

CHAPTER ONE

EEOC COMPLAINT PROCESS OVERVIEW

I. INTRODUCTION

Federal employees with complaints of discrimination are entitled to have those complaints heard by the Equal Employment Opportunity Commission. The EEOC, or Commission, employs administrative judges who hear and decide cases in much the same way as judges in court. The rules and the setting are less formal, but the process is akin to a traditional trial. The parties have a right to representation, to examine and cross-examine witnesses, and to introduce documents and other evidence into the record. In most instances, the administrative judge will also give the parties an opportunity to make opening and closing statements. The administrative judge oversees prehearing discovery, rules on motions, conducts the hearing, and ultimately issues a decision.

All in all, the process seems quite simple. Yet, the Commission's administrative judges constantly bemoan the level of practice before them. Some of the judges' dissatisfaction with the quality of the trial work they see can be traced to several factors, including the fact that many complainants appear *pro se*, which is merely a fancy legal way of saying they represent themselves, and others are represented by layperson representatives who may not be entirely familiar with or experienced in preparing and trying cases. But, spend a few minutes with virtually any Commission administrative judge and it becomes clear that the dissatisfaction also extends to the performance of the parties' lawyers on both sides of the table. Complainants and agencies frequently are represented by lawyers who have little or no experience in federal sector EEO cases and whose specialty is elsewhere, including private sector employment discrimination cases where many things about case processing differs.

The parties and their representatives also question the process. To those who practice and appear before the EEOC, many of the Commission's litigation procedures seem arbitrary at first glance. Though efforts have been underway in past years to standardize hearing practices, historically there have been great variations in practices among the district offices and even among the administrative judges within a particular district office. As a result, many participants in the EEO hearing process have come to view the administrative judges as incompetent or, even worse, biased.

Perhaps part of the reason for this great dissatisfaction among all participants, including the judges, is that the process is not quite as simple as it seems. For most adjudicatory bodies, whether administrative or judicial, the trial or hearing is, and always has been, the *raison d'être*. The adjudicatory process of the Merit Systems Protection Board starts with the employee or former employee filing an appeal of the action taken by the agency and a request for a hearing. From that point forward, almost all of the Board's procedures are designed to get the parties to a hearing as expeditiously as possible. The Board and its administrative judges place considerable emphasis on, and sometimes engage in considerable arm-twisting in, attempts to get the parties to settle their dispute short of actual litigation. But, all of that is done in the context of a pending hearing.

The same is not true of the EEOC even though under the Commission's regulations at 29 CFR Part 1614, which became effective November 9, 1999, the hearing has become far more significant. For the Commission, the hearing is one part of a much larger process that includes precomplaint counseling, agency acceptance and dismissal of complaints, agency investigation of complaints, and appeals from the decisions of its judges' and from final agency decisions. Aside from the complainant, there is no one who is involved in all facets of the EEO process. The EEO counselor who is responsible for the initial processing of the complaint has no involvement after the precomplaint stage. The EEO personnel that decide whether to accept or dismiss the complaint and define the claims for investigation have minimal involvement in the investigative stage of the complaint and virtually no involvement in the hearing process. The investigator does not become involved with the complaint until after the claims are defined and the complaint is assigned for investigation and will have no involvement in the complaint once the investigation is completed. Frequently, the agency representative has no involvement in a case until after the request for a hearing and the assignment of an administrative judge to the case. With perhaps greater frequency, complainants' representatives do get involved in the agency processing of EEO complaints, but that remains the exception rather than the rule. Of course, the judge has no involvement prior to the request for a hearing.

Complicating the segmented complaint process is the wide array of persons who engage in representational activities before the EEOC. The Commission does not require that a representative for either party be a lawyer; some are and some are not. There is significant variation in the legal education, skill, and experience that representatives bring to a particular case. Even among the lawyer representatives, there is significant variation in the education, skill, and experience relevant to EEO practice. Smaller agencies often do not have lawyers who spend all, or even most, of their time on personnel matters. The lawyers in those agencies often have special education, skill, and experience in the substantive law that most affects the agency. Such lawyers appear before the EEOC infrequently and have little interest in the cases because they view them as detracting from their real work. This means that employee relations specialists, who may have little or no legal training, are forced to grapple with difficult legal issues and complex procedures. For opposition, they may face anything from an experienced lawyer to a *pro se* complainant.

On the complainants' side, there is only a small corps of lawyers who specialize in federal personnel law. Many complainants must rely on lawyers who specialize in private sector employment law where the procedures are much different or on general practitioners with virtually no employment law experience at all. Almost no one, lawyer or lay-representative, regardless of whether he or she represents complainants or agencies, specializes solely in EEO cases. Federal personnel law is a complex subject that can, and does, involve representation before the EEOC, the MSPB, arbitrators under collective bargaining agreements, the Federal Labor Relations Authority, and in the federal court system. The result is that few representatives on either side can bring together a combination of specialized education, skill, and experience in EEOC litigation.

In addition, unlike entities such as the MSPB and the FLRA, the EEOC was not created solely to deal with federal sector employment litigation. Congress originally created the Commission to combat discrimination in the private sector workforce. The EEOC did not have jurisdiction over discrimination charges in the federal workplace during its first 15 years of existence. Thus, its federal sector caseload has not always been a priority for the agency. This is not to suggest that the Commission does not take its federal sector responsibilities seriously; it is merely to acknowledge that its private sector responsibilities require a greater portion of the agency's budget and resources. Consequently, the Commission has been slow

to develop uniform adjudication procedures. For many years, district offices were free to fashion their own procedures and, within district offices, judges were given discretion to further develop individual hearing practices. In addition, some of the Commission's administrative judges have never practiced law as an advocate or have relatively little representational experience and a limited understanding of the day-to-day practicality of representing clients.

For many, the entire EEOC litigation process was undermined by the lack of authority on the part of its administrative judges to issue binding decisions. Prior to November 9, 1999—the effective date of amendments to the Commission's regulations—administrative judges could issue only recommended decisions. Agencies were then free to issue final decisions accepting, rejecting, or modifying those recommended decisions. This gave the entire process a surreal aspect, because the hearing, to some degree, was a meaningless exercise, particularly because the EEOC's Office of Federal Operations (OFO), which engages in appellate review of final agency decisions on discrimination complaints, did not grant the factual findings of the administrative judges any deference but conducted a *de novo* review of those findings.

It is little wonder, then, that EEOC litigation has spawned dissatisfaction on the part of all involved. In the past, there was both limited opportunity and limited incentive to develop real expertise in federal sector EEOC litigation.

Fortunately, much about the process has since changed. In February 1998, the Commission published a notice of proposed rulemaking seeking to amend its regulations at 29 CFR Part 1614 to address many of the system's most glaring deficiencies. Foremost was a proposal to make the decisions of EEOC administrative judges binding and to give both parties the right to appeal those decisions to the EEOC Office of Federal Operations. In combination with the proposed regulation changes, OFO began to implement a policy of granting substantial deference to the factual findings of Commission administrative judges.

On July 12, 1999, the Commission published a notice of final rulemaking at 64 FR 37644. Based on language in 42 USC 2000e-16 that referred to "final actions" by agencies, the Commission altered its proposal to give its judges binding decision powers. Instead, the Commission gave agencies 40 days from receipt to implement the decision of an administrative judge. If the agency refuses to implement the decision, it must notify the complainant and simultaneously file an appeal of the decision with OFO. Particularly in light of OFO's policy of granting substantial deference to the factual findings of administrative judges, the new procedure results in a kind of "virtual binding decision." On November 9, 1999, the Commission issued an updated version of Management Directive 110 that made additional changes to the EEO complaint and hearing process.

Finally, on July 1, 2002, the Commission issued a *Handbook for Administrative Judges*. Although the *Handbook* is not binding and a judge's failure to follow its guidance cannot serve as the basis for appeal, it represents another step toward standardization of the EEOC's federal sector hearing practices.

The focus of this book is on those hearing practices. Whether one represents complainants or agencies, much has been and continues to be written about the substantive law of the EEOC. Precious little has been written about the practical aspects of representing clients and trying cases before the EEOC. This book is offered hoping to in some small way fill the void and to provide practitioners with a litigation manual that specifically addresses the EEO federal sector hearing process. For those looking for a detailed discussion of substantive law, this is the wrong book. Some substantive law is included to the extent that it is necessary to put the practical aspects of this book in the proper perspective. But, this book is, first and foremost, about the "nuts and bolts" of trying cases in the EEOC hearing process.

In the final analysis, litigation is more of an art form than a science. Unyielding rules are hard to fashion and even harder to follow. There are a few unyielding rules to be sure. Among them:

- Never say anything to an administrative judge that, if said to your spouse or significant other, would cause you to sleep on the couch for the next week.
- There are times when you can guarantee the client a loss, but never guarantee the client a win.
- If you are in private practice, never start work before the retainer check clears.

More than rules, there are principles and guidelines that can be applied to the wide variety of circumstances that come before the practitioner. For many of us, the price of learning these principles and guidelines has been trial and error—mostly the latter. Perhaps in setting down the principles and guidelines learned as a practitioner, the error rate of those who follow can be reduced.

Because the process is complex, the following overview of EEOC jurisdiction and the complaint process is provided.

II. EEOC STATUTORY JURISDICTION

The Equal Employment Opportunity Commission's authority to adjudicate federal sector employment discrimination cases comes primarily from six federal statutes: Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, the Pregnancy Nondiscrimination Act, the Age Discrimination in Employment Act, the Equal Pay Act, and the Genetic Information Nondiscrimination Act. Each of the statutes, as well as the Commission's regulations, also prohibit retaliation for filing or pursuing an EEO complaint or opposing what an individual reasonably believes to be an unlawful employment practice.

These statutes define the "protected bases" for EEO purposes. An employee who invokes a claim that does not involve discrimination on the basis of race, color, religion, sex, national origin, age, disability, genetic information or retaliation for protected activity may have a justiciable claim but not within the EEO process.

A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964, codified at 42 USC 2000e *et seq.*, prohibits employment discrimination based on race, color, religion, sex and national origin. As originally passed, Title VII did not apply to federal government employees or applicants for employment. Discrimination on the basis of race, color, religion, sex and national origin was prohibited by executive order, but not by statute. In 1972, when Pub. L. 96-261 was passed, Title VII became applicable to the federal workplace. 42 USC 2000e-16(a), provides, in relevant part:

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

The original enforcement power for federal sector complaints under Title VII was given to the former Civil Service Commission, which was abolished in 1978 with the passage of the Civil Service Reform Act. 42 USC 2000e-16(b) (1978). Enforcement power was given to the EEOC pursuant to § 4 of Reorganization Plan No. 1 and § 1-100 of Executive Order 12106 (Dec. 28, 1978).

Title VII applies to everyone. Although many people think of anti-discrimination statutes as protecting members of minority groups, Title VII protects all people from employment discrimination because of any of the enumerated bases.

1. Civil Rights Act of 1991

Effective November 21, 1991, Congress amended Title VII of the Civil Rights Act of 1964. The most significant change brought about by the Civil Rights Act of 1991 is that complainants who prevail on claims of intentional discrimination under Title VII or the Rehabilitation Act may receive monetary compensation for the harm caused by the discrimination. 42 USC 1981a(a). This is referred to as compensatory damages. Compensatory damages include a monetary award to the victim of discrimination for intangible losses such as pain and suffering and future economic losses. Federal employees subjected to intentional discrimination may receive up to \$300,000 in compensatory damages.

Another important change brought about by the 1991 Act was to reverse, in part, the U.S. Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), regarding the burdens of proof in disparate or adverse impact cases. The *Wards Cove* decision placed the burden of proof in such cases entirely on employees. The 1991 Act reinstated the standard initially set down by the Court in *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed.2d 158 (1971), providing that if an employee establishes a *prima facie* case of adverse impact discrimination, the burden of production and persuasion then shifts to the employer to justify the challenged practice.

2. Same-Sex, Sexual Orientation and Transgender Discrimination

Until recently, the accepted interpretation of sex discrimination within the meaning of Title VII was that it included only the "traditional" meaning of sex as in gender and did not extend protection against discrimination based on sexual orientation and transgender status. In *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed.2d 207 (1996), the Supreme Court held that same-sex discrimination could violate Title VII, though the precise parameters of the doctrine were unclear.

The Employment Nondiscrimination Act would prohibit employment discrimination on the bases of sexual orientation and gender identification and give enforcement authority to the EEOC but is stalled in Congress. Both the Commission and the courts have extended the protections of Title VII to gay, lesbian, bisexual and transgender employees often relying on the gender stereotyping analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989). See, e.g., *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 290 (3rd Cir. 2009); *Miller v. City of New York*, 177 Fed. Appx. 195 (2nd Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2nd Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004); *Veretto v. Postmaster General*, 0120110873 (2011); *Castello v. Postmaster General*, 0520110649 (2011).

Although no federal court has gone as far, finally, in *Macy v. Attorney General*, 0120120821 (2012), the Commission held unequivocally that discrimination on the basis of transgender status is prohibited by Title VII. The *Macy* case did not involve hostile environment harassment but is included in the discussion of significant cases in the "Hostile Environment Harassment" section of Chapter Two because of the frequency with which the issue of coverage arises in hostile environment cases.

B. REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973, codified at 29 USC 791, *et seq.*, prohibits discrimination against qualified individuals with disabilities. The Rehabilitation Act also requires affirmative steps on the part of the federal government. Specifically, the Act requires that each federal government agency, including the U.S. Postal Service, develop an affirmative employment plan "for the hiring, placement and advancement of individuals with disabilities..." 29 USC 791(b).

The Rehabilitation Act provides protection to three categories of individuals with disabilities—1) those who have a physical or mental impairment that substantially limits a major life activity; 2) those who have a record of such an impairment; and 3) those who are regarded as having such an impairment. The Act further requires agencies to provide reasonable accommodations to qualified individuals with a disability to enable them to perform their jobs on equal footing with nondisabled employees. A qualified individual with a disability is one who meets the first or second prong of the definition of an individual with a disability, meets the minimum qualifications for the job, and can perform the essential functions of the job with or without reasonable accommodation. Agencies can avoid the obligation of reasonable accommodation only by showing that accommodating a qualified individual with a disability would impose an undue hardship on its operations.

As with Title VII, the Civil Service Commission originally had jurisdiction over disability discrimination complaints in the federal sector until it was abolished in 1978. The EEOC was granted authority to enforce the Rehabilitation Act under § 4 of Reorganization Plan No. 1 and § 1-100 of Executive Order 12106 (Dec. 28, 1978).

1. Civil Rights Act of 1991

The Civil Rights Act of 1991, discussed above, not only amended Title VII; it also changed the Rehabilitation Act of 1973. As with cases of intentional discrimination under Title VII, the 1991 Act provides for compensatory damages under the Rehabilitation Act in cases involving intentional discrimination and failure to make reasonable accommodation. 42 USC 1981a(a). In cases of discrimination based on failure to provide reasonable

accommodation, however, an agency can avoid liability by showing that it made good faith efforts, in consultation with the complainant, to provide reasonable accommodation.

2. Americans With Disabilities Act of 1990

The Rehabilitation Act has been impacted by the enactment and amendment of the Americans with Disabilities Act (ADA). The ADA was enacted in July 1990, Pub. L. 101-336, codified at 42 USC 12101 *et seq.* The ADA, as enacted, does not apply to federal sector employees. The only provision of the ADA originally applicable to the federal government excluded current illegal users of drugs from the definition of “qualified individual with a disability.”

In 1992, Congress amended the Rehabilitation Act to further incorporate some of the provisions of the ADA. The 1992 amendments, codified at 29 USC 791(g), provide:

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 and the provisions of sections 501 through 504, and 510 of the Americans with Disabilities Act of 1990, as such sections relate to employment.

The relevant sections of the ADA are found at 42 USC 12111 *et seq.*, 12201–204, and 12210. The amendments also substituted the phrase “individuals with disabilities” for “handicapped employees.”

3. ADA Amendments Act of 2008

The Americans with Disabilities Act Amendments Act became effective January 1, 2009. The main thrust of the amendments was to reverse four decisions of the U.S. Supreme Court that had significantly narrowed the Act’s protections by raising the threshold of what it meant to be substantially limited in a major life activity and requiring individuals to establish that they were “significantly” or “severely” restricted in the performance of major life activities as compared to the average person in the general population. *See, Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), and *Toyota Motor Manufacturing, KY, Inc. v. Williams*, 527 U.S. 471 (2002).

The ADA emphasizes the concept of “broad coverage” under the Act that does not require extensive and detailed analysis of the question of whether an individual has a disability and focuses instead on whether the agency has met its obligations under the ADA. This is a radical departure from pre-amendment Act cases in which much of the litigation focused on whether the complainant was an individual with a disability.

C. AGE DISCRIMINATION IN EMPLOYMENT ACT

As its name suggests, the Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age. When it was passed in 1967, as Pub. L. 90-202, the ADEA did not apply to the federal sector. It was amended in 1974 through Pub. L. 93-259 to prohibit age discrimination in the federal workplace. The ADEA, at 29 USC 633a(a), provides that:

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5 [5 U.S.C. § 102], in executive agencies as defined in section 105 of Title 5 [5 U.S.C. § 105] (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

The threshold age for protection under the ADEA is 40 years. There is no prohibition against employment actions taken on the basis of age for anyone under 40 years old.

The ADEA has some unique aspects that set it apart from Title VII and the Rehabilitation Act. In addition to the absence of any exhaustion requirement, as explained below, prevailing federal sector employees are not entitled to attorney fees for work in administrative proceedings under the ADEA. In addition, the 1991 Civil Rights Act did not amend the ADEA. As a result, there is no recovery of compensatory damages in age discrimination cases in the federal sector.

1. Exhaustion of Administrative Remedies

Unlike employees alleging discrimination under Title VII or the Rehabilitation Act, employees with claims of discrimination under the ADEA may proceed directly to federal court. The employee is not required to exhaust administrative remedies by filing an administrative complaint with the employing agency. The only requirement before proceeding to court is that the employee must give the EEOC at least 30 days notice of intent to file a complaint in U.S. district court. This notice must be given within 180 days of the alleged discriminatory action or practice. 29 USC 633a(c)-(d).

Nothing prevents an employee from filing an administrative complaint alleging age discrimination. If the employee elects to pursue the complaint of age discrimination through the administrative process, he or she must then exhaust the administrative remedies. This means the employee may not seek relief in U.S. district court until the complaint has been pending with the agency for more than 180 days. 29 CFR 1614.201(c). Filing an administrative complaint, however, does not toll the two-year statute of limitations for filing a civil action in U.S. district court.

D. EQUAL PAY ACT

The Equal Pay Act (EPA) prohibits employers from paying different wage rates for the same job on the basis of sex. The EPA is an amendment to the Fair Labor Standards Act and is codified at 29 USC 206(d). Section 206(d) provides, in relevant part:

No employer having employees subject to the provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than

the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The EPA applies to federal agencies, and enforcement authority lies with the EEOC. See Reorganization Plan No. 1, § 1. In the past, the EEOC processed claims under the EPA separately from other claims of discrimination. Under the EEOC's current regulations, claims under the EPA are processed the same as any other complaint of discrimination. 29 CFR 1614.202. A claim of sex-based wage discrimination also falls under Title VII. Employees who allege such discrimination can pursue the claim under both statutes.

1. Exhaustion of Administrative Remedies

Like the ADEA, complainants alleging a violation of the EPA are not required to exhaust their administrative remedies but may instead proceed directly to U.S. district court after giving the EEOC 30 days advance written notice within 180 days of the alleged violation. Also like the ADEA, filing an administrative complaint under the EPA does not toll the two-year statute of limitations for filing a civil action.

E. GENETIC INFORMATION NONDISCRIMINATION ACT

The Genetic Information Nondiscrimination Act became effective November 21, 2009. Title II of GINA, codified at 42 USC 2000ff, *et seq.*, prohibits employment discrimination on the basis of genetic information about an employee or applicant or family members of the employee or applicant and gives the EEOC enforcement authority.

GINA also places restrictions on the collection and use of genetic information about employees and family members. The remedial provisions of Title VII apply in GINA cases, meaning that prevailing complainants are entitled to compensatory damages and attorney fees.

F. REPRISAL

Each of the antidiscrimination statutes—Title VII, the Rehabilitation Act, the ADEA, the EPA, and GINA—contain provisions prohibiting retaliation for filing a complaint of discrimination or opposing any discriminatory employment practice. The Commission's regulations, at 29 CFR 1614.101(b), further provide:

No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.*), the Equal Pay Act (29 U.S.C. 206(d)), the Rehabilitation Act (29 U.S.C. 791 *et seq.*), or the Genetic Information Nondiscrimination Act (GINA) (42 U.S.C. 2000ff *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

Large numbers of retaliation complaints are filed against agencies each year and for several years running retaliation complaints have topped the list of basis for complaints in both the federal and private sector. The reality is that any time an employee files an EEO complaint, participates in the EEO process or opposes a discriminatory employment practice and the agency subsequently takes some action, an agency is potentially subject to a retaliation complaint regardless of the merits of the agency's action. The other reality is that the EEOC has made retaliation complaints a top priority. In May 1998, the Commission issued a revised section of its Compliance Manual on retaliation that takes a liberal view of what constitutes a viable retaliation complaint. The guidance, entitled, "[Section 8: Retaliation](#)," replaced § 614 of the Compliance Manual. The directive is available on the Commission's website, www.eeoc.gov, and provides significant guidance in reprisal cases. Although the Compliance Manual primarily addresses private sector cases, § 8 has been cited by OFO in federal sector decisions. See, e.g., *Cabone v. Postmaster General*, 01975812 (1998); *Grayson v. Secretary of Treasury*, 01975891 (1998).

The U.S. Supreme Court also has taken a liberal view of what is actionable under the retaliation provisions of Title VII and held that it extends beyond the types of personnel actions covered by the substantive prohibition on race, color, religion, sex and national origin and extends to any action by an employer, including actions outside the workplace, that might well dissuade a reasonable person from filing or pursuing a complaint. See *Burlington Northern & Sante Fe Rwy. Co. v. White*, 548 U.S. 23 (2006).

Complaints of reprisal are processed by the Commission in the same manner as any other type of discrimination complaint.

III. EEOC INDIVIDUAL COMPLAINT PROCESS

The vast majority of complaints of discrimination are individual complaints. That is, an employee or applicant for employment alleges that the agency discriminated against him or her and the employee or applicant is seeking redress for the harm imposed upon him or her by the agency. An employee or applicant who wants to pursue a discrimination complaint must go through the EEO administrative process, except for complaints under the Age Discrimination in Employment Act and Equal Pay Act as noted [above](#). In what is surely an anomaly for those who usually represent private sector employees in discrimination complaints, the agency alleged to have engaged in discrimination is responsible for processing EEO complaints against it. The processing, however, must be consistent with the EEOC's regulations, which are set forth at 29 CFR Part 1614 and further explained in EEOC Management Directive 110.

This book focuses on representing agencies and complainants before the EEOC, which, as can be seen [below](#), does not happen until the complainant makes a request for a hearing. Still even for those representatives who do not enter a case until the hearing stage, an understanding of the agency administrative process is helpful, if not necessary, and it is to the process that we now turn our attention.

A. EEO COUNSELING

The first step for an employee or applicant who suspects discrimination is to contact an EEO counselor. Each agency appoints employees to serve as EEO counselors. There are no formal requirements to be an EEO counselor. Training, however, is required. Under MD-110, new EEO counselors are required to have 32 hours of counselor training and must have eight hours of counselor training each year. MD-110 at 2-1 to 2-3. Those who

were counselors in 1999 when MD-110 was originally implemented were not required to undergo the 32 hours of training, but they are required to receive eight hours of annual training. In addition to the required training, the EEOC also encourages agencies to appoint fulltime counselors, instead of using employees who perform counseling as a collateral duty.

The counseling phase of the EEO process is commonly referred to as precomplaint counseling or informal counseling. The authors generally disapprove of the term "informal" when referring to counseling. Precomplaint counseling is an absolute prerequisite to filing a formal complaint. Counselor contact must be made within 45 days of the date of the alleged discriminatory personnel action or incident, with a couple of exceptions set forth in the regulations. Counseling should be concluded within 30 days, except as noted in the regulations. The EEOC's regulations, at 29 CFR 1614.105, provide:

- (a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.
 - (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.
 - (2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.
- (b)(1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with Sec. 1614.108(f), election rights pursuant to Secs. 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to Sec. 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the claims raised in precomplaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.
 - (2) Counselors shall advise aggrieved persons that, where the agency agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph (c) of this section.
- (c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.
- (d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 calendar days of the receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.
- (e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.
- (f) Where the aggrieved person chooses to participate in an alternative dispute resolution procedure in accordance with paragraph (b) (2) of this section, the pre-complaint processing period shall be 90 days. If the claim has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.
- (g) The counselor shall not attempt in any way to restrain the aggrieved individual from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

Precomplaint counseling may not be waived by either the employee or the agency. Moreover, an agency cannot deny a request for precomplaint counseling. As noted in § 1614.105(f), however, if the agency offers alternative dispute resolution (ADR) and the complainant agrees to participate in it, this can be done in lieu of precomplaint counseling. In such a case, the 30-day time period for counseling is extended to 90 days for alternative dispute resolution. The 90 days is counted from the initiation of counseling and not from the agreement to pursue alternative dispute resolution.

Chapter 2 of MD-110 offers substantial guidance on the duties of the EEO counselor. The EEO counselor's general duties include providing information to complainants about their legal rights and obligations, determining the basis(es) for a complaint, and defining the issues involved. EEO counselors should also attempt to resolve complaints.

The precomplaint counseling stage of the EEO process ends with a notice of final interview. The notice must be in writing, must inform the employee of the right to file a formal complaint, the time limit for doing so, and where the complaint should be filed. The notice must also inform the complainant of the duty to notify the agency if representation is obtained.

The EEO counselor must keep a record of the counseling activities and file a report within 15 days of being advised that a formal complaint has been filed. 29 CFR 1614.105(c). Many agencies require counselors to file reports on all cases regardless of whether a formal complaint is filed, and this is clearly the better practice. As set forth at MD-110 at 2-15, the report must include:

1. A precise description of the claim(s) and basis(es) identified by the complainant;
2. Pertinent documents gathered during the inquiry, if any;
3. Specific information bearing on timeliness of the counseling contact;
4. If timeliness appears to be a factor, an explanation of the delay; and
5. An indication as to whether an attempt to resolve the complaint was made.

MD-110 provides a recommended format for the counselor's report at [Appendix G](#).

B. ALTERNATIVE DISPUTE RESOLUTION

As part of an increased effort to reduce the number of formal complaints and encourage early resolution, the Commission's regulations require that all agencies either set up an alternative dispute resolution program or have ready access to one. 29 CFR 1614.102(b)(2). Chapter 3 of MD-110 provides guidance on ADR programs. Alternative dispute resolution may be offered in lieu of precomplaint EEO counseling. The agency has discretion as to whether it will offer ADR in any given case. In other words, the agency is required to have an ADR program, but it is not required to offer ADR in every case. An agency may not, however, preclude entire bases of discrimination from its ADR program.

In cases where an agency does offer ADR, the complainant's decision whether to participate is entirely voluntary. EEO counselors must advise complainants of their right to elect participation in either ADR or traditional counseling. Complainants may elect to undergo traditional EEO counseling instead of ADR if they so choose. A complainant who chooses ADR, however, waives his right to undergo traditional precomplaint counseling.

The core principles of ADR are that the process be voluntary, neutral, confidential, and enforceable. MD-110 at 3-15 to 3-17 provides:

Any program developed and implemented by an agency must be fair to the participants, both in perception and reality. Fairness should be manifested throughout the ADR proceeding by, at a minimum: providing as much information about the ADR proceeding to the parties as soon as possible; providing the right to be represented throughout the ADR proceeding; and providing an opportunity to obtain legal or technical assistance during the proceeding to any party who is not represented. Fairness also requires the following elements:

1. Voluntariness

Parties must knowingly and voluntarily enter into an ADR proceeding. An ADR resolution can never be viewed as valid if it is involuntary. Nor can a dispute be actually and permanently resolved if the resolution is involuntary. Unless the parties have reached a resolution willingly and voluntarily, some dissatisfaction may survive after the ADR proceeding. Such dissatisfaction could lead to dissatisfaction with other aspects of the workplace, or even to charges that the resolution was coerced or reached under duress.

In addition, aggrieved parties should be assured that they are free to end the ADR process at any time, and that they retain the right to proceed with the administrative EEO process if they decide that they prefer that process to ADR and resolution has not been reached. Both parties should be reassured that no one can force a resolution on them, not agency management or EEO officials, and not the third party neutral. Finally, parties are more likely to approach a resolution voluntarily when they know of their right to representation at any time.

2. Neutrality

To be effective, an ADR proceeding must be impartial and must be independent of any control by either party, in both perception and reality. Using a neutral third party as a facilitator or mediator assures this impartiality. A neutral third party is one who has no stake in the outcome of the proceeding. For example, he or she might be an employee of another federal agency who knows none of the parties and whose type of work differs from that of the parties. Or he or she may be an employee within the same agency as long as he or she can remain neutral regarding the outcome of the proceeding. The agency must ensure at all times the independence and objectivity of the neutral.

3. Confidentiality

Confidentiality is essential to the success of all ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in § 574 of ADRA, specifically exempting qualifying dispute resolution communications from disclosure under the Freedom of Information Act. Parties who know that their ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of ADR information. For implementation and reporting purposes, the details of a resolution can be disseminated to specific offices with a need to have that information. As noted above in Section V, neither the ADRA nor EEOC's core principles require the parties to agree that a settlement must be confidential.

Confidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution, and by any neutral third party involved in the proceeding. The EEOC encourages agencies to issue clear, written policies protecting the confidentiality of what is said and done during an ADR proceeding.