

**Authority for Dismissing EEO
Complaints pursuant to 29 C.F.R. §
1614.107(a)(1)**

29 C.F.R. § 1614.107(a)(1)

An agency must dismiss a complaint that:

fails to state a claim under 29 C.F.R.
§1614.103 or 29 C.F.R. § 1614.106(a);
or

states the same claim that is pending
before or has been decided by the
agency or Commission.

A Claim

To state a claim, the complainant must allege:

- s/he is an employee or applicant of the federal government
- who suffers present harm/is "aggrieved,"
e.g.,
 - ✓ tangible harm to a term, condition or privilege of employment, or
 - ✓ harassment so severe or pervasive as to alter the conditions of employment
- because of a protected basis

Employee/Applicant v. Contractor

For purposes of employment discrimination, Title VII does not cover contract employees, however

Whether an employee is a "contractor" depends on the extent of the authority and control the agency has over the individual.

Present Harm/Is Aggrieved - Tangible Harm

- Always assume what the complainant claims is true
- Harm must be based on some **agency** action or inaction affecting a term, condition or privilege of complainant's employment
 - < harm being claimed must be specific
 - < must claim more than a "generalized grievance" that affects an entire group of employees equally

Scenario #1

CP was terminated from her employment with the Department of Bureaucracy. Two weeks later, CP sought to withdraw the funds in her Thrift Saving Plan (TSP) account, but was denied access to her TSP funds. CP files an EEO complaint on the basis of sex concerning the agency's refusal to release her TSP funds to her. The senior accountant for administering the TSP program at the DOB submitted a statement to the EEO counselor indicating that complainant was denied access to her TSP account because the agency policy requires a 45-day waiting period between separation and access to the account, not for any discriminatory reasons.

Scenario #2

CP frequently serves as a representative for his co-workers in the EEO complaint process and has spent a significant amount of time pursuing their claims. Jennifer, one of CP's co-workers, sought CP's representation in her EEO complaint concerning discipline she had received.

Management refused to allow CP to meet with Jennifer on agency time, in light of the time he spent representing other co-workers in the EEO process. CP files his own EEO complaint on the basis of age, claiming that management refused to allow him to represent Jennifer.

Present Harm/Is Aggrieved - Collateral Attacks

Alleging discrimination from matters that occurred in another forum's process are considered collateral attacks and do not state a claim. For example, filing a complaint:

- regarding the agency's delay in submitting Office of Workers' Compensation Program paperwork; or
- alleging discriminatory treatment by the Criminal Investigation Division during the course of an investigation; or
- alleging discriminatory collusion by agency and union officials in the grievance process.

Present Harm/Is Aggrieved - Harassment

- Assume what the complainant claims is true
- Consider all incidents of harassment together
- Incident(s) must be severe or pervasive
 - < Sliding scale - less frequent the incidents the more severe they must be
 - < Viewed from the perspective of a "reasonable person" in same circumstances
 - < Psychological harm not necessary
- Dismissal only appropriate where there is no claimed set of facts that would entitle complainant to relief

Harassment and Verbal Altercations

- Verbal remarks without concrete action will generally not state a claim
- Extremely inflammatory remarks or communication may be considered harassment
- Claim must be raised on one of the eight statutorily protected bases
- Not a general civility code

Scenario #3

CP works for the Customs Bureau in a building managed by the General Services Administration (GSA). GSA hired contractors to provide security for the building. CP files a complaint alleging that a security guard made inappropriate sexual advances toward her on a daily basis as she entered and exited the building. She contends that despite her complaints to management, the Customs Bureau has taken no action to relieve the harassment she suffers.

Discuss whether CP has stated a claim.

Retaliation/Reprisal

The Commission has taken the position that the statutory anti-retaliation provisions prohibit any action that is based on a retaliatory motive and is likely to deter the employee or others from engaging in protected EEO activity. The actions need not materially effect the terms and conditions of employment. In general, protected activity comes in two forms - participation and opposition.

Security Clearances

The Commission is precluded from reviewing the validity of the requirement of a security clearance or the substance of a security clearance determination. The Commission may, however, review whether the grant, denial, or revocation of a security clearance was carried out in a discriminatory manner.

Scenario #4

CP contacted the EEO office on January 17, 2003 to request pre-complaint documents. After obtaining the documents, CP decided not to pursue the matter. On September 30, 2003, CP again initiated EEO Counselor contact and subsequently filed a complaint. In CP's complaint, he alleged discrimination based on reprisal (prior EEO activity on January 17, 2003) when on September 18, 2003, the manager insulted and degraded him, physically assaulted him, called the police on him, and told him to leave the premises.

Scenario #5

CP is removed from his position at the agency. The position required a Top-Secret clearance. CP claims that he was removed from his position on the basis of his age. The supervisor informs the EEO counselor that CP was removed because his Top-Secret clearance was revoked, not because of his age.

States Same Claim Pending or Decided by Agency or EEOC

The present matter and the previous matter must be **identical**. To be considered identical, the matter in the previous complaint must involve:

- the same time
- the same place/location
- the same incidents
- the same parties

Scenario #6

CP was not selected for promotion from General Air Marshall to Senior Air Marshall under vacancy announcement DHS-USAM-003, and filed an EEO complaint claiming race discrimination. Shortly thereafter, CP filed a second EEO complaint concerning non-promotion to a Senior Air Marshall position.

**Authority for Dismissing EEO
Complaints pursuant to 29 C.F.R.
§1614.107(a)(2)**

29 C.F.R. § 1614.107(a)(2)

An agency must dismiss a complaint:

- that fails to comply with the applicable time limits contained in §§ 1614.105 (EEO counselor contact), 1614.106 (formal complaint) and 1614.204(c) (class complaint), unless the agency extends the time limits, **or**
- that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that was brought to the Counselor's attention.

Untimely EEO Counselor Contact

- CP must initiate contact with an official logically connected with the EEO process with an intent to begin the EEO process within 45 days of the date of the alleged discriminatory event or the effective date of a personnel action or the complaint will be dismissed unless
- CP can show that s/he was not notified of the time limit

General Exception to Untimely Contact

The agency shall extend the time limit where CP shows that:

- s/he was not notified of the time limits and was not otherwise aware of them;
- s/he did not know and reasonably should not have known that the discriminatory event or personnel action occurred;
- despite due diligence s/he was prevented by circumstances beyond his/her control from contacting an EEO counselor within 45 days

Notice of Time Limit for Contact

- Agency may not dismiss where CP shows it did not notify him/her of time limit nor was s/he otherwise aware
- Agency may show constructive knowledge of time limit by showing that:
 - <EEO counselor information and time limit conspicuously posted in the CP's workplace; or
 - <CP received training or an orientation which specifically addressed the EEO process and time limit for counselor contact.

Reasonable Suspicion of Discrimination

- 45 day time limit is triggered by "reasonable suspicion" of discrimination
- "Reasonable suspicion" determined by the degree of permanency that the alleged discriminatory act has
- CP may not wait until all facts are gathered

Circumstances Beyond Complainant's Control

Agency may be barred from dismissing on timeliness grounds where the CP shows circumstances beyond his/her control prevented him/her from contacting an EEO counselor within 45 days. Circumstances include:

- physical or mental incapacity
- erroneous information from the EEO office

Hostile Work Environment Claims

Hostile work environment claims involve allegations of discrimination with respect to a series of employment actions and decisions. The actions and decisions are related in kind or character and *collectively* constitute a single "employment practice." So long as one of the actions or decisions in the *series* occurred within the 45 day period prior to EEO counselor contact, it may be combined with the other untimely actions and decisions outside of the 45 day period to make the claim actionable.

Formal and Class Complaint Time Limit

A formal or class complaint must be filed within 15 days of the CP's or class agent's receipt of the "Notice of Right to File a Complaint," or the agency may dismiss the complaint as untimely filed, pursuant to 1614.107(a)(2).

These time limits can also be extended.

Scenario #1

CP contacted an EEO Counselor alleging that she was subjected to discrimination based on her sex, disability, age and reprisal for prior EEO activity when on September 13, 2002, she was denied Continuation of Pay and other benefits related to her on-the-job-injury.

Informal efforts to resolve CP's concerns were not successful. The agency mailed the Notice of Right to File Individual Complaint which was received by CP on January 16, 2003. CP filed her formal complaint on February 3, 2003.

Claim Not Brought to EEO Counselor Attention

- A claim should be dismissed if the CP did not bring it to the attention of the EEO counselor, **and**
- It is not like or related to claims that were presented to the EEO counselor

< claim adds to or clarifies the original claim(s) and could reasonably have been expected to grow out of the counseled claims.

**Authority for Dismissing EEO
Complaints pursuant to 29 C.F.R. §
1614.107(a)(3-4)**

29 C.F.R. § 1614.107(a)(3)

An agency must dismiss a complaint:

- that is or was the basis of a pending civil action in a U.S. District court in which the CP is a party provided at least 180 days have passed since the filing of the EEO complaint; or
- that was the basis of a decided civil action in a US District court in which the CP is a party; and
- where the incidents of discrimination are identical
 - <use factual allegations not just bases or requested relief to determine

Scenario #1

CP filed a formal EEO complaint claiming harassment when the agency reassigned her from a customer service position to a baggage screener position on the basis of retaliation for her letter to a Congressman opposing the agency's EEO practices. Subsequently, CP filed a civil action in US District Court concerning her reassignment to baggage screener duties, claiming violations of the Privacy Act, and the First, Fifth and Fourteenth Amendments to the Constitution.

29 CFR§ 1614.107(a)(4)

An agency must dismiss a complaint:

- where the same matter has been raised in a negotiated grievance procedure that permits claims of discrimination; or
- where the same matter has been raised in an appeal to the Merit Systems Protection Board (MSPB); and
- indications are that CP has elected to use a non-EEO process.

Negotiated Grievance Procedure

Requirements for dismissal:

- CP filed a grievance in a procedure established pursuant to a collective bargaining agreement between the agency and a union representing its employees;
- grievance procedure provides for claims of discrimination to be raised in grievance procedure or the statutory EEO process, but not both;
- CP elected to pursue his/her allegations of discrimination in the grievance procedure, instead of the EEO process, **AND**
- grievance and EEO complaint involve identical matters.

MSPB Appeal

Requirements for dismissal:

- CP filed an appeal with the MSPB
- CP elected to pursue his/her claim with the MSPB, not the EEOC
- the MSPB appeal and the EEO complaint involve identical matters.

Scenario #2

CP filed an MSPB appeal concerning her termination from her administrative assistant position. Fifteen days later, CP filed an EEO complaint alleging that she was terminated because of her national origin (Czechoslovakian). Before the agency decided whether to accept, dismiss or hold her complaint in abeyance, the MSPB dismissed her mixed-case appeal for lack of jurisdiction.

**Authority for Dismissing EEO
Complaints pursuant to 29 C.F.R. §
1614.107(a)(6-7)**

29 C.F.R. § 1614.107(a)(6)

An agency shall dismiss a complaint:

- **where the CP cannot be located**
- **provided that reasonable efforts to locate have been made and the CP has not responded**

29 C.F.R. § 1614.107(a)(7)

An agency must dismiss a complaint for failure to cooperate where:

- **the CP fails to respond to agency's request for information; or**
- **the response fails to address the agency's request**

Scenario #3

CP timely contacted an EEO counselor claiming that she had been discriminated against based on her sex when she was issued a Notice of Removal. Informal processing of the matter was unsuccessful and CP filed a formal complaint of discrimination. Following the agency's acceptance of her complaint, the agency mailed to her three separate requests for CP to complete an affidavit regarding her claims of employment discrimination. The agency's requests were mailed November 3rd and 22nd, 2006, and December 21, 2006. Complainant failed to respond to each affidavit request sent by the agency.

U.S. Department of Bureaucracy
Denver Regional Office
1 Government Way Building
Denver, Colorado 07028

Certified No. Z 123 456 789
Return Receipt Requested

August 2, 1999

Gus Goodfellow
1234 Mockingbird Lane
Munsters, WY 45678

Re: Acknowledgment Letter
Case No. EEO 1

Dear Mr. Goodfellow:

We have received your complaint of discrimination filed on July 30, 1999.

If your complaint is accepted, you will be notified of such and it will be assigned to an investigator. In the event, your complaint is not accepted you will receive notice of the agency's final action.

Sincerely,

Wendy Wu
EEO Director

U.S. Department of Bureaucracy
Denver Regional Office
1 Government Way Building
Denver, Colorado 07028

Certified No. Z 123 456 777
Return Receipt Requested

February 19, 2001

Gus Goodfellow
1234 Mockingbird Lane
Munsters, WY 45678

Re: Acknowledgment/Acceptance Letter -
Formal Discrimination Complaint
Case No. EEO 2

Dear Mr. Goodfellow:

We have received your complaint of discrimination filed on February 16, 2001. Your complaint has been accepted for investigation. The scope of the investigation will include the following issue(s) only:

Whether complainant was discriminated against on the basis of age and sex when he was not selected for the position of Chief Surveyor, Vacancy Announcement No. 09-2000.

If you do not agree with the defined issue(s), you must provide us with sufficient reasons, in writing, within seven (7) calendar days of receipt of this letter.

The investigation of this complaint has been assigned to Sam Snoop. Mr. Snoop's telephone number is (307) 555-5757.

The investigation will be completed within 180 calendar days of the date of your filing of the complaint, with the exception that the complainant and the U.S. Department of Bureaucracy may voluntarily agree, in writing, to extend the time period up to an additional 90 calendar days. I am including an Agreement to Extend the 180-Day Investigative Process Form for your review and consideration. Please sign the Form and return it if you agree to extend the investigative process for an additional period not to exceed 90 additional days.

When the investigation is completed, you will receive a copy of the investigative file, and you will be notified of your right to a hearing before an Equal Employment Opportunity Commission Administrative Judge, or of your right to a final decision by the agency head or designee without a hearing.

You may request a hearing by an EEOC Administrative Judge by notifying the EEO District Office within 30 calendar days of your receipt of the investigative file and notice of right to file. If you do not receive your investigative file and notice of right to file within 180 calendar days from the filing date, you may request a hearing at any time up to 30 calendar days after receipt of the investigative file.

If you are dissatisfied with the final decision of the U.S. Department of Bureaucracy, after a hearing or without a hearing, you may exercise your appeal rights. You may appeal to the Office of Federal Operations, Equal Employment Opportunity Commission within 30 calendar days, or you may file a civil action in an appropriate U.S. District Court within 90 calendar days of your receipt of the decision.

Any appeal to the EEOC should be addressed to the Office of Federal Operations, Equal Employment Opportunity Commission, PO Box 19848, Washington, DC 20036-9848. Along with your appeal, you must submit proof to the EEOC that a copy of the appeal and any supporting documentation were also submitted to the U.S. Department of Bureaucracy.

After 180 calendar days from the date of filing your formal complaint, you may file a civil action in an appropriate U.S. District Court if the U.S. Department of Bureaucracy has not issued a final decision on your complaint.

If you decide to appeal to the Office of Federal Operations, EEOC, you may file a civil action in an appropriate U.S. District Court within 90 calendar days after your receipt of the EEOC's decision. If you do not receive a decision on your appeal within 180 days from the date of your appeal, you may file a civil action.

Sincerely,

Wendy Wu
EEO Director

U.S. Department of Bureaucracy
Denver Regional Office
1 Government Way Building
Denver, Colorado 07028

Certified No. Z 123 456 799
Return Receipt Requested

August 14, 2001

Gus Goodfellow
1234 Mockingbird Lane
Munsters, WY 45678

Re: Acknowledgment /Acceptance / Partial Dismissal
Case No. EEO 3

Dear Mr. Goodfellow:

We have received your complaint of discrimination filed on August 13, 2001. Your complaint has been accepted for investigation. The scope of the investigation will include the following issue(s) only:

Whether complainant was discriminated against on the bases of disability and retaliation when he was continually harassed starting in January 2001 and ongoing.

In your August 13, 2001 complaint, you also alleged that you were discriminated against on the basis of disability when you were voted off the softball team. The agency finds that you have failed to show harm to a term, condition or privilege of employment. Therefore, the claim is dismissed for failure to state a claim pursuant to 29 C.F.R. section 1614.107(a)(1). The determination to dismiss this claim is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

If you do not agree with the defined issue(s), you must provide us with sufficient reasons, in writing, within seven (7) calendar days of receipt of this letter.

The investigation of this complaint has been assigned to Sam Snoop. Mr. Snoop's telephone number is (307) 555-5757.

The investigation will be completed within 180 calendar days of the date of your filing of the complaint, with the exception that the complainant and the U.S. Department of Bureaucracy may voluntarily agree, in writing, to extend the time period up to an additional 90 calendar days. I am

including an Agreement to Extend the 180-Day Investigative Process Form for your review and consideration. Please sign the form and return it if you agree to extend the investigative process for an additional period not to exceed 90 additional days.

When the investigation is completed, you will receive a copy of the investigative file, and you will be notified of your right to a hearing before an Equal Employment Opportunity Commission Administrative Judge, or of your right to a final decision by the agency head or designee without a hearing.

You may request a hearing by an EEOC Administrative Judge by notifying the EEO District Office within 30 calendar days of your receipt of the investigative file and notice of right to file. If you do not receive your investigative file and notice of right to file within 180 calendar days from the filing date, you may request a hearing at any time up to 30 calendar days after receipt of the investigative file.

If you are dissatisfied with the final decision of the U.S. Department of Bureaucracy, after a hearing or without a hearing, you may exercise your appeal rights. You may appeal to the Office of Federal Operations, Equal Employment Opportunity

Commission, or you may file a civil action in an appropriate U.S. District Court within 90 calendar days of your receipt of the decision.

Any appeal to the EEOC should be addressed to the Office of Federal Operations, Equal Employment Opportunity Commission, PO Box 19848, Washington, DC 20036-9848. Along with your appeal, you must submit proof to the EEOC that a copy of the appeal and any supporting documentation were also submitted to the U.S. Department of Bureaucracy.

After 180 calendar days from the date of filing your formal complaint, you may file a civil action in an appropriate U.S. District Court if the U.S. Department of Bureaucracy has not issued a final decision on your complaint.

If you decide to appeal to the Office of Federal Operations, EEOC, you may file a civil action in an appropriate U.S. District Court within 90 calendar days after your receipt of the EEOC's decision. If you do not receive a decision on your appeal within 180 days from the date of your appeal, you may file a civil action.

Sincerely,

Wendy Wu
EEO Director

Format for a Dismissal Final Agency Decision

Agency Letterhead

John Doe,
Complainant,

v.

Jane Roe,
Secretary,
Department of Government,
Agency.

Agency Case No. 12345-00

FINAL AGENCY DECISION

Statement of Claim(s)

Clearly and specifically identifies the claim(s) raised in the complainant's (CP's) complaint. **Example:** The CP claims that the agency discriminated against him on the basis of race (Asian) when he was not selected for the position of Widget Inspector, GS-5555-12, effective October 1, 2000.

Procedural History

Explains how the case reached the stage where a FAD is being issued. Includes the following, as applicable, with dates: alleged discriminatory incident(s), initial contact with EEO Counselor, counseling conducted, notice of right to file issued, formal complaint filed, and acknowledgment letter issued. The dates and

outcomes of any previous activity on the claim(s) before the EEOC, Office of Federal Operations, should also be laid out here.

Statement of the Facts

Includes all material and relevant facts needed to dispose of the case. Contains citations to the case file/record. Defines all acronyms used. Explains agency policy and procedures relevant to the claim(s) raised. Identifies and explains any gaps in the record.

Legal Analysis

Applies the law to the facts of the case. Explains the legal/factual basis for the agency's decision in a manner understandable to the CP. Legal analysis must be sufficient so that the CP may meaningfully exercise his/her appeal rights. Contains citations to the case file/record and applicable law, including Federal statutes, regulations, and case law (EEOC case law where such exists and in the absence of relevant EEOC case law, Federal case law) being relied on for the decision.

Statement of Conclusions

Sets forth the outcome of the legal analysis. Example: Based upon the evidence of record, and for the foregoing reasons, we find that the complainant failed to file his/her formal complaint within the regulatory 15 days, and is thus untimely. We further find that no good cause exists to warrant an extension of the time period. Therefore, complainant's complaint is properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(2).

Statement of Relief

Explains why no relief is awarded. Example: Because the CP has not prevailed on his/her claim of race discrimination, no relief is awarded.

Statement of Rights

Informs the CP of his/her appeal rights. Accurately advises the CP whether and within what time frame s/he may pursue the claim(s) further with the EEOC, MSPB, and/or a United States District Court, as applicable.

Dated Signature Block

Contains the printed name, title and signature of the individual issuing the FAD.
Contains the date on which the Dismissal FAD was signed/issued.

Certificate of Service

Statement averring that the Dismissal FAD was sent to all necessary parties upon its issuance – usually the CP and the CP’s representative (if any). Sets forth the addresses to which the Dismissal FAD was sent. Specifies the means of delivery, *e.g.*, certified mail (includes number) or regular U.S. mail (with a presumption of receipt notice). Contains the printed name, title and the signature of the individual responsible for sending out the Dismissal FAD, and shows the date on which the Dismissal FAD was sent.

TEST YOURSELF

Choose the appropriate ground(s) for dismissal of the following hypothetical scenarios.

1. CP alleges discrimination on the basis of disability when she learned that her supervisor submitted evidence in opposition to her claim for workers compensation.

2. CP alleges discrimination on the basis of age when he was denied leave. CP filed an EEO complaint on April 1, 2001 and a grievance on March 15, 2001 alleging discrimination.

3. CP alleges discrimination on the basis of sex when she was not selected for an Analyst position under Vacancy Number 12SM972-743. CP also filed a complaint in district court, in accordance with the appropriate time restrictions, claiming the agency violated Title VII and the ADEA when it failed to select her for Analyst vacancies throughout 2002-2003.

4. CP alleges harm from her supervisor's comment that she was "a useless waste of oxygen."

5. CP not selected for position, and leaves message on EEO Office voice-mail asking for info about filing complaint. EEO Counselor calls complainant back 3 days after receiving message, 46 days after nonselection.

6. CP files formal complaint with no return address. EEO Counselor has not completed report because several certified-mail letters to his residence of record were returned unclaimed, and calls to his last known telephone number reveal that his phone has been disconnected. Most recently returned letter informed CP that complaint may be dismissed if failed to respond. Inquiries to the post office reveal no forwarding address.

7. On January 1, CP begins EEO counseling concerning his 14-day suspension. He then files a MSPB appeal on Jan. 10, and formal EEO complaint Jan. 22.

8. CP receives notice of right to file a complaint on November 10. The notice informs CP of the 15-day time limit for filing her complaint. The agency receives the December 1 postmarked complaint on December 5. CP includes a cover letter indicating that since she lost both of her parents earlier this year, she became "stressed-out" during the Thanksgiving holidays, and was unable to think clearly.

9. CP alleges discrimination on the bases of race and sex when she was harassed in February 2002. Records indicate OFO recently affirmed the agency's dismissal of a separate complaint alleging religious and age discrimination when CP was harassed from January - March 2002.

10. In formal complaint, CP alleges harm from denial of leave. Counselor's Report reveals that failure to receive award and "satisfactory" performance appraisal were the matters discussed.

11. CP alleges harm from "harassment." In Counseling, CP stated, "Management is out to get me." At the conclusion of counseling, CP filed a formal complaint. Realizing that more information is needed, the agency sends CP a request for specific information concerning why he believed he was being harassed. CP failed to respond. Three weeks later, the agency sent a second request for information, warning CP that his failure to respond within fifteen days could result in dismissal. CP wrote back, "Why don't you do your jobs and investigate this travesty. I shouldn't have to tell you anything!"

