Introduction to Discrimination Law and Procedure

SECTION 1
THE EEO STATUTES AND PROCESS

I. INTRODUCTION

There are countless textbooks, treatises and manuals on employment discrimination law. Even when the field is narrowed to federal sector employment discrimination law, the list of publications is impressive. Most of what has been written previously is dry, highly legalistic, and geared toward attorneys and agency representatives who prosecute and defend federal sector cases. These books are certainly necessary and helpful to those who litigate EEO cases. The remainder of what has been written is aimed at advising supervisors and managers on how to avoid discrimination complaints and what to do if a complaint is filed, or on advising *pro se* complainants on representing themselves. The writing tends to be more reader-friendly, but the content is overly simplistic. Many of these publications are probably useful to EEO Counselors and Investigators, as well. But there has been little written in the way of plain English, practical guidance geared specifically to the needs of EEO Counselors and Investigators. This is unfortunate, given the importance of the counseling and investigative stages of the EEO complaint process. Properly used, effective counseling and investigation can lead to early resolution of EEO complaints to the mutual satisfaction of agencies and complainants. At the very least, effective counseling and investigation can result in more clearly defined claims, more meaningful and useful Reports of Investigation and, as a result, more fairly resolved complaints. This book is intended to fill the existing gap in federal sector EEO literature, and to provide EEO Counselors and Investigators with practical information and advice to help process complaints effectively.

This book differs substantially from most of the existing resources. First, it is not highly dependent on case law and legal citations. This is an intentional omission on the part of the authors. There is nothing inherently wrong with books that are highly dependent upon case law and legal citations. To those who litigate, such books are very useful. They are far less useful to EEO Counselors and Investigators, whose daily efforts depend far more upon mastering a basic understanding of the EEO process and applicable substantive law than on being able to cite the source of that understanding. Make no mistake. The authors have relied heavily upon the EEO statutes, the regulations and guidance of the Equal Employment Opportunity Commission and the case law of the Commission and courts in writing this manual. The emphasis, however, is on communicating the roles of the

Counselor and Investigator and the skills required by those individuals rather than on communicating our sources. Where appropriate, citations are used. But they have been kept to a minimum. The citations used are those that EEO Counselors and Investigators will commonly encounter and need to recognize and understand. Citations to specific cases also have been used to illustrate some of the points the authors make. They are not used to show the authors' source. Those who want more in the way of specifics are referred to *A Guide to Federal Sector Equal Employment Law & Practice*, (Dewey Publications) by Natania Davis and founding author Ernest Hadley.

This book also differs substantially from most of the existing federal sector EEO literature in that it is written for the neutrals in the EEO process and not for advocates or those with a vested interest in the outcome of a complaint. It is true that most of the federal sector EEO literature for representatives is "neutral" to the extent that it favors neither complainants nor agencies. But it is written for those whose role is to advocate on behalf of one of the parties. The remaining literature is written for those who find themselves, by choice or otherwise, enmeshed in the EEO complaint process with much riding on the outcome. There is no attempt in such literature to be neutral nor, given its purpose, should there be. However, the integrity and, ultimately, the success of the counseling and investigation processes depend heavily upon the neutrality of those who administer it. This book has been written with those specific goals in mind.

The book is divided into an introduction and two manuals. This—the Introduction—provides an overview of the EEO statutes, the individual complaint process, the class complaint process, the bases and theories of discrimination, and the remedies available to complainants who prevail on claims of discrimination. It is intended for both EEO Counselors and Investigators as a basic primer that serves as a foundation for the specific roles and duties of each group. The alternatives of pursuing EEO complaints in the negotiated grievance process or before the Merit Systems Protection Board are discussed in the first manual, which is the EEO Counselors' Manual. The second manual is the EEO Investigators' Manual. In addition, Reference Materials consisting of relevant portions of EEO law, regulations and guidance are provided as a free download at www.deweypub/refecim. Readers should always check with their EEO office, however, to ensure that they have access to and read the most current regulations and Management Directives from the EEOC, as well as any agency-specific policies.

For those who are experienced Counselors and Investigators, the Introduction may appear too basic to be of real value. Still, the authors recommend it be read by all prior to moving on to the Counselors' and Investigators' Manuals. A refresher in the basics never hurt anyone. The EEOC significantly changed the administrative process in November 1999. The

EEOC issued regulations to implement the ADA Amendments Act of 2008 in March 2011. The EEOC also issued regulations to implement the Genetic Information Nondiscrimination Act of 2008 in November 2010. The EEOC revised Management Directive 110 in 2015. The authors also recommend that EEO Counselors read the EEO Investigators' Manual and *vice versa*. Although distinct, there is much overlap in the roles of the Counselor and Investigator. Section 6 of the EEO Counselors' Manual on Interviewing Techniques contains much that will be of assistance to EEO Investigators.

However, the most important reason that all Counselors and Investigators should review the entire book is to ensure that they are thoroughly familiar with the entire EEO process. Counselors, in particular, are required to inform complainants about the EEO process during precomplaint counseling and, obviously, such information cannot be imparted to a complainant unless the Counselor is well versed about the process. But even in the absence of such a requirement, the duties of the EEO Counselor and Investigator can only be fully understood in the context of the entire discrimination complaint process. For better or for worse, the EEO process is divided into distinct stages. The result is that no one, other than the complainant, actually participates in all those stages. For the most part, the Counselor's duties in a particular case end with preparation of the Counseling Report. They do not participate in the investigation, hearing or appellate stages of the process. Investigators do not become involved in complaints until after precomplaint counseling has been completed, a formal complaint of discrimination has been filed and the claims for investigation have been defined. Their role ends with issuance of the Report of Investigation. They do not participate in the counseling, hearing or appellate stages. EEOC administrative judges do not become involved in a complaint until there is a request for a hearing. Their role ends with issuance of a decision. They do not participate in the counseling, investigation or appellate stages of the complaint. Even EEO directors and complaint managers are not involved with the entire process. They may oversee the counseling and investigation stages, but are seldom actually involved in those activities. They have virtually no role in the hearing or appellate stages of the complaint process. Yet each of these individuals plays an integral role in the EEO process. The performance of those roles is enhanced when each individual in the process has a firm grasp of the entire process.

II. STATUTES ENFORCED BY EEOC

The three statutes enforced by the EEOC that are of primary importance to EEO Counselors and Investigators are: Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. There have been significant amendments to Title VII

and the Rehabilitation Act, which are discussed more fully below. The Commission also has jurisdiction over gender-based pay disparities under the Equal Pay Act. Additionally, as of November 21, 2009, it is illegal for employers to discriminate against applicants or employees on the basis of genetic information under the Genetic Information Nondiscrimination Act.

A. TITLE VII OF THE 1964 CIVIL RIGHTS ACT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex and national origin. Title VII is codified at 42 USC 2000e, *et seq*. As originally passed, Title VII did not apply to federal government employees or applicants for employment. Beginning in 1965, employment discrimination based on race, color, religion, sex and national origin in the federal government was prohibited by Executive Order 11246, as amended by Executive Order 11478. An Executive Order is an order issued by the President of the United States. In 1972, when Public Law 96-261 was passed, Title VII was amended to apply to the federal workplace. Codified at 42 USC 2000e-16(a), the section currently 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 Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from discrimination based on race, color, religion, sex, or national origin.

The original enforcement power for federal sector complaints under the Executive Order and later under Title VII was given to the former Civil Service Commission, which was abolished in 1978. The EEOC assumed enforcement power pursuant to section 1-100 of Executive Order 12106 (Dec. 28, 1978).

Unlike the other anti-discrimination statutes, Title VII applies to everyone. Although most people think of anti-discrimination statutes as protecting members of minority groups, Title VII protects all people. Everyone has a race, color, national origin and gender, and Title VII protects everyone from employment discrimination because of any of these enumerated bases. Discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII.

With regard to religion, protection extends to all by virtue of the fact that Title VII protects people of all religious beliefs, including those people who do not subscribe to organized religion, when employment action is taken on the basis of religious beliefs or lack of religious beliefs. When a complainant seeks EEO counseling and files a complaint of discrimination under Title VII, the Counselor and Investigator need not be concerned with whether or not the complainant is covered by the statute. Undoubtedly, the complainant is covered. The main tasks are to identify the specific basis or bases alleged, and to gather evidence concerning whether the employment action at issue was taken as a result of that basis or bases.

1. Civil Rights Act of 1991; Compensatory Damages

Effective November 21, 1991, Congress, through Public Law 102-166, amended Title VII of the Civil Rights Act of 1964, as well as the Rehabilitation Act, discussed later. 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. This type of recovery is referred to as compensatory damages and the amendment is codified at 42 USC 1981a(a). Compensatory damages include monetary awards to the victim of discrimination for past out-of-pocket expenses caused by the discrimination, and for intangible losses such as pain and suffering, as well as future economic losses. Federal employees who have been subject to intentional discrimination may receive up to $300,000 in compensatory damages for emotional distress and future economic losses. This cap of $300,000 has not been increased, thus every year that passes results in awards of compensatory damages holding lesser value. Recovery for past out-of-pocket expenses is not subject to this cap.

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, 109 S. Ct. 2115, 104 L. Ed.2d 733 (1989), regarding the burdens of proof in so-called disparate or adverse impact cases that challenge facially neutral employment practices or policies on the basis of their effect on protected groups. 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 Co.*, 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 disparate impact discrimination by showing a discriminatory effect on a protected group or groups, the burden of production and persuasion then shifts to the employer to justify the challenged practice.

2. The Lilly Ledbetter Fair Pay Act of 2009

In January 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 in response to a Supreme Court decision that stated the relevant timeframe in determining the timeliness of a compensation-based claim ran from when the discriminatory act started. The Act superseded this decision and held that the timeframe starts anew with the issuance of each supposedly discriminatory paycheck. The Act is retroactive to May 28, 2007. Counselors and Investigators must keep these timeframes in mind when examining and investigating claims of compensation discrimination under Title VII.

3. Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act went into effect on June 27, 2023. It requires covered employers to provide reasonable accommodations to a worker's known limitations relating to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

B. REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973 prohibits employment discrimination against qualified individuals with disabilities. Passed as Public Law 93-112, it is codified at 29 USC 791, *et. seq*. Title 29 of the USC relates to Labor and includes most of the federal employment legislation that was not part of a larger civil rights bill such as Title VII or part of the Civil Service Reform Act of 1978. From the outset, the Rehabilitation Act has applied to federal executive agencies.

In addition to prohibiting employment discrimination against qualified individuals on the basis of disability, the Rehabilitation Act requires affirmative action on the part of the federal government. Specifically, the Act requires that each federal government agency, including the U.S. Postal Service and the Postal Rate Commission, develop an affirmative action plan "for the hiring, placement and advancement of individuals with disabilities…." 29 USC 791(b).

The Rehabilitation Act further requires agencies to provide reasonable accommodations that allow qualified individuals with disabilities to compete for and perform jobs on equal footing with nondisabled employees. Agencies can only avoid the obligation of reasonable accommodation 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 and its responsibilities were transferred to the EEOC.

1. Americans With Disabilities Act of 1990

The Americans with Disabilities Act (ADA) was enacted in July 1990 as Public Law 101-336, and codified at 42 USC 12101 *et seq*. Like Title VII, the ADA applies to more than just employment discrimination.

The ADA does not apply directly to the federal government. The federal government is specifically exempted from the definition of an employer under the Act. The only provision of the ADA that originally applied to the federal government excluded current users of illegal drugs from the definition of "qualified individual with a disability."

In 1992, through Public Law 102-569, Congress amended the Rehabilitation Act to incorporate some of the provisions of the ADA and make them applicable to the federal government. 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 applicable to the federal government are found at 42 USC 12111 *et seq*., 12201-204, and 12210. The 1992 amendments also substituted the phrase "individuals with disabilities" for the term "handicapped individuals," which was used in the original version of the Rehabilitation Act.

The "nonaffirmative action" standards referred to in the 1992 amendments to the Rehabilitation Act are those provisions that prohibit employment discrimination against qualified individuals on the basis of disability and those provisions that require reasonable accommodation of such individuals. The provisions of the Rehabilitation Act that require federal agencies to engage in affirmative action in the hiring, placement and advancement of disabled individuals were left unchanged.

Through the 1992 amendments, the medical examination and inquiry provisions, as well as the confidentiality requirements, of the ADA were incorporated into the Rehabilitation Act. The medical examination and inquiry provisions apply to every employee and applicant for employment regardless of whether the employee or applicant has a disability. The

provisions significantly restrict when an agency can order a medical examination and the medical information an agency can request of an employee or applicant. Improper examination orders and overly broad requests for medical examinations are independent violations of the ADA and require no finding of intent on the part of the agency.

The same holds true of the ADA's confidentiality provisions; they apply to all employee regardless of whether they have a disability. The agency is required to keep medical records segregated from personnel files and may disclose medical information only on a need to know basis. Again, failure to maintain confidentiality is an independent violation of the ADA with no required showing of intent.

2. Civil Rights Act of 1991

The Civil Rights Act of 1991, discussed earlier, not only amended Title VII; it 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.

3. Americans With Disabilities Act Amendments Act of 2008

The ADA Amendments Act of 2008, Public Law 110-325, amended sections of the Americans With Disabilities Act, the Rehabilitation Act, and enacted new sections of law concerning the rights of disabled employees. The ADA Amendments Act of 2008 is codified at 29 CFR 1630 *et seq*. We will discuss the substantive changes the ADA Amendments Act made to claims of disability discrimination later in this text. This Act significantly broadened coverage of individuals with medical conditions. Further, the Act eliminated many of the restrictions previously put in place by a series of Supreme Court decisions that examined who is disabled under the law. Much of the analysis performed by EEO Investigators in disability cases was rendered moot by the Act and subsequent implementing regulations. For example, whether an employee uses items such as a cane or medication to mitigate the impacts of the medical condition is no longer relevant to investigating whether an employee meets the definition of having a disability under the law.

C. AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age. When it was passed in 1967 as Public Law 90-202, the ADEA did not apply to the federal sector. It was amended in 1974 through Public Law 93-259 to apply to the federal workplace. The ADEA, in part 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 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 Rate 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, and in the Government Printing Office, the General Accounting 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 of age. 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. First, federal sector employees who only prove age discrimination are not entitled to attorney fees for work in administrative proceedings brought solely 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.

The Supreme Court held in *Babb v. VA*, 140 S. Ct. 1168 (2020), that federal employees can prevail on claims of age discrimination by showing that age was a consideration in the contested agency decision. Age does not need to be the but-for cause of a challenged personnel decision because the plain meaning of the ADEA "demands that personnel actions be untainted by any consideration of age." However, a failure to show age was the but-for reason for discrimination may result in only limited remedies.

1. Exhaustion of Administrative Remedies

Typically, federal employees bringing claims under Title VII or the Rehabilitation Act are required to pursue their claims under the administrative process before filing a lawsuit in federal court. This process