

CHAPTER 12

SETTLEMENT AUTHORITY

I. **INTRODUCTION**

Public policy favors the amicable settlement of disputes. It is clear that this policy in favor of settlement of disputes applies particularly to employment discrimination cases. *See, e.g., Sears Roebuck & Co. v. Equal Employment Opportunity Comm.*, 581 F.2d 941 (D.C. Cir. 1978); *Shaw v. Library of Congress*, 479 F. Supp. 945 (D.D.C. 1979). Agencies are encouraged to seek resolution of EEO complaints through settlement at any time during the administrative or judicial process. Agencies and EEO complainants should be creative in considering settlement terms. In this chapter, we discuss the authority for settlements of EEO disputes and various options for those settlements.

II. **AUTHORITY**

Title VII of the Civil Rights Act of 1964 expressly encourages the settlement of employment discrimination disputes without litigation. Courts have consistently encouraged the settlement of discrimination claims and have upheld those settlements when challenged. *See, e.g., Occidental Life Insurance Co. v. Equal Employment Opportunity Comm.*, 432 U.S. 355 (1977); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

The Supreme Court held in *Chandler v. Roudebush*, 425 U. S. 840 (1976), that federal employees have the same rights under the employment discrimination statutes as private sector employees, thus recognizing the right of federal employees to enter into voluntary settlements with federal agencies. As a result, section 717 of Title VII of the Civil Rights Act of 1964 authorizes agencies to fashion settlements of EEO disputes in resolution of such claims. The same analysis applies to disputes brought under section 501 or 505 of the Rehabilitation Act of 1973, section 15 of the Age Discrimination in Employment Act of 1967 and the Equal Pay Act. *See Matter of Albert D. Parker*, 64 Comp. Gen. 349 (1985).

Conciliation and voluntary settlement are critical to efforts to eradicate employment discrimination, both in the public and private sectors. The legislative history of section 717 of Title VII is unequivocal in stressing that the broadest latitude exists in determining the appropriate remedy for achieving this end. ⁽¹⁾

The Equal Employment Opportunity Commission's strong support for settlement attempts at all stages of the EEO complaint process is codified in 29 C.F.R. § 1614.603, which states, "Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage."⁽²⁾ Settlement agreements entered into voluntarily and knowingly by the parties are binding on the parties. Settlements may not involve waiver of remedies for future violations. Settlements of age discrimination complaints must also comply with the requirements of the Older Workers Benefits Protection Act, 29 U.S.C. § 626, involving waivers of claims. That is, a waiver in settlement of an age discrimination complaint must be knowing and voluntary.⁽³⁾

The Department of Justice Office of Legal Counsel has affirmed the broad authority of agencies to settle EEO disputes by applying remedies a court could order if the case were to go to trial. In an opinion interpreting the authority of an agency to settle a Title VII class complaint, the Department's Office of Legal Counsel advised that a complainant can obtain in settlement whatever the agency concludes, in light of the facts and recognizing the inherent uncertainty of litigation, that a court could order as relief in that case if it were to go to trial. In the case it reviewed, which alleged discrimination in classification decisions, the Office of Legal Counsel determined that the agency could agree not to reclassify positions

of specific employees downward because a court could enjoin reclassification of the positions of those employees if the court found some cognizable danger of recurrent violation. The Office of Legal Counsel found the proposed settlement valid under Title VII even though the Office of Personnel Management contended that the agency's authority to reclassify pursuant to applicable statutes, rules and regulations cannot be superseded by settlement.

The relief provided by an agency to settle an EEO dispute cannot be greater than the relief a court could order if that particular dispute were to go to trial. For example, assume that a GS-9 employee files an EEO complaint alleging discrimination in the denial of a promotion to the level of a GS-11. If the employee has met the time-in-grade and any other job-related requirements, it is appropriate to offer in settlement a retroactive promotion to GS-11. It would not be appropriate, however, to propose a promotion to a GS-12 position for which the employee has not met the requirements. However, if an individual was denied promotion to a GS-11 position and one or more individuals who got the promotion at that time was subsequently promoted to GS-12 based on a career ladder, then it may be appropriate to offer a GS -12 position in settlement of the complaint.

On the other hand, parties are encouraged to be creative in resolving an employment dispute and may agree to settle a complaint for relief that may be different than that which a court might order, as long as it is no greater than what a court might order. For example, an agency may settle a complaint involving the termination of an employee by agreeing to pay for or provide outplacement services to help the former employee find a new job, provided that the cost of the outplacement services does not exceed the total monetary relief a court could order if the complainant were to prevail in the case. In another example, an agency could agree to reassign a complainant to a different supervisor or office in a settlement of a complaint alleging discriminatory failure to promote, where the complainant and the supervisor who made the promotion decision do not get along.

III. TITLE VII AUTHORITY INDEPENDENT OF BACK PAY ACT

The Comptroller General of the United States has considered objections to settlements of EEO disputes in a number of cases. In these decisions, the Comptroller General has confirmed the authority of agencies to enter into settlements of EEO claims and considered ancillary questions about settlements.

In one of these decisions, the Comptroller General affirmed that Title VII contains authority for remedying employment discrimination and this authority is independent of the authority contained in the Back Pay Act to provide back pay only where a finding has been made of "an unwarranted and unjustified personnel action." 5 U.S.C. § 5596. "The connection between Title VII and the Back Pay Act arises only because EEOC has provided in its regulations on remedial actions that when discrimination is found, an award of back pay under Title VII is to be computed in the same manner as under the Back Pay Act regulations." Matter of Equal Employment Opportunity Commission, Informal Settlement of Discrimination Complaints, 62 Comp. Gen. 239, 242 (1983). The authority to award back pay is derived from Title VII; the regulations borrow the formula for calculating the amount of back pay owed from the Back Pay Act.

The independent Title VII authority to settle EEO claims is significant because unlike the Back Pay Act, section 717 of Title VII does not limit awards of back pay to situations where there has been a finding of an unjustified or unwarranted personnel action. Thus, there is no impediment to an award of back pay as part of a settlement without a finding of discrimination.

When evaluating the risk of litigation versus the cost of settlement, agencies should include the cost of a federal retirement annuity in their consideration if an annuity would become payable immediately. This reflects the actual cost to the government of the proposed settlement and should be considered when deciding whether the settlement is in the interest of the government. This calculation may lead an agency to explore alternative solutions such as purchasing a private annuity. The purchase of a private annuity may not be desirable in all instances, but can be considered as a possible alternative. Following are some examples that reflect this calculation:

- An employee at a GS-14, step 10, separates at age 50 with 25 years of service. His only annuity eligibility is for a deferred annuity at age 62. The present value of this deferred benefit (when the employee is age 50) is \$259,992. If, under the terms of a settlement agreement, his separation is

changed to an involuntary separation (thus entitling him to an immediate discontinued service retirement benefit), the value of the benefit is \$691,546. Thus, the cost to the government resulting from the settlement is the difference, or an additional \$431,554.

- An employee at a GS-14, step 10, separates at age 55 with 30 years of service, and therefore is eligible for an immediate annuity. The value of this annuity is \$843,800. If, in settlement, she is retroactively promoted to a GS-15, step 10, for three years, the value of her annuity becomes \$992,669. This means the settlement costs the government an additional \$148,869 in retirement annuities.
- An employee at GS-14, step 10, separates at age 56 with 30 years of service and is eligible for an immediate annuity valued at \$825,588. If, pursuant to a settlement, he is retroactively considered a law enforcement officer for 20 years of his federal career, the value of his retirement benefit becomes \$1,027,344. Thus, the settlement adds \$201,756 to the government's cost of his retirement.
- An employee at a GS-14, step 10, separates at age 50 with 25 years of service. When the employee is 55, the value of her deferred annuity payable at age 62 is \$364,653. If the employee is returned to the agency's rolls for five years, enabling her to retire immediately, her retirement benefit has a value of \$1,044,361. This settlement would add \$679,708 to the government's costs.
- In settlement, the level of a GS-12, step 10, employee is retroactively changed to GS-14, step 10, for a period of three years. Assuming that she is entitled to an immediate annuity, the value of her retirement benefit is raised from \$582,132 to \$817,945. Thus, the additional cost to the government of this settlement is \$235,813.

IV. **NO FINDING OF DISCRIMINATION NECESSARY FOR SETTLEMENTS**

It has long been the practice in both the private sector and the federal sector for employers and agencies to enter into settlements that contain cash payments where there has been neither a finding of discrimination, either judicially or administratively, nor an admission by the employer or agency of any wrongdoing.

The Comptroller General has supported these settlements, stating "it is beyond question that an agency has the general authority to informally settle a discrimination complaint and to award back pay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination." Matter of Equal Employment Opportunity Commission, Informal Settlement of Discrimination Complaints, 62 Comp. Gen. 239, 242 (1983).

V. **CASH AWARDS WITHOUT CORRESPONDING PERSONNEL ACTIONS**

Settlements of EEO disputes may contain monetary payments that are independent of any personnel action, provided that the monetary payment does not exceed the amount of back pay, attorney's fees,⁽⁴⁾ costs or damages⁽⁵⁾ the employee would have been entitled to in the case if discrimination had been actually found.

The Comptroller General has considered settlements of EEO disputes comprised of monetary payments unconnected to personnel actions on at least two occasions and held that they were authorized and appropriate.

[W]e conclude that Federal agencies have the authority in informally settling discrimination complaints filed under Title VII of the Civil Rights Act of 1964, as amended, to make awards of backpay, attorney's fees or costs, without a corresponding personnel action and without a finding of discrimination, provided that the amount of the award agreed upon must be related to backpay and may not exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made.

Id., 62 Comp. Gen. at 244; Matter of Albert D. Parker, 64 Comp. Gen. 349 (1985).

VI. **PERSONNEL ACTIONS WITH LUMP SUM PAYMENTS**

An agency may informally settle an EEO complaint by providing a retroactive personnel action, but providing for a lump sum payment in lieu of back pay. As long as the settlement does not exceed the relief to which the complainant would be entitled if a finding of discrimination had been made, it is authorized.

If the settlement provides for a retroactive personnel action, all appropriate contributions to the retirement funds must be made. Settlements may resolve claims actually made and also claims that could be made, provided that the factual predicate for the claims that could be made has occurred. For example, an agency may settle a complainant's formal complaint alleging failure to promote and include relief for the complainant's retaliation claim, which has not been raised, except in the settlement discussions.

Since the Civil Rights Act of 1991 provided for award of compensatory damages in appropriate cases, settlements often provide for one lump sum amount covering monetary relief even when there is a personnel action involved as well. In these cases, parties can agree to an overall figure in the settlement that represents damages, back pay and attorney's fees. That figure can reflect the maximum amount a court could award, and need not be limited to an amount that the agency believes a complainant can prove in court. The settlement agreement does not need to contain a separate breakdown of the lump sum showing individual amounts of back pay, damages and fees. The lump sum agreed to by the parties can be equal to or less than the total amount of back pay, damages and fees that would be awarded if a finding of discrimination were made. A lump sum cannot, under any circumstances, exceed the amount that the agency concludes, in light of the facts and recognizing the inherent uncertainty of litigation, a court could award if a lawsuit were brought.

If a lump sum settlement is intended to award enhanced retirement benefits as part of its terms, the rates of basic pay or grade and step deemed to be received by the complainant, and the periods during which each rate of pay was received, must be specified in the settlement terms. OPM advises that if this specific information is not set out in the settlement document, the terms of the settlement will not be included in the calculation of the complainant's retirement benefits.

VII. **IMPLEMENTING SETTLEMENT AGREEMENTS**

There may be some instances where a proposed informal settlement appears to be at odds with normal personnel procedure or practice contained in regulations implementing Title 5 of the United States Code or processing guidance of the Office of Personnel Management. Such situations could arise where Office of Personnel Management regulations or guidance foresee personnel actions taken in the normal course of business and do not generally discuss personnel actions taken pursuant to court order or a settlement. Title VII provides authority to enter into settlements of EEO complaints⁽⁶⁾, and, likewise, Title VII provides authority for agencies to effectuate the terms of those settlements.

Chapter 32, Section 6(b) of OPM's Guide to Processing Personnel Actions describes the procedure for documenting personnel actions taken as the result of a settlement agreement, court order, EEOC or MSPB decision. The purpose of this procedure is to protect the privacy of the employee.

Rather than including personal and irrelevant settlement information on the employee's SF-50, the SF-50 may be processed with the computer code "HAM." ("HAM" is a computer code that prints on the SF-50 a citation to 5 C.F.R. § 250.101.) If an agency's computer system does not permit the use of the citation "HAM," then the SF-50 may cite to 5 C.F.R. § 250.101. This section of the Code of Federal Regulations indicates that the personnel action is processed under an appropriate legal authority.

[Chapter 11](#) | [Table of Contents](#)

1. S. Rep. No. 92-415, 92nd Cong., 1st Sess. 15 (1971), reprinted in Senate Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 424

(Comm. Print 1972).

2. One of the mechanisms for settling complaints is the offer of resolution, which is set forth in 29 C.F.R. § 1614.109(c). Offers of resolution are not, however, the only way to settle complaints; they are a particular method, which, in certain circumstances, can limit an agency's liability for attorney's fees and costs.

3. Section (f)(2) of OWBPA in conjunction with sections (f)(1)(A) through (E) set forth the minimum standards. A settlement agreement is knowing and voluntary when the complainant is given a reasonable period of time to consider the settlement agreement, and the waiver is worded in a reasonably understandable way, specifically refers to rights or claims under the ADEA, and does not waive future rights. In addition, the settlement agreement must provide something of value in exchange for the waiver and must advise the complainant to consult with an attorney before signing the agreement.

4. Attorney's fees are not available during the administrative process of complaints brought under the Age Discrimination in Employment Act or the Equal Pay Act.

5. EEOC has the authority to award compensatory damages during the administrative process. Gibson v. West, 527 U.S. 212 (1999). Agencies, therefore, are authorized to pay compensatory damages in a settlement during the administrative process. Compensatory damages should be calculated separately from back pay, other benefits and fees, and are limited to no more than \$300,000.

6. As noted earlier in this chapter, the same analysis applies to EEO complaints filed under the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act of 1963.