

CHAPTER 1

INTRODUCTION

Managers often feel like the victim when Equal Employment Opportunity (EEO) complaints are filed against them. This is understandable because the EEO system affords nearly all of the rights and protections to the complaining party. The process is slow and inefficient and managers are often not kept informed of the status of cases filed against them. Despite the need for changes, being able to cope with the system is essential to surviving in today's workplace.

Federal managers are typically more challenged by the EEO system than private sector employers. While there are several reasons for this, the main one is that almost all federal sector complaints are required to be investigated, regardless of merit. This is costly and time-consuming. Another reason is that the EEOC believes that the federal government has a larger responsibility to ensure equal employment and to be a "model employer." A third major reason is that official work time is allowed for employees to file and pursue EEO complaints.

As most experienced managers know, federal employees have many rights under various laws. These rights and their respective processes are confusing because of the overlapping authority of several different agencies, different appeal routes and different time limitations. Of the existing rights, the EEO system is the least understood and the most sensitive. As this handbook explains, if a management official directly or indirectly attempts to discourage use of the system, a finding of discrimination based on reprisal is likely. As discussed in Chapter 2, under the subheading "[Retaliation](#)," you must control your reactions. Keep in mind that you need to go about the business of being a manager despite complaints. This includes interacting with employees and trying not to be personally offended. This handbook focuses on the federal sector EEO process, but it also touches on other areas. For those unfamiliar with the federal EEO process, it is outlined in [Appendix I](#). The EEOC now allows some agencies to engage in pilot projects to find improvements to the federal sector process, so it is possible that your agency's process is different.

Our purpose is not a philosophical discussion of civil rights and their continuing evolution or the almost universally recognized need to change the federal EEO process. Instead, *Surviving EEO Complaints* is intended to help the federal manager understand the federal sector EEO process, the way it works, how to navigate it, and, in doing so, provide some reassurance that managers are not alone in their bewilderment of a cumbersome, resource-consuming, and often unfathomable system. It is also designed to increase your understanding of management's role in trying to avoid and respond to complaints. Common sense ideas on how to survive allegations of discrimination are also provided.

Conflict is an inevitable part of worklife. Even in strong organizations, decisions that adversely affect an employee's career can lead to a complaint. The EEO system is widely used by employees who are unhappy, whether or not they believe it is an EEO issue. Management cannot control this, but if you can keep the following goal in mind, it is easier to deal with the process. As a manager, your role is of primary importance in creating and maintaining an atmosphere where work is accomplished without consideration of factors that are unrelated to merit. Employees should feel secure that the federal agency for which they work will not treat them differently or less favorably for any reason other than their conduct and performance. No amount of EEO policy statements can overcome the perception of employees who feel unappreciated, misled, or discriminated against by their supervisors. Often, the supervisor is their main contact

with management, and you are their reality when it comes to how management feels about them. Despite your best attempts, managers often must make decisions that leave employees unhappy. And sometimes, notwithstanding your best efforts, employees will still file complaints naming you as the responsible management official.

Equal opportunity does not mean equal results. Choices have to be made about discipline, promotions, awards, assignments, and training, and agencies generally have broad discretion to set policies and carry out personnel decisions. The existence of that discretion leaves room for discriminatory practices, but through your actions or inactions, you can help avoid the existence and a finding of discrimination. The problem is that most agency managers do not understand how discrimination is found. Management's best hope is to be educated on what constitutes discrimination and what can be done to avoid unlawful discriminatory decisions.

Facing an allegation that you have discriminated against someone, regardless of the alleged basis or the possible strength of that charge, is an unsettling affair. Many managers do not know the EEO system well enough to understand why their agencies react adversely when an employee files a complaint. A front line manager will hear that an investigation is forthcoming and may feel that he is being placed on trial without adequate support or guidance. The No Fear Act and increased emphasis on punishing managers who discriminate or allow discrimination make management's concerns real.

The challenges of properly handling workplace decisions have increased with a startling array of diversity issues to manage. This handbook is designed to teach managers to understand and effectively navigate the EEO process. The informed participation of managers will improve the EEO process through avoidance of conduct that constitutes or permits discrimination, vigorous defense of complaints lacking merit, appropriate settlements, and proper relief to employees who are victimized by discrimination.

EEO law is complicated and constantly evolving. While our objective is to help management understand the law and processes involved, you can't know it all. By reading this book, you are way ahead of the curve. To be even better prepared, we recommend you get to know your agency's resources and who is there to help you.

Since the third edition of *Surviving EEO Complaints* (2010), various areas of EEO law continue to become more confusing and stringent for agency managers. They include new regulations passed under the Americans with Disabilities Act as Amended (ADAAA); the impact of COVID-19 vaccine and testing mandates (and possibly future similar edicts) and its effect on reasonable accommodations; the change in addressing the reasonable religious accommodations; advancement and subsequent prohibition against diversity, equity and inclusion practices; and handling of matters based on sexual orientation and gender identity, all discussed in this book. Additionally, there are new laws to contend with, to include the Pregnant Workers Fairness Act and a slew of executive orders. With the changing law, these areas receive increased attention in this updated handbook. Additional guidance is also provided in Chapter 8, addressing ["Strategies for Reducing Complaints."](#)

One last note. This handbook provides many case studies to make the law easier to understand. In the majority of real life cases, discrimination is not found. The best way to avoid findings of discrimination is by learning how the EEOC reviews the mistakes of other managers. Most of the case studies show where the agency made errors in judgment that could result in a finding of discrimination.

I am very pleased to announce Dora Malykin as the new main author of this book. She has been both a representative for employees and employers and brings a well-balanced view that improves the guidance in this book. Her view and advice gives a common sense approach to the strategies and tactics for handling EEO complaints, but also on how to improve supervisory skills with tools to address workplace issues.

A special thanks to Dewey Publications' Business Manager Karen Troutman for finalizing this handbook. Without her help, this handbook would not be possible. Any of my expressions of gratitude (or angst) are totally inadequate for the mentorship and vast wisdom that publisher Peter Broida provides on each of the projects at Dewey Publications.

Sarah Tuck
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CHAPTER 2

A SUMMARY OF DISCRIMINATION LAWS

The law envisions that employment decisions will be made without regard to nonmerit factors. If successful, the government as an employer will show neither bias against nor preference toward anyone based on his or her protected class. The mission is indisputably admirable, and the goal is one to which everyone should aspire.

The challenges to engage and utilize the growing diversity of our nation are real.

In 2024, the U.S. Census Bureau reported notable demographic shifts across several major population groups. The African-American population reached 41.1 million, marking a steady increase of 1.5 million since the 2005 Census report. Growth among Hispanics and Latinos was even more pronounced: this group expanded to 68 million, now representing 20% of the nation's population and reflecting a substantial rise of 25 million over the same period. The Asian population also continued its upward trajectory, totaling 21.3 million in 2024 and accounting for 6% of the overall population. Together, these trends highlight the increasing diversity of the United States and the significant demographic changes that have unfolded over the past two decades.

The increasing diversity of the nation and, consequently the workplace, is a daunting challenge to manage, especially in an EEO context. But in creating their diversity plans, some agencies misunderstand the basic concept that use of a Title VII factor, no matter how well-intended, is generally still unlawful, absent some specific lawful and limited purpose.

As managers, you have heard the term “affirmative action” and you may be asking what the role of affirmative action plans are in the workplace today. The [EEOC's Compliance Manual of Race and Color Discrimination \(2006\)](#) notes:

In order to open the American workplace to historically excluded groups, some employers use diversity and affirmative action programs. Diversity and affirmative action are related concepts, but the terms have different origins and legal connotations. Workforce diversity is a business management concept under which employers voluntarily promote an inclusive workplace. Employers that value diversity create a culture of respect for individual differences in order to “draw talent and ideas from all segments of the population” and thereby potentially gain a “competitive advantage in the increasingly global economy.” Many employers have concluded that a diverse workforce makes a company stronger, more profitable, and a better place to work, and they implement diversity initiatives for competitive reasons rather than in response to discrimination, although such initiatives may also help to avoid discrimination.

Title VII permits diversity efforts designed to *open up opportunities* to everyone. For example, if an employer notices that African Americans are not applying for jobs in the numbers that would be expected given their availability in the labor force, the employer could adopt strategies to expand the applicant pool of qualified African Americans such as recruiting at schools with high African American enrollment. Similarly, an employer that is changing its hiring practices can take steps to ensure that the practice it selects minimizes the disparate impact on any racial group. For example, an employer that previously required new hires to have a college degree could change this requirement to allow applicants to have a college degree or two years of relevant experience in the field. A need for diversity

efforts may be prompted by a change in the population's racial demographics, which could reveal an underrepresentation of certain racial groups in the work force in comparison to the current labor pool. (Emphasis added.)

The EEOC points out that Congress drafted the statute broadly to cover race or color discrimination against *anyone*—Whites, Blacks, Asians, Latinos, Arabs, American Indians and Alaska Natives, Native Hawaiians and Pacific Islanders, persons of more than one race, etc.

In practice, although there are exceptions such as efforts to hire persons with disabilities (under the Rehabilitation Act, Section 501 and Executive Order 13163, dated July 26, 2000) and special hiring authorities for some appointment types such as veterans, most employment authorities are competitive in nature. Under current law, in most cases when an employer hires an employee using race, color, sex, or national origin as a reason for the decision, it is a violation of law.

Restated, just as it is illegal *not* to hire, promote, fire someone based on protected bases (sex, national origin, etc.), it is generally illegal *to favor* (hire, promote) an individual because of his or her membership in a protected class.

In January 2025, a new mandate reshaped federal hiring and employment practices with the issuance of Executive Order 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.” This order revoked several prior diversity-related executive orders and expressly prohibited federal contractors and subcontractors from engaging in any form of “workforce balancing” based on protected characteristics such as race, color, sex, sexual preference, religion, or national origin. In addition to its impact on federal operations, EO 14173 also encourages private-sector employers to move away from diversity, equity, and inclusion (DEI) initiatives. As a result, employment practices tied to DEI programs are now largely prohibited—or at minimum strongly disfavored—with only limited exceptions remaining in place.

Understanding the laws and guidance under which this system operates and digesting its evolving case law is a full-time job for persons with analytical abilities, legal training, and significant on-the-job experience. This handbook will not make you an expert in discrimination law, but it is designed to help you understand the basics of the legislation and how it is supposed to work.

Case law decisions and EEOC guidance are in abundance and there is no attempt to reproduce it all here. The EEOC's website is extensive and contains considerable information at <http://www.eeoc.gov>. Much of the material in this handbook is based on guidance and samples from the EEOC's website, in shortened or reorganized form. A second and comprehensive resource for information is *A Guide to Federal Sector Equal Employment Law & Practice* by Natania M. Davis and Ernest C. Hadley, founding author, which is updated and published annually by [Dewey Publications, Inc.](#)

The EEOC has enforcement authority over federal sector discrimination complaints. The EEOC's authority comes from three main pieces of legislation: the Title VII of the 1964 Civil Rights Act, as amended; the Age Discrimination in Employment Act of 1967; and the Rehabilitation Act of 1973, as amended. Other legislation exists and most of it will be mentioned, but knowing about the principal statutes will help you understand how the laws apply and to whom they apply. What you learn will also provide insight into the theories of discrimination. You will also gain more understanding of how those theories might be proven by a complainant or rebutted by agency representatives if the case is litigated rather than settled.

I have not attempted to cover all EEO laws or guidance. It cannot be that detailed, or it would not be a handbook. This handbook is not an authoritative review. It is designed to

help management explain its position in EEO cases and to give a foundation upon which to do more research. Knowledge being a powerful tool, it is hoped that the following introductory course equips you with a better understanding of EEO law and goals. Use this knowledge in conjunction with your agency's resources.

I. THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 protects everyone. At the time of its creation, the employment portion of the Civil Rights Act was aimed at ending discrimination against African Americans. However, everyone is presumably of a race, color, sex, religion (or not religious), and has a national origin. With very few exceptions, such factors cannot be the basis for employment decisions. The exceptions, called *bona fide* occupational requirements (BFOQs), are narrowly applied. By law, BFOQs do not apply to race and color but only apply in very limited circumstances to a person's religion, national origin, sex or age.

A. RACE

The term "race" is broadly construed under EEO laws. The EEOC issued guidance on race and color discrimination in its [Compliance Manual, Number 915.003](#), dated April 19, 2006. This comprehensive guidance is on the EEOC's website and is utilized as a basis to describe race and color discrimination in this handbook. Under the guidance, "race" generally encompasses ancestry, physical characteristics, race-linked illnesses, culture, perception, or association with others of a particular race.

Case Study

Jason is interviewed by telephone for a position in New York City. A central duty of the position is to give tours to visitors. Jason is from Alabama and has a fairly heavy accent that sounds "Black." He is otherwise extremely well-qualified for the job and is a highly successful tour guide at museums in the South. The agency does not select him. Notes taken during the interviews show the reason he was not selected was because the selecting official was concerned that Jason would not make a good impression on the myriad of tourists he would guide because of his "Ebonic accent." This is an example of race discrimination as it has roots in Jason's culture.

Keep in mind that race is mostly based on self-identification, and distinctions among races can be difficult to make. The EEOC doesn't bother with differentials and neither should you, because once the employee claims to be of a particular race, it is then incumbent upon that complainant to prove that his or her particular race was a factor under the applicable burdens of proof. Be aware of your own biases and work to overcome them in employment decisions.

B. COLOR

Color and race clearly overlap, but they are not the same. Every shade and complexion is covered under the definition of "color."

Case Study

Ms. Walker worked as a clerk typist in the Internal Revenue Service's Atlanta office. Although both she and her supervisor, Ms. Lewis, were African-American, Ms. Walker was light-skinned while Ms. Lewis was dark-skinned. Their working relationship had been strained for several years, and Ms. Walker reported that Ms. Lewis subjected her to unusually close scrutiny and reprimanded her for issues that were overlooked when committed by darker-skinned employees. Ultimately, Ms. Lewis terminated Ms. Walker's employment. Ms. Walker believed the stated reasons for her removal were pretextual and that the real motivation was discrimination based on her race and color.

A court reviewing the matter concluded that the facts, if proven, could constitute unlawful race and color discrimination—even though the individuals involved were members of the same racial group. The case illustrates that discrimination claims can arise within racial groups when adverse treatment is tied to color, skin tone, or other protected characteristics.

C. SEX

The EEOC believes that the *bona fide* occupational qualification exception as to sex is narrow. Label—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other. With very few exceptions, sex cannot be the basis for employment decisions. EEOC regulations, [29 CFR 1604.2 \(a\)\(1\) \(i-iii\)](#), provide the following as examples of sex discrimination:

- i. The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
- ii. The refusal to hire an individual based on stereotyped characterizations of the sexes. Those stereotypes include, for example, that men are less capable of assembling intricate equipment: that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
- iii. The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

The exceptions to the above, called *bona fide* occupational requirements (BFOQs), are very narrowly applied. *Bona fide* occupational qualifications may be imposed, for example, by the use of male guards to conduct intimate bodily or strip searches of male prisoners. Another example of a BFOQ is the need for a person of a particular sex in a federal undercover sting operation. In some cases, it is appropriate to merely exclude certain duties from the person. For example, it may be appropriate to have female health technicians observe female patients giving urine samples for routine drug testing as the patient cannot be left unattended during the test, but the rest of the duties at this facility can be performed by either sex.

How might a BFOQ work in practice?

Case Study

Discrimination was found when a military federal agency presented a hypothetical concern about hiring a male as a Clothing Alterations Contract Monitor for female service personnel. As the job entailed assessing the adequacy of clothing alterations while the clothing was being worn, the agency did not present a *bona fide* occupational qualification for not considering a male for the job.

Case Study

Rebecca is an experienced Detention Enforcement Officer for a facility that is composed of approximately 95% male detainees who are illegal immigrants. Her job entails taking detainees to court, transporting them for medical needs, conducting surveillance, and escorting detainees who are to be deported to and from airports, railroad and bus depots, hospitals, courts, and residences. When detainees are taken to airports and officers are required to escort the detainee on a flight, the agency sends two officers. The agency has an informal policy at Rebecca's worksite that was established by her supervisor and reads, "[a]n alien should never be escorted by an officer of the opposite sex. If no officer of the same sex is available, a Service employee of the same sex as the alien should accompany the officer on such an escort detail." This practice was established, in part, because the supervisor believed there were safety concerns, and the majority of the male detainees were from Mexico and had "traditional gender preferences inherent in the cultures of other nationalities."

Rebecca's case was heard by an EEOC judge, and during the hearing, the evidence showed that the practice was that two male officers could escort females, but that two female officers could not escort males. A team of one male and one female officer could escort a male detainee. The agency managers cited safety reasons for this difference, but offered no specifics.

According to the EEOC judge, the agency failed to demonstrate a meaningful difference between male and female officers in their ability to safely perform their duties. The agency's safety and security concerns were not supported by the evidence and were based upon sexual stereotypes. The judge also dismissed the agency's contention that the policy was related to the cultural sensitivity of the detainees, reasoning that such a justification was likened to "customer preference," which has been rejected as a *bona fide* occupational qualification. The judge found discrimination.

If the agency had other reasons, i.e., if the officers were required to perform strip searches and shower/toilet surveillance, it could likely have established that these duties needed to be performed by officers of the same sex as the detainees.

Moving beyond the narrow BFOQ criteria, the more common situations involving sex discrimination follow.

1. Sex Discrimination—Covered Issues

The basic concept that underpins all claims of sex-based discrimination is that the action complained of must be linked to the person's sex. Many claims properly fall under a claim of sex discrimination, many do not. Gender-based harassment, even without sexual overtones, is actionable. As this can be confusing, common types of allegations are discussed to clarify what the law provides along with the basic principles of each.

a. Sexual Harassment

Sexual harassment is a subcategory of sex-based discrimination. This subject is legally complex and emotionally charged from all points of view. Because it is such an important area of law, and because of its complexity, the theory of sex-based harassment is explained in some detail. One of the most important lessons for a manager to learn is that the EEOC expects *prevention* of sexual harassment. Management can limit or prevent liability only by knowing what is expected of you. Another important thing to learn is that the EEOC applies the standards used in sexual harassment cases to all hostile work environment claims. This means that if an employee claims that a hostile work environment is based on his or her age, race, religion, or disability, the same strict standards will apply. [For more detail on this topic, please read the “[Harassment](#)” section in Chapter 5.]

One of the current challenges in identifying and addressing harassment is that on January 22, 2026, the EEOC voted to rescind its 2024 Enforcement Guidance on Harassment in the Workplace. As of the writing of this edition, no replacement guidance had been announced. Notwithstanding the rescission, federal, state and local employment laws remain in force.

Returning to the basic concept of sexual harassment, in most cases the connection between the person's behavior and the sex of the victim is fairly obvious. However, the crux of a sexual harassment claim is that the discrimination is based on the person's sex, i.e., the sexual behavior would not occur but for the person's *gender*.

In its regulations at [29 CFR 1604.11](#), the EEOC defines sexual harassment:

[U]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment can occur in a variety of circumstances, including the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a coworker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.