of the date you receive the final action or final decision from USAID or EEOC.*

Identification of the Defendant

The complainant must properly identify the defendant in a civil action. The defendant in a civil action against a Federal agency is the head of the agency.

Representation of the Agency

The United States Attorney (USA) represents USAID in court proceedings.

NOTICE REQUIREMENTS

A complainant who chooses to file a civil action must notify EEOC **30 calendar days** before the initiation of the civil action.

Section 3: MIXED CASE COMPLAINTS

DEFINITION

A "mixed case complaint" is an EEO complaint filed with the agency claiming employment discrimination based on race, color, religion, sex, national origin, age, disability, or reprisal that is related to or stemming from an action that fits the criteria for appeal to the Merit Systems Protection Board (MSPB). The complaint may contain only a single allegation of employment discrimination in an appealable action, or it may contain additional claims that the individual does not allege are based in discrimination but are actions the MSPB has jurisdiction to address. A "mixed case appeal" is an appeal filed directly with the MSPB and alleging an appealable agency action was taken, in whole or in part, because of discrimination on the basis of race, color, religion, sex, disability, national origin and age.

Special procedures for processing apply to mixed case EEO complaints. The relationship between 29CFR1614 complaints and Merit Systems Protection Board (MSPB) appeals is described below. All of the time frames listed are in calendar days. Managers who are involved in specific mixed case complaints may seek guidance from the Office of Equal Opportunity Programs, the Office of Human Resources, and/or the Office of General Counsel on their roles and responsibilities in regard to these complaints.

If a complainant[19] files a mixed case complaint through the EEO process, there is no right to a hearing before an EEOC Administrative Judge. The Agency issues a decision on the merits of the complaint, and the complainant's appeal rights are then to the MSPB.

ELECTION OF PROCEDURE

When an employee is the subject of an action that may be appealed to the MSPB, but believes discrimination was a factor in the action, the employee must make a decision whether to pursue the matter through an appeal to the MSPB or to file a formal EEO complaint. However, the employee may first enter EEO counseling on the matter, which does not constitute a decision as to forum. EEO counseling is an informal process and is at the "pre-complaint" stage, offering an opportunity to achieve resolution of the matter at issue. Participating in EEO counseling does not require the aggrieved person to file a formal EEO complaint. Once EEO counseling has concluded, the employee must elect either to file an appeal with the MSPB or to file a formal EEO complaint. An EEO complaint on an appealable action may not be filed through the EEO process and at the same time appealed to the MSPB. The complainant must elect one forum or the other. If

[19] During the pre-complaint EEO process, the employee raising the concern is called the "aggrieved person." If the aggrieved person files a formal EEO complaint, s/he is referred to as the Complainant. If the employee elects the MSPB as the forum to hear the mixed case appeal, s/he is referred to as the Appellant.

the aggrieved person elects to file an EEO complaint on a mixed case, special procedures apply.

EEOC regulations do provide for processing discrimination complaints on matters that are otherwise appealable to the MSPB. However, two determinations must be made to decide whether the mixed case regulations apply. They are:

1. the employee must have standing to file such an appeal with the MSPB; and
2. the matter that forms the basis of the discrimination complaint must be appealable to the MSPB.

STANDING

The following employees generally have standing and, as such, have a right to appeal to the MSPB and, therefore, to initiate a mixed case complaint or appeal:[20]

1. competitive service employees not serving a probationary or trial period under an initial appointment;
2. career appointees to the Senior Executive Service;
3. non-competitive service preference eligible employees with one or more years of current continuous service (e.g., postal employees and attorneys with veterans preference); and,
4. non-preference eligible excepted service employees who have completed their probationary period or who have two or more years of current continuous service (e.g., attorneys).

The following employees generally **do not** have a right to appeal to the MSPB:

1. probationary employees (but see 5CFR315.806 for certain circumstances [i.e., discrimination based on political party affiliation, marital status, procedural deficiencies, etc.] that allow appeal);
2. non-appropriated fund activity employees (such as employees of the Army and Air Force Exchange);
3. employees serving under a temporary appointment limited to 1 year or less; and,
4. employees of the Central Intelligence Agency, the General Accounting Office, the United States Postal Service, the Postal Rate Commission, the Tennessee Valley Authority, and the Federal Bureau of Investigation.

[20] This is not an all-inclusive list of those employees who have standing to appeal to the MSPB and questions that arise in this area should be referred to the Human Resources office or to the MSPB.

APPEALABLE MATTERS

When a personnel action is taken against an employee and that action is appealable to the MSPB, the decision letter contains instructions to the employee regarding appeal rights. The Employee Relations Specialist who assists the management official taking the personnel action can answer any specific questions the manager has about the process at that point.

Most MSPB appealable matters fall into the following six categories:

1. Reduction in grade or removal for unacceptable performance;
2. Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service;
3. Separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of a reduction in force;
4. Reduction-in-force action, including those affecting a career appointee in the Senior Executive Service;
5. Reconsideration decision sustaining a negative determination of competence for a general schedule employee; and,
6. Disqualification of an employee or applicant because of a suitability determination.

The following provides more information about other actions that may be appealed to the MSPB:

- Denial of restoration after recovery from compensable injury of an excepted service employee;
- Termination during probation [under limited circumstances (i.e., when the alleged cause is marital status or political affiliation)];
- Certain involuntary reassignments or demotions connected with conversions to Senior Executive Service;
- Improper application of re-employment priority rights;
- Denial of re-employment rights under various circumstances;
- Denial of restoration following military duty or recovery of competitive service employees from certain injuries;
- Reduction-in-grade and removal based on unacceptable performance;
- Denial of within-grade increases;
- Adverse suitability determinations;

- All adverse retirement decisions of OPM except termination of annuity payments;
- Adverse actions involving administrative law judges; and,
- Reductions-In-Force;

ELECTION TO PROCEED IS REQUIRED

The regulations provide that an individual with standing may raise allegations of discrimination in a mixed case either as a direct appeal to the MSPB or as an EEO complaint with the Agency, ***but not both*.**

Whatever action (appeal to the MSPB or formal EEO complaint) the individual files first is considered an election to proceed in that forum. Filing a formal EEO discrimination complaint constitutes an election to proceed in the EEO forum. However, contacting an EEO Counselor or receiving EEO counseling does not constitute an election; EEO counseling is considered an informal or "pre-complaint" process.

Where an aggrieved person files an MSPB appeal and seeks timely EEO counseling, counseling may continue pursuant to 29CFR1614.105, at the option of the parties. The EEO Counselor will attempt to resolve the complaint during the EEO process and will advise the aggrieved person of his/her rights. This includes the option of mediation through the Alternate Dispute Resolution (ADR) program, if the informal complaint meets the USAID requirements[21] for participation. The EEO Counselor also has a responsibility to explain the election process to the aggrieved person for mixed case complaints.

EEO counseling must be completed within **30 calendar days** of initial contact to request counseling, unless the aggrieved person agrees to an extension of the counseling period. The counseling period may be extended an additional **60 calendar days**, if ADR is available and aggrieved person agrees to participate or if there is otherwise reason to believe the complaint could be resolved if counseling is extended. If counseling is extended, the total length of time available to EEO counseling is **90 calendar days**. At that time, the EEO Counselor issues a notice of the right to file a formal EEO complaint. It is at this point that the aggrieved person must elect a forum – either an appeal to the MSPB or a formal EEO complaint with the EOP.

[21] The USAID ADR program is not available for class action complaints, security clearances, applicants or other non-USAID employees, or Reductions-in-Force. For other claims, the decision whether to offer ADR is made on a case by case basis by the Director, EOP.

PROCEDURES FOR HANDLING DUAL FILING

Cases Where the Agency Does Not Dispute MSPB Jurisdiction

If an individual files a mixed case appeal with the MSPB, but then subsequently files a mixed case EEO complaint with USAID EOP wherein the Agency does not dispute MSPB jurisdiction, EOP must then dismiss any EEO complaint filed on the same matter that was first filed with the MSPB, regardless of whether the appellant raised allegations of discrimination in the appeal to the MSPB. Filing an appeal with the MSPB constitutes an election of the MSPB as the forum for hearing the appeal.

In the letter (Final Agency Decision) dismissing the formal EEO complaint because the complainant filed an appeal with the MSPB before filing a formal EEO complaint, USAID EOP must advise the complainant that s/he must bring the allegations of discrimination contained in the dismissed complaint to the attention of the MSPB, in accordance with 5CFR1201.155. If the complainant appeals the Agency's dismissal of the complainant's formal mixed cased EEO complaint to the EEOC, the EEOC Administrative Judge must advise the complainant that s/he must bring the claims of discrimination contained in the dismissed formal EEO complaint to the attention of the MSPB.

The Agency Final Decision dismissing the mixed case complaint must also advise the complainant of the right to petition EEOC to review the MSPB's Final Decision on the discrimination issue in the case appealed to the MSPB. The final decision dismissing the complaint on procedural grounds may be appealed to the EEOC. An agency decision to dismiss a mixed case complaint is not appealable to the EEOC except where it is alleged that 29CFR1614.107(d) has been applied to a non-mixed case matter.

Cases Where the Agency or the MSPB Administrative Judge Questions MSPB Jurisdiction

USAID EOP is required to hold the mixed case complaint in abeyance until the MSPB's Administrative Judge rules on the jurisdictional issue. EOP must also notify the complainant that this is occurring, and instruct him/her to bring the discrimination allegation to the attention of MSPB. During this period, all time limitations for processing or filing the complaint are tolled.

The complainant may not appeal to EEOC a USAID decision to hold a mixed case complaint in abeyance while jurisdictional matters are settled. If the MSPB's Administrative Judge finds the MSPB has jurisdiction over the matter, USAID's EOP is then required to dismiss the mixed case complaint, as the MSPB has the responsibility for reviewing and making a decision on the merits of the complaint. EOP must also advise the complainant that, once the MSPB issues its final decision, the complaint has the right to petition EEOC to review MSPB's final decision on the discrimination issue.

If the MSPB Administrative Judge finds that MSPB does not have jurisdiction over the matter, EOP is required to renew processing of the mixed case complaint as a non-mixed case EEO complaint. In other words, if the MSPB does not have jurisdiction, the complaint is not a mixed case complaint.

Cases Where a Complainant Files with the Agency First

If an employee first files a mixed case complaint as a formal complaint of discrimination at EOP and then files a mixed case appeal with the MSPB, EOP should advise MSPB of the prior agency filing and request that the MSPB dismiss the appeal without prejudice.

Cases Where a Complainant has a Pending Non-Mixed Case Complaint or a Series of Non-Mixed Case Complaints and the Matters Raised in those Complaints Lead to an Appeal on a Matter that is Appealable to the MSPB[22]

If the Agency believes the non-mixed case complaint(s) are sufficiently related to the subsequent mixed case complaint to the degree that the mixed case matter cannot be adjudicated without also adjudicating the non-mixed matters, EOP must notify the complainant in writing that the filing of a mixed case appeal with the MSPB **may** terminate the processing of the non-mixed case by EOP, and also that the non-mixed matters will be consolidated with the mixed case appeal.

USAID may file a motion to consolidate the non-mixed case matter with the mixed case appeal with the MSPB. On filing the motion, the non-mixed case complaints will be held in abeyance pending a decision by the MSPB Administrative Judge on the Agency's motion to consolidate. If the MSPB Administrative Judge should fail to consolidate the non-mixed case claims with the mixed case complaint, EOP must then process the non-mixed case claims pursuant to 29CFR1614.106, which outlines the processing requirements for individual formal complaints of discrimination. Time for processing will begin to run, without notice, **15 calendar days** following the decision denying MSPB jurisdiction. The time periods are to run from the time processing stopped initially (i.e., at the point where the Agency filed a motion with the MSPB to consolidate the claims). This means that, if processing of the non-mixed matter stopped on the 70th day when the motion was filed, the count of days for completion of processing will begin with day 71. EOP has a total of **180 calendar days** from the date of filing in which to complete the processing of a non-mixed case formal complaint of discrimination.

PROCESSING WHERE MSPB DISMISSES A MIXED CASE APPEAL FOR LACK OF JURISDICTION

If an individual files a mixed case appeal with the MSPB and the MSPB subsequently dismisses the appeal because it does not have jurisdiction, the Agency must inform the individual that s/he may contact an EEO Counselor within **45 calendar days** to raise the discrimination claim(s) and that the filing of the mixed case appeal will be considered to be the date the individual initially contacted the EEO Counselor.

[22] This provision is specifically meant to address those situations where a series of events connected in time or type end in termination or appealable disciplinary action against a person with standing to appeal to MSPB. Example: minor discipline, warnings or other matters that form the basis for a non-mixed case but ultimately lead to a suspension in excess of 14 days or termination that raise mixed case issues.

The EOP must provide the complainant a 30 day notice of right to elect a final decision with an EEOC hearing or an immediate final decision by the Agency as required by 29CFR1614.110 and thereafter proceed as in a non-mixed case; 1) if the individual filed the MSPB appeal after the Agency issued a final decision on the mixed case complaint; or 2) after **120 calendar days** if the Agency failed to issue a final decision on the mixed case complaint within that time frame.

PROCESSING MIXED CASE COMPLAINTS

If an employee elects to file a mixed case formal EEO complaint, USAID must process the complaint in the same manner as it would any other discrimination complaint, **except**:

a. Within **45 calendar days** following completion of the investigation, the Agency must issue a final decision without a hearing before an Administrative Judge.

b. On the filing of the mixed case formal EEO complaint, the Agency must advise the complainant that, if a final decision is not issued within **120 calendar days** of the date of filing the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter, as specified in 5CFR1201.154(a), or may file a civil action as specified in 29CFR1614.310(g), **but not both**.

c. On the filing of the mixed case formal EEO complaint, EOP must notify the complainant that if s/he is dissatisfied with the Agency's Final Decision on the mixed case EEO complaint, s/he may appeal the matter to the MSPB (not the EEOC) within **30 calendar days** of receipt of the Agency's Final Decision.

d. On issuance of the Agency's Final Decision on a mixed case complaint, EOP must advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within **30 calendar days** of receipt of the notice and of the right to file a civil action as provided in 29CFR1614.310(a).

ACCEPTANCE/DISMISSAL OF COMPLAINT

A complainant may initially file a mixed case complaint with the Agency or s/he may file a mixed case appeal directly with MSPB, **but not both.** Whenever a complainant files with EOP a mixed case or claim concerning an action that s/he has previously appealed to the MSPB, EOP is required to reject in writing the claim or complaint, even though the complainant did not charge discrimination in the mixed case appeal to the MSPB. EOP must also advise the complainant that, as part of the decision rejecting such a complaint or claim(s) within a complaint, s/he may raise to the attention of the MSPB the charges of discrimination contained in the rejected complaint.

Whenever USAID learns a mixed case complaint or claim that has been filed with and accepted by the Agency contains a claim or claims that also form the basis of an appeal already filed with the MSPB, EOP must determine which was filed first, the mixed case

EEO complaint or the appeal to the MSPB. If the MSPB appeal was filed first, EOP must dismiss in writing that portion of the mixed case complaint related to the action appealed to the MSPB and advise the complainant, as part of the decision dismissing the complaint in whole or in part, that s/he must bring the discrimination allegations to the MSPB's attention. If the mixed case complaint was filed first, EOP must advise the MSPB and request the appeal be dismissed without prejudice. Then, the Agency must process the complaint as a mixed case complaint and issue a Final Agency Decision within **120 calendar days**. The Agency may also dismiss a mixed case complaint when it learns the complainant has chosen to appeal the matter to MSPB on expiration of **120 calendar days** from the date the mixed case complaint was filed with the Agency.

The Agency's decision to reject or dismiss a mixed case complaint is not subject to appeal to the EEOC, except where the decision has misapplied the provisions for rejection or cancellation to a non-mixed case matter.

INVESTIGATION

A mixed complaint filed with EOP is assigned for investigation, as with any other EEO complaint. The investigation is conducted in the same manner as any other EEO investigation and will result in a Report of Investigation. The same standards of proof are required, as with any EEO complaint. The review process for the Report of Investigation, including opportunities to supplement the investigative file, is the same as with any EEO complaint. This same process is followed for a complaint that has been "unmixed" by MSPB and returned to USAID EOP for processing and for which the complainant files a formal complaint.

SETTLEMENT

Early resolution through settlement is encouraged with mixed case complaints, as with any other complaint. Settlement can occur at any point in the process, and managers are encouraged to become actively involved in the settlement process. Settlement agreements must be reduced to writing and signed at a minimum by the complainant and/or his/her representative, and by the Director, EOP.

HEARING

If a mixed case complaint is filed with the MSPB, there is no right to a hearing at the EEOC. However, if a case is unmixed by the MSPB and the complainant pursues the complaint through the EEO process, the complainant has the right to request an EEOC hearing. The same rights and responsibilities are then the same as those of any complainant who filed a formal EEO complaint without having first attempted to file an appeal with the MSPB.

FINAL AGENCY DECISION

When a complainant has pursued an unmixed case through the EEO process, the same procedures apply in regard to the Final Agency Decision as would apply in any EEO complaint filed against USAID.

APPEAL TO MSPB

If the MSPB has "unmixed" a case for lack of jurisdiction, the complainant has no further ability to appeal the case to MSPB. At that juncture, the only available process to the complainant is the EEO process, and any appeals would be filed with the EEOC in accordance with the requirements in the EEO regulations at 29CFR1614.

PETITION FOR REVIEW BY EEOC

Who May File

Petitions to consider issues of prohibited discrimination may be filed by individuals and/or their representatives who have been before the MSPB with a matter involving allegations of discrimination and have received a Final Decision from the MSPB.

CONTENTS OF PETITION

Petitions may be written or typed but must contain:

1. the name and address of the petitioner;
2. the name and address of the petitioner's representative, if any;
3. a statement of the reasons why the petitioner and/or representative believes the decision of the MSPB is incorrect, in whole or in part, with regard to issues of discrimination based on race, color, religion, sex, national origin, age, disability and/or violations of the Equal Pay Act;
4. a copy of the decision of the MSPB; and
5. the signature of the petitioner and/or representative, if any.

No specific format is required, but petitioners are encouraged to use EEOC Form 573, Notice of Appeal/Petition, which may be obtained from the EEOC and the EOP.

Method of Filing

Filing should be made by certified or registered mail, return receipt requested, to the Office of Federal Operations, EEOC.

Time to File

In order to be timely, any petition must be filed with the EEOC either within **30 calendar days** after receipt of notice of the MSPB's Final Agency Decision or within **30 calendar**

days after the initial decision of an MSPB Field Office becomes final. The date of filing shall be determined by the date of the mailing, as indicated on the certified or registered mail.

RIGHT TO FILE A CIVIL ACTION

An individual who files a mixed case complaint or a mixed case appeal is authorized to file a civil action in an appropriate U.S. District Court:

1. Within **30 calendar days** of receipt of a Final Decision issued by the Agency on a complaint unless an appeal is filed with the MSPB; or
2. Within **30 calendar days** of receipt of notice of the Final Decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or
3. Within **30 calendar days** of receipt of notice that the EEOC has determined not to consider the decision of the MSPB; or
4. Within **30 calendar days** of the receipt of notice that the EEOC concurs with the decision of the MSPB; or
5. If the EEOC issues a decision different from the decision of the MSPB, within **30 calendar days** of receipt of notice that the MSPB concurs and adopts in whole the decision of the EEOC; or
6. If the MSPB does not concur with the decision of the EEOC and reaffirms its initial decision or reaffirms its initial decision with a revision, within **30 calendar days** of the receipt of notice of the decision of the Special Panel; or
7. After **120 calendar days** from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or
8. After **120 calendar days** from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or
9. After **180 calendar days** from the date of filing a petition for consideration with the EEOC if there is no decision by EEOC, reconsideration decision by the MSPB, or decision by the Special Panel.

Section 4: NEGOTIATED GRIEVANCE PROCEDURE

An aggrieved employee may have another alternative means of pursuing a discrimination claim, other than an appeal to the MSPB. That alternative method is to pursue a complaint through a negotiated grievance procedure; if the employee is a member of a collective bargaining unit. The negotiated grievance procedure must, however, provide for raising and processing discrimination complaints. Whatever options are available, the employee must elect one option to pursue.

Aggrieved Employee Must Make an Election

USAID employees are covered by a collective bargaining agreement that permits allegations of discrimination to be raised in the negotiated grievance process. However, they must elect to raise the matter under either 29CFR1614 (EEO Complaint Procedures) or the negotiated grievance procedure, **but not both**. An election to proceed under 29CFR1614 is indicated only by the filing of a written complaint. An employee's contact with an EEO Counselor does not constitute an election. An aggrieved employee who files a complaint under 29CFR1614 may not thereafter file a grievance on the same matter. This preclusion holds regardless of whether or not discrimination is actually raised in the grievance. For example, if an aggrieved employee elects to have a matter involving a claim of discrimination addressed under the terms of a collective bargaining agreement by filing a grievance, s/he could not also file a formal complaint of discrimination under 29CFR1614 on the same matter.[23]

An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An aggrieved employee, who files a grievance may not thereafter file a complaint on the same matter under 29CFR1614; irrespective of whether the Agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure, including the right to appeal to the Equal Employment Opportunity Commission (EEOC) from a final decision. The dismissal of

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[23] For Civil Service employees, the Negotiated Agreement between USAID and the American Federation of Government Employees Local 1534, June 15, 1987, Article 24, Section 5, provides that "employees who have an informal discrimination complaint under this Article may meet with an EEO Counselor in an attempt to resolve the complaint. If resolution is not reached after meeting with the Counselor, the employee may file a statutory complaint [of discrimination] under 29CFR1614 or a grievance under Article 31 of this Agreement, but not both." This Agreement should be consulted for full discussion of election of process options, as well as, timeliness applicable to the grievance process.

For Foreign Service employees, 3 FAM 4428 paragraph (d) provides that "With respect to a grievance based on an alleged violation of a law, rule, regulation or policy directive referred to in 3 FAM 4412 paragraph c (9) [prohibited discrimination], a grievant may either: (1) file a grievance under this subchapter; or (2) initiate in writing a proceeding under another provision of law, regulation, or Executive Order that authorizes relief, but not both." See 3 FAM 4428 (relationship to Other Remedies) or the AFSA Grievance Guidelines at www.afsa.org. for a discussion on the election of remedies in the Foreign Service grievance process. The Guidelines should also be consulted for guidance on timelines applicable to the grievance process.

such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision with the EEOC.

Section 5: HARASSMENT (SEXUAL AND NON-SEXUAL)

Harassment does not violate Title VII law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability or protected activity under the anti-discrimination statutes. Sexual harassment claims involve sexually oriented and/or sexually related comments and/or conduct and may or may not involve claims of tangible employment harm. USAID accepts sexual orientation as a basis and will process EEO complaints of harassment (either sexual harassment or harassment/hostile work environment) based on sexual orientation of the complainant. However, complaints based on sexual orientation have no statutory appeal rights to the EEOC.

HARASSMENT (SEXUAL)

Sexual harassment may expose the Agency to significant monetary damages if management level employees knew or should have known of the harassment and failed to remedy or prevent the harassment in a reasonable and appropriate manner.

BACKGROUND

Although Federal employment discrimination law does not expressly forbid sexual harassment, EEOC and the Federal courts have been uniform in agreement that unwelcome sexual conduct that affects a term or condition of employment is harassment and is illegal under Title VII. The law does not distinguish between sexual advances made in or outside of the office or advances made at social or business occasions; if the advances are unwelcome, they meet the definition of sexual harassment. Consensual sexual relationships are not prohibited under Title VII; rather, in order to be in violation, the conduct must be unwelcome.

The EEOC Guidelines provides that “unwelcome” sexual conduct constitutes sexual harassment when “submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment. There are two types of sexual harassment as defined by the EEOC: *quid pro quo* and hostile work environment. *Quid pro quo* sexual harassment occurs when submission to or rejection of an individual’s sexual advances or conduct of a sexual nature is used as the basis for employment decisions affecting the employee. For example, if the supervisor requires an employee to provide sexual favors in order to receive a promotion, this constitutes *quid pro quo* sexual harassment. *Quid pro quo* sexual harassment occurs whether the employment action tied to the sexual conduct is either to the advantage (such as a promotion in return for submission) or to the detriment (such as assignment of onerous duties as a result of rejection) of the victim. Hostile work environment sexual harassment is that which unreasonably interferes with an individual’s job performance or creates an intimidating, hostile or offensive working environment, even if it leads to no tangible or economic job consequences.

In some instances, the sexual harassment includes aspects of both *quid pro quo* and hostile work environment sexual harassment. For example, if an individual initially tolerates comments and actions in the work place yet considers them offensive and later complains, termination of the individual's employment as a result of the complaint would combine both the *quid pro quo* and the hostile work environment types of sexual harassment. The Supreme Court's decision in *Meritor Savings Bank v. Vinson* established that both types of sexual harassment are actionable under Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.D. 2000e-2(a), as forms of sex discrimination.

Although sexual orientation is not protected under Title VII, sexual harassment is prohibited, regardless of the sexual orientation of the alleged harasser or the victim (i.e., same sex sexual harassment is still sexual harassment).

To establish a *prima facie* case of *quid pro quo* sexual harassment, the complainant must show that:

1. submission to unwelcome verbal or physical conduct of a sexual nature is made either explicitly or implicitly a term or condition of employment; and,
2. submission to or rejection of such conduct is used as a basis for employment decision(s) affecting him or her.

The fact that the acts complained of by the complainant may be insufficient to have created a hostile work environment is completely irrelevant to the establishment of a *quid pro quo* case of sexual harassment.

When there is a finding of *quid pro quo* sexual harassment in an EEO complaint, the victim is entitled to "make whole" relief, including the payment of attorney fees and costs. The complainant is entitled to receive whatever has been lost as a result of the harassment, including promotion, raised performance appraisal rating, backpay, or anything else that is appropriate.

Most of the sexual harassment complaints filed are hostile work environment claims. In order to establish a case of a sexually harassing/hostile work environment, the complainant must prove by a preponderance of the evidence that:

1. s/he belongs to a protected class by virtue of her/his gender;
2. s/he was subjected to a series of unwelcome sexual advances, requests for sexual favors and other sexual or physical conduct of a sexual nature;
3. the harassment complained of was based on gender;
4. the harassment was so severe or pervasive that it affected a term or condition of employment and/or had the purpose or effect of interfering with his/her work environment and/or creating an intimidating, hostile, or offensive work environment.

It is not necessary to show the complainant was harassed to the point of emotional or psychological damage in order to show adverse effect. The standard for determining

whether verbal or physical conduct is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a "reasonable person" would find the conduct intimidating, hostile, or abusive.

In the event of a finding in a hostile work environment sexual harassment complaint, the courts have not agreed on whether a complainant who cannot prove tangible loss is entitled to attorney fees and costs. The Director, EOP, will examine each situation on a case-by-case basis and provide guidance as appropriate.

In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action.[24] However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements: 1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. The question of liability arises only after there is a determination that unlawful harassment occurred. Harassment does not violate Federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability or protected activity under the anti-discrimination statutes. For sexual harassment to have occurred, the harassment has to have been based on gender in that it involved sexually-related or sexually-oriented conduct.

The first prong of an affirmative defense for the employer is the employer's duty to exercise reasonable care. This requires the establishment, publication and enforcement of anti-harassment policies and complaint procedures. USAID policy makes it clear that it will not tolerate harassment based on sex, race, sexual orientation, color, religion, national origin, age, disability and protected activity. The policy also encourages employees to report harassment before it becomes severe or pervasive.

USAID requires that all managers, supervisors, and employees report to EOP conduct and/or complaints of harassment. The Agency must take immediate action to address the situation. The first step is for the manager or supervisor of the alleged harasser to counsel the individual concerning the charges made, and to inform the individual that any and all conduct that might be construed as harassment must be terminated immediately. The Agency will conduct an administrative inquiry into the allegations of harassment and make a determination based on the record from the inquiry as to whether or not the charges of sexual harassment are valid. If the charges are valid, the Agency will take corrective/remedial

[24] A tangible employment action, as defined by the EEOC, is a "significant change in employment status."

action. The EOP is responsible for arranging for the administrative inquiry and making the determination as to whether or not the record supports the charges of sexual harassment.

Upon completion of the administrative inquiry, the individual alleging sexual harassment will be advised of the outcome of the inquiry, provided a copy of the inquiry report, and provided a copy of the Notice of Right to File a formal complaint of discrimination. If a formal complaint is filed and accepted, the complaint will be processed in accord with the provisions of 29CFR1614, with one exception. The administrative inquiry report will become the Report of Investigation for the sexual harassment issues. A supplemental investigation will be conducted to address any additional issues, not already included in the administrative inquiry, that are raised by the complainant and accepted by EOP.

USAID can also be held responsible for the acts of persons not within its employment, if the person is permitted on the work premises and the Agency knew or should have known of the sexual harassment. Liability can also be imputed if the unwelcome sexual conduct is from officials or employees with whom the USAID employee works, should sexual harassment be shown to have occurred, and USAID management knew or should have known of the sexual harassment.

The second prong of affirmative defense is the employee's duty to exercise reasonable care. This would be a showing by the employer that the complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270.

UNWELCOME SEXUAL CONDUCT

Although it is often difficult to discern whether conduct is invited, uninvited-but-welcome, offensive-but-tolerated, or flatly rejected, it is important to be able to make the distinction because sexual conduct becomes unlawful only when it is unwelcome (i.e., the employee did not solicit or incite the offensive behavior, and the employee regarded the conduct as undesirable or offensive). When there is conflicting evidence, the record as a whole and the totality of the circumstances are considered in determining whether the conduct was in fact unwelcome. When the complainant made a contemporaneous protest or complaint, the complainant's credibility as to unwelcomeness is strengthened. However, a contemporaneous complaint or protest is not mandatory in order for the allegation of unwelcomeness to have merit. For example, there are circumstances in which it is credible to believe the complainant reasonably feared retaliation in the face of protest or complaint against unwelcome sexual conduct. In an EEO investigation into allegations of sexual harassment, the investigator must show in the record whether the complainant made management aware of the conduct and that it was unwelcome, and if not, why.

Managers should encourage employees that, should unwelcome sexual conduct occur, the concerned party should tell the individual involved the conduct is unwelcome and that it should stop. If the concerned party is uncomfortable with confronting the person responsible for the offensive sexual conduct, then the concerned party should express his or her concerns to any supervisor or manager with whom the concerned party feels comfortable in speaking, or go directly to an EEO Counselor or to the Office of Equal

Opportunity Programs (EOP). Managers are encouraged to periodically raise the subject of sexual harassment in staff meetings. Managers should indicate that such conduct is inappropriate and unacceptable in the workplace, and ensure that all employees know how to bring concerns about sexual harassment to the Agency's attention, either through the management chain, another manager, or through EOP, so that immediate, appropriate action may be taken.

The complainant's conduct may be considered in determining whether sexual comments or actions were welcome. However, that conduct must be related to the alleged harasser. For example, although the complainant may have used comparable language in the presence of some co-workers, the fact that the alleged harasser was told by the complainant to stop making those kinds of statements to or in the complainant's presence may be considered sufficient evidence that the complainant considered the behavior unwelcome and offensive.

Management should not interpret a prior consensual relationship between the parties to mean that subsequent conduct cannot be considered sexually harassing by one of the parties. While prior consensual relationship may make it more difficult for the complainant to prove conduct by the other party is now unwelcome, it is not impossible to do so. Demands for further sexual favors and connecting the submission or rejection thereof to employment decisions is *quid pro quo* sexual harassment, regardless of whether there was a prior consensual relationship. Unresolved personal conflicts that exist between the two parties, yet not tied to requests for sexual favors, will not necessarily be considered sexually harassing. It depends on the specific circumstances involved and would be determined on a case-by-case basis.

It is also possible for an employee to sustain allegations of sexual harassment successfully when the employee initially participated in the conduct, but later considered it unwelcome and offensive and alleged it to have created an offensive working environment. For example, an individual may perceive it to be necessary to get along with the supervisor or co-workers by participating in such conduct, then later attempt to withdraw from the conduct. In order to sustain allegations of an offensive work environment under these circumstances, the employee must make it clear to the alleged harasser that the conduct is no longer welcome (or no longer will be tolerated). Should the conduct then continue, the employee must bring the matter to the attention of higher management in order to avoid the possible inference the conduct is in fact welcome.

There is no requirement with *quid pro quo* sexual harassment that more than one incident occur. If a single unwelcome sexual advance is linked to the granting or denial of employment benefits, it may constitute sexual harassment.

EVIDENCE OF HARASSMENT

Unwelcome sexual conduct may occur in private, without eyewitnesses. Similarly, sexual conduct of a nature and extent as to create a hostile or offensive work environment may appear to be consensual. Therefore, the final decision in a sexual harassment claim may depend on the credibility of the parties. Administrative inquiries and/or formal EEO

investigations into allegations of sexual harassment should examine all avenues for possible corroborating evidence, including asking about the credibility of the parties. Interviews should include questions to supervisors and managers as well as co-workers, not only about their direct knowledge of the alleged harassing incidents between the individual(s) and the complainant, but also about whether they personally have observed or overheard comparable behavior in relation to other employees or have personally experienced incidents of the type alleged by the complainant to have been harassing. When the employee interviewed has experienced comparable conduct, the affidavit should show whether the witness considers the conduct to have been offensive and/or to have created a hostile or offensive work environment. Also, although there might not have been a direct eye witness to an incident alleged by the complainant to have been offensive or upsetting, someone may have observed the complainant behaving differently after the incident, such as appearing shaken and upset or avoiding contact with the alleged harasser. Co-workers, supervisors, and managers can be asked whether they observed any change in the behavior of the complainant after the date(s) and/or time(s) of the alleged incident(s).

Conduct that is not sexual in nature or content can still constitute harassment based on sex if the harassment would not have occurred but for the sex of the victim. If an individual is subjected to gender-based harassment and harassment that is specifically sexual in content, all acts may be properly considered part of the sexual harassment suffered by the victim.

DETERMINATION OF A WORK ENVIRONMENT AS "HOSTILE"

The Supreme Court established in *Vinson* that for sexual harassment to violate Title VII, it must be sufficiently severe or pervasive as to alter the terms and conditions of employment and create an abusive atmosphere. In order to determine whether this condition exists, the alleged conduct must be viewed in the context of the totality of the circumstances, considering such things as the nature of the sexual advances, the frequency of the offensive encounters, the total number of days over which all of the offensive incidents occurred and the context in which they occurred. Not all acts of sexually implicit conduct, such as off-color remarks, personal invitations to go on dates, occasional touching or expressions that may be viewed as sexual innuendo are sufficient to establish unlawful sexual harassment. However, there are acts that are sufficiently egregious that a single occurrence is sufficient as to be considered to have created an abusive atmosphere. This is particularly true when the act of harassment is physical. The most obvious example is the deliberate and unwelcome touching by a supervisor of an employee's intimate body areas (genitalia, breasts, etc.). This type of act, when unwelcome, need not be committed more than one time to be considered sexually harassing. Generally, the more severe the incident of harassment, the less the need to show a repetitive series of incidents.

In determining whether harassment is proven to be sufficiently severe or pervasive to create a hostile environment, the conduct is evaluated from the objective standpoint of a "reasonable person." Witness opinions as to whether the conduct complained of is sufficiently severe or pervasive as to affect the work environment can be helpful in reaching a decision in the adjudication of the complaint. If the challenged conduct would not substantially affect the work environment of a "reasonable person," no violation should be found. However, this objective standard should be applied in relation to the context in

which the challenged conduct occurred. For example, if a co-worker on several occasions suggests to the complainant that she join him and others who regularly socialize at dinner after work, a reasonable person would consider the invitations not to have been sexual, viewed in that context. However, if the invitations are to join him at his home for dinner, a different view might be taken, because the context of the invitations has changed. The reasonable person standard should consider the concerned person's perspective.

When the complainant is shown to be the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated, and it is more likely that a violation will be found.

SEXUAL HARASSMENT IN CONSTRUCTIVE DISCHARGE

If constructive discharge due to a hostile environment of sexual harassment is proven, the claim also becomes one of *quid pro quo* harassment. EEOC and a majority of courts have taken the position that an employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, regardless of whether the employer specifically intended to force the victim's resignation.

An important factor in determining if constructive discharge resulting from sexual harassment has occurred is whether the employer has an internal procedure for the reporting of sexual harassment and takes prompt and appropriate action when sexual harassment is reported. If the employer has effective avenues of complaint and redress and the employee knows this but fails to take advantage of it, it will be more difficult for the employee to prove constructive discharge. However, it is not sufficient for the employer merely to have a stated policy. Employees must know the policy and know how to raise concerns of sexual harassment to management's attention. Therefore, managers should periodically address in staff meetings the subject of sexual harassment, making clear the Agency's intolerance of such conduct, and ensure that all employees know how to bring any perceived problem to management's attention, either through the management chain, another manager or supervisor or through the EOP office, so that action may be taken before the problem becomes severe.

When concerns of sexual harassment are raised, management must immediately take appropriate action to redress the problem, if in fact one exists. Appropriate action includes an administrative inquiry/investigation of the allegations and, if sexual harassment is found, taking corrective action. If the allegations raised are significant, then steps should be taken immediately to remove the alleged harasser from contact with the concerned party, usually through a temporary detail. However, if the alleged incidents are egregious, placing the alleged harasser on administrative leave is an option. As, at this juncture, management is looking into the allegations, management's actions involving the alleged harasser should be as inconspicuous as possible, in the event that the allegations of sexual harassment are found to be unsupported. Managers involved in making this type decision should seek guidance from the Director, EOP.

THIRD PARTY SEXUAL HARASSMENT

Consensual romantic or sexual relationships do not constitute sexual harassment under the law in regard to the individuals consenting to the relationship. However, third parties who are denied tangible employment benefits may file claims of third party sexual harassment based on favoritism being shown to a partner in the consensual relationship. Favoritism of this type can also lead to the filing of claims of third party sexual harassment based on a hostile or offensive work environment. However, if the incidents of preferential treatment based on a consensual relationship are isolated, the likelihood of a finding of third party sexual harassment is diminished, because it is neither severe nor pervasive, and both men and women are similarly disadvantaged.

All employment decisions should be made on established objective principles and for merit reasons, and not on the basis of personal relationships.

EMPLOYER LIABILITY

The question of employer liability arises only after there is a determination that unlawful harassment occurred. For sexual harassment to have occurred, the harassment in the form of sexually related or sexually oriented conduct must have occurred, and the harassment must have been based on the gender of the party subjected to harassment.

As described above, the Supreme Court made clear in *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, that employers are subject to vicarious liability for unlawful harassment by supervisors. When the evidence shows that the sexual harassment occurred and it resulted in a tangible employment action, the employer is always responsible. However, when sexual harassment has occurred and no tangible employment action has resulted, the employer may be able to avoid liability or limit damages if it can show an affirmative defense that includes demonstration that the employer exercised reasonable care to prevent and correct promptly any harassing behavior and that the concerned employee unreasonably failed to take advantage of avenues provided by the employer to prevent and/or correct the harassment or otherwise to avoid harm.

The employer is shown to exercise reasonable care to prevent harassing behavior by the promulgation of a sexual harassment policy and the training of managers and employees in the policy. Both formal training for managers and informal guidance to managers and employees through promulgation of policy and information on alternate ways to raise concerns of sexual harassment are appropriate. However, even though a policy exists and employees are made aware of and trained in the policy, if management is aware sexual harassment is or may be occurring and takes no action to look into the matter and correct it, the employer may be found liable. Managers must take immediate and appropriate investigative and corrective action.

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer or its agents or supervisory

employees know or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

When allegations of sexual harassment are raised to management, management must undertake an administrative inquiry investigation into the allegations. When the concerns raised are of such significance that the alleged victim and the alleged harasser should be separated until an investigation can be conducted, management should detail the alleged harasser to a function that does not require him or her to come in contact with the party who raised the sexual harassment concerns. The party raising the allegations is not to be detailed, unless he or she requests it or readily agrees to a detail. Management should take care that there is no appearance the concerned party is being punished for bringing the matter to management's attention. When the alleged sexually harassing acts are sufficiently egregious (e.g., inappropriate touching), management should place the alleged harasser on administrative leave until the investigation is completed and a determination is made whether and what actions should be taken. Should it be found to be necessary to remove both the alleged victim and the alleged harasser from the workplace during the investigation of the allegations of sexual harassment, both should be placed on administrative leave.

Agency managers are the key to making the sexual harassment policy effective. This can be accomplished through frequent dissemination of information about the policy and by actively discouraging a work place that tolerates the denigration of males or females as a group. Similarly, managers should actively encourage employees who have a concern to bring it forward either to management or to EOP, should immediately investigate allegations of sexual harassment that are raised, and should take immediate and appropriate remedial action when evidence of sexual harassment is found.

The second line of affirmative defense is to show that the concerned employee unreasonably failed to take advantage of avenues provided by the employer to prevent and/or correct the harassment or otherwise to avoid harm. Again, management must be able to show a policy existed, the employees were trained in avenues through which to raise sexual harassment concerns, but the concerned party did not avail himself or herself of these avenues. However, fear of retaliation is often presented as a factor in why a concerned party did not come forward sooner. In applying the "reasonable person" standard, the appearance of the overall work environment to other employees and the impression they hold as to whether the supervisor or manager would be likely to retaliate may be considered in determining whether the concerned party was realistic in fearing reprisal.

Managers must encourage employees who believe they have been victims of sexual harassment to come forward with their concerns. Further, employees who witness unwelcome sexual conduct by a fellow employee or a supervisor toward a co-worker must be encouraged to raise the matter to management's attention. Managers should address the agency policy on sexual harassment with employees in staff meetings, provide guidance as to what sexual harassment is and what it is not, and identify the procedures available to employees for bringing concerns about sexual harassment to management's attention. When the alleged harasser is a supervisor in the employee's chain of command, the alleged

victim does not have to go through the harassing supervisor to raise the matter to management's attention. The employee may call EOP or may go to a higher level management official within his or her chain of command.

Also, Agency managers are to encourage employees to tell the alleged harasser that he or she is uncomfortable with the statements or physical acts. Doing this may prevent situations from occurring that develop into an uncomfortable or offensive work environment. Managers are to make it clear that no one is required to join in conversations he or she finds offensive or uncomfortable in order to "fit in." Conversations with individuals are in fact individual. No one should feel he or she must participate in sexual innuendo, off-color jokes, etc., regardless of whether this kind of conversation reaches a level wherein it could realistically be considered harassing, any more than any individual should feel compelled to discuss a particular movie or a football game, just because others are.

If an employee enters EEO counseling with a claim of sexual harassment without otherwise bringing the allegations of sexual harassment to management's attention, management's obligation to take appropriate remedial action still prevails. However, managers are not in any instance automatically to treat allegations of sexual harassment as having merit without the benefit of findings from an administrative inquiry/investigation. Even if an allegation raised appears to be part of a continuing pattern on the part of the alleged harasser, the Agency has an obligation to look into the matter and determine whether the harassment did occur or is likely to have occurred (i.e., the person bringing the charge is more credible than the alleged harasser). If harassment did occur or is likely to have occurred, management must take action to protect the victim of the harassment from any further harassment. If harassment did occur, disciplinary action appropriate to the specific harassing conduct is to be taken. If the inquiry/investigation is not able to determine with certainty whether harassing conduct did occur, at a minimum the manager is to talk with the alleged harasser in order to provide guidance as to how to prevent future problems.

PREVENTIVE AND REMEDIAL ACTION

EEOC's guidelines encourage employers to take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment, and developing methods to raise awareness and understanding of the rights of men and women in the workplace.

Since Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult, the Agency will be held liable for failing to remedy known hostile or offensive work environments. Failure to investigate allegations of sexual harassment gives tacit approval to the discrimination because the absence of sanctions encourages abusive behavior.

When sexual harassment is found to have occurred, the Agency will take immediate and corrective action to end the harassment and prevent it from recurring, as well as to restore

to the victim any lost employment benefits or opportunities. Since the work product of the victims of sexual harassment may suffer, part of the relief afforded to a victim should be in the form of helping the victim to recover full productivity.

Disciplinary action will be taken against the offending supervisor or employee, ranging from reprimand to discharge. The corrective action will reflect the severity of the conduct. If the harasser is found to have engaged again in sexually harassing conduct, a more severe disciplinary action will be imposed. Follow up inquiries must be made to ensure the harassment has not resumed, and the victim has not suffered retaliation.

Managers who know or should have known of sexual harassment and took no appropriate action may be subject to disciplinary action. If a manager questions how he or she should proceed in the face of the inference of sexual harassment in the work place, s/he should contact the Agency's Director, EOP, for guidance.

RESPONSIBILITY TO REMEDIATE LESSER CONDUCT

When an employee reports incidents of offensive conduct but the severity and extent does not constitute hostile work environment sexual harassment, the Agency still has an obligation to take immediate and appropriate action. For example, if a woman reports that her supervisor or co-worker tells jokes in the work place that she finds offensive, the EOP should determine whether the allegation is true, whether the jokes in fact are offensive to others in the workplace, and speak to the supervisor or co-worker about it. If nothing else, the supervisor or co-worker should be told to be more sensitive to the reactions of his or her audience in telling such jokes and to avoid the telling of them in the future.

By taking immediate and appropriate action when minor problems surface, the manager not only may be preventing the situation from turning into a problem but also will be sending a signal that the Agency intends the work place to be free from discrimination based on gender.

HARASSMENT (NON-SEXUAL)

Non-sexual harassment is any type of repeated abusive or demeaning conduct that is based on a person's race, color, religion, national origin, physical or other disability, age, political belief, or affiliation, sexual orientation or socioeconomic status.

In order to establish a case of a hostile work environment (non-sexual), the complainant must prove by a preponderance of the evidence that:

1. s/he belongs to a protected class;
2. s/he was subjected to a series of adverse actions or other conduct or incidents of a negative nature;
3. the harassment complained of was based on the membership in the protected class; and,

4. the harassment was so severe or pervasive that it affected a term or condition of employment and/or had the purpose or effect of interfering with his/her work environment and/or creating an intimidating, hostile, or offensive work environment.

As with a claim of hostile work environment resulting from sexual harassment, it is not necessary in a case of non-sexual harassment to show the complainant was harassed to the point of emotional or psychological damage in order to show adverse effect. Again, the standard for determining whether verbal or physical conduct is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a "reasonable person" would find the conduct intimidating, hostile, or abusive.

Most frequently, claims of non-sexual hostile work environment involve supervisory actions regarding the complainant. There is usually no direct evidence that the supervisory actions alleged to have been harassing were in fact based on the complainant's membership in the protected class (i.e., epithets, slurs, negative stereotyping, written or graphic material that denigrates or shows aversion or hostility toward an individual or group because of membership in the protected group(s)). Therefore, each claimed incident of harassment must be examined to determine whether it in fact occurred; if it occurred, is the supervisor able to justify the action; and whether similarly situated others not of the complainant's protected group(s) were treated more favorably in comparable circumstances.

Courts and the EEOC have concluded harassment claims should be analyzed in the same manner as sexual harassment claims that allege a hostile or abusive work environment. The only significant difference is that the sexual harassment hostile work environment claims must involve conduct that is sexual in nature.

Typically, it is a totality of circumstances that, taken together, constitute a harassing or hostile environment.