

Writing Timely and Effective Final Agency Decisions

A FAD-Writer's Perspectives

3 Goals of this Seminar

1. We will discuss a "litigation model" for FAD writing.
2. We will discuss the inevitability of differing opinions, and why in-depth analysis is just as important as reaching the "right" conclusion.
3. We will discuss techniques for using a "simple" FAD as an opportunity to develop yourself professionally and to make your next complex FAD a little easier.

29 C.F.R. § 1614.110(b)

- Agencies must write a Final Agency Decision...
 - If Complainant does not request a hearing
 - If the Agency dismisses the complaint
- A FAD shall consist of...
 - Findings on the merits of the complaint
 - Rationale for dismissal
 - Appropriate relief (if discrimination is found)

29 C.F.R. § 1614.110(b)

➤ Timeframes:

- 60 days from the date of Complainant's request for a FAD
- 60 days from the expiration of Complainant's timeframe to elect a hearing, if no election is made
- CFR silent on dismissal FADs

Perkins v. Dept. of Air Force

- Agency wrote a one-paragraph FAD, stating that after careful consideration of the evidence, a finding of no discrimination is warranted.
- Office of Federal Operations held that this does not meet the regulatory requirement, which requires analysis to support the conclusion.
- EEOC Appeal No. 01832208 (January 16, 1985)

What is a Timely FAD?

- For the Agency, you have 60 days from the FAD election.
- For the Specialist, it depends...
 - Workload
 - Complexity of the complaint
 - Review process after FAD is written
 - Role of the specialist – dedicated FAD-writer or formal complaints processor?

FAD-writer vs. complaints processor – advantages

FAD-Writer

- Can handle more FAD assignments at once
- Generally, the most complex aspect of EEO complaint processing
- Can act as a fresh set of eyes after an EEO investigation
- But how do you handle dismissals?

Complaints Processor

- Can frame accepted claims with FAD-writing in mind
- Can make determinations about sufficiency of the investigation while it is ongoing with FAD-writing in mind
- Can begin outlining FAD while investigation is ongoing

A Litigation Model for FAD Writing



You are an Administrative Judge, not a rubber stamp!

Controlling your ROI

- The first question: What are the claims and bases asserted in the complaint?

Controlling your ROI

- The Acceptance Letter states the claim as follows:

“Whether Complainant was discriminated against on the basis of race (African American) when he was not selected for the position of GS-11 Specialist.”

Controlling your ROI

The prima facie case – five questions:

1. Is Complainant a member of a protected class?
2. Did Complainant apply for the position?
3. Was Complainant qualified for the position?
4. Was Complainant non-selected for the position?
5. Was the selectee outside Complainant's protected class(es)?

Controlling your ROI

- Complainant's affidavit:

- Complainant is African American
- Complainant applied for the position
- Complainant was interviewed
- Complainant was not selected
- The selectee is Caucasian

Controlling your ROI

- Does management contest these points?
 - Was Complainant really qualified for the position?
 - Was the selectee Caucasian?
- Complainant was on the certificate
- Selectee identified as Caucasian

Controlling your ROI

The legitimate, nondiscriminatory reason:

Why did management select the Selectee over Complainant?

Controlling your ROI

- Selecting Official's affidavit:
 - Candidates were asked what experience they had with the records system that the agency uses.
 - Selectee worked with that system for five years, and helped streamline its use for his prior agency.
 - Complainant had never worked with it. He stated that the system is a poor one, and that a different system would be a better choice for the agency.

Controlling your ROI

Is there additional/supporting evidence for management's reason?

Controlling your ROI

- Two other interview panel members corroborate the Selecting Official's statement.
- Interview notes:
 - Each panel member rated Selectee's response to this question "Outstanding."
 - Each panel member rated Complainant's response to the question "Acceptable."

Controlling your ROI

- Does this satisfy management's burden of stating a reason for the action at issue?
- The legitimate, nondiscriminatory reason must be "sufficient 'to allow the trier of fact rationally to conclude' that the agency's action was not based on unlawful discrimination." Johnson v. Postal Service, EEOC Appeal No. 01931010 (1993).

Controlling your ROI

- Can Complainant prove pretext?
- 5 ways:
 1. The question was never asked in the interview,
 2. He did not respond to it as stated,
 3. Selectee did not respond to it as stated,
 4. Complainant's answer was better than "Acceptable,"
 5. Selectee's answer was less than "Outstanding."

Controlling your ROI

- Complainant's rebuttal affidavit:
 - Complainant was asked the question at issue
 - He answered it as stated
 - Complainant claims that his response was objectively better than Selectee's because it "thinks outside the box."
 - Complainant argues that the Selecting Official's refusal to consider alternatives should not reflect on Complainant's interview.

Controlling your ROI

Has Complainant met his burden of proving pretext?

To prove pretext, Complainant must prove "that [management's] reason was false, and that discrimination was the real reason." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993).

But they don't agree with me!



Differing opinions sometimes occur.
Therefore, quality analysis is very important.

But they don't agree with me!

- "In the absence of direct evidence of discrimination, the allocation of burdens and order of presentation of proof in a Title VII case alleging discrimination is a three-step process." Pruden v. Dept. of the Army, EEOC Appeal No. 01970573 (2000).
- In other words, the typical EEO complaint is based on circumstantial evidence.

Was it discrimination?

- Non-selection complaint (disparate treatment)
 - Complainant is Asian, female
 - Selectee is Caucasian, male
- Complainant and Selectee are coworkers in the same office; their first-line supervisor (Caucasian, female) is the Selecting Official (RMO)

Was it discrimination?

➤ Management's reason:

- Complainant and Selectee had identical interview scores, so RMO relied on her personal experience supervising Complainant and Selectee
- RMO had received customer complaints about Complainant's gruff or impatient attitude
- Selectee handled a heavier workload and produced better work products than Complainant.

➤ Does this meet management's burden?

Was it discrimination?

➤ Can Complainant prove pretext?

➤ 3 approaches:

1. Complainant's interview score was better than Selectee's;
2. RMO did not receive any complaints about Complainant's gruff or impatient attitude; or
3. Selectee did not handle a heavier workload or produce better work than Complainant.

Was it discrimination?

➤ Complainant's rebuttal affidavit:

- Complainant's and Selectees interview scores were identical.
- No one has ever complained about her customer service.
- Selectee has been on an extended detail assignment halfway across the country, and RMO had no direct oversight of his work product or his workload.

➤ Does this meet Complainant's burden?

Was it discrimination?

- RMO is re-interviewed for further information.
 - Selectee was on an out-of-state detail, but RMO remained Selectee's first-line supervisor during that time.
 - RMO had received complaints about Complainant, but never documented them.
 - RMO could not recall the names of anyone who ever complained about Complainant's attitude.
- Has Complainant proven pretext?

Was it discrimination?

"In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 (2000).

Was it discrimination?

- Has Complainant proven that the employer's reason was false?
- Has Complainant proven a discriminatory motive?
- Is this an "appropriate circumstance" for the trier of fact (you) to "reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose?"
- What if your supervisor disagrees?
- What if the EEOC disagrees?

Now, let's make things more complicated!



Researching new law will develop yourself professionally and improve your FADs

Complexifying your FAD

- One simple rule with simple FADs:
- Ask yourself, what argument can be made?
- Note, this rule applies to complex FADs too!

A simple scenario?

- Complainant contacts an EEO Counselor 49 days after a non-selection
 - He wanted to discuss the non-selection with management first, to hear the specific reasons for his non-selection
 - Emailed management a request to meet
 - Management did not respond
 - Complainant contacted an EEO Counselor

The CFR - pretty straightforward

An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1).

So what would an attorney argue?

- Reasonable suspicion standard. See Ball v. U.S. Postal Service, EEOC Appeal No. 01871261 (1988).
- Where Complainant would like to hear specific reasons for the non-selection, does he have a reasonable suspicion that discrimination has occurred?
- What does Hadley say?

Cottman v. Def. Investigative Serv.

- Complainant was notified of his nonselection in July 1986.
- On July 26, 1986 Complainant requested the race and age of the selectees.
- Agency replied on April 2, 1987—selectees were a different race and younger than Complainant.
- Complainant contacted an EEO Counselor on April 13, 1987.

Cottman (continued)

- Agency dismissed the complaint.
- OFO overturned, found Complainant's EEO Counselor contact timely under the reasonable suspicion standard.
- EEOC Appeal No. 01873397 (1988).

So now should we accept Complainant's complaint?

- What distinguishes the current case from Cottman?
 - Complainant already knows the age of the selectee
 - Complainant never received a response to his request for more information—Cottman did
- What does westlaw.com have to say?
 - Search term: "reasonable suspicion" /p "failed to respond"

Allen v. EEOC

- August 24, 2004, Complainant was nonselected. States he did not receive notice.
- September 2006, Complainant emailed HR asking who was selected for the position. HR did not respond.
- October 20, 2006, Complainant contacted an EEO Counselor, claimed he suspected discrimination when no one responded to his email.

Allen v. EEOC (continued)

- “The Commission will look at what, if anything, a complainant has learned between the date of the original incident and the event which first triggers the complainant’s suspicion in making a determination as to whether the complainant meets the ‘reasonable suspicion standard.’”
- EEOC Appeal No. 0120072557 (2009).

Applying the law

- Between February 1, 2010 (when he emailed RMO) and February 22, 2010 (when he contacted an EEO Counselor) what, if anything, did Complainant learn that would arouse a reasonable suspicion of discrimination?

Questions?



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