

**CONDUCTING EFFECTIVE DISCOVERY  
IN FEDERAL SECTOR  
ADMINISTRATIVE CASES**

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**WHY CONDUCT DISCOVERY?**

- A. Summary Judgment/Decision without Hearing
- B. Hearing
- C. Settlement

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**WHEN IS DISCOVERY CONDUCTED?**

- Acknowledgement and Order in non-class cases at V. DISCOVERY:
  - Discovery shall be **completed within 90 calendar days from date of receipt A/Order**
  - A party must **initiate discovery within 20 calendar days of receipt of A/Order**

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**WHAT TYPES OF DISCOVERY ARE PERMITTED?**

- Interrogatories
- Requests for production of documents
- Requests for admission
- Deposition
  - Acknowledgement and Order, Section V, Discovery, B

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**WHAT ARE THE PERMITTED SUBJECTS OF DISCOVERY?**

Non-repetitive material evidence

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**EVIDENCE RELEVANT AND MATERIAL TO CLAIMS AT ISSUE**

- A. Define the claims
  - The issue (action taken by the agency); and
  - The basis (protected EEO group characteristic)
- B. Define the elements of the claim
  - (MD-110, Appendices K, L)

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**MODEL FOR ANALYSIS –  
DISPARATE TREATMENT**

Prima Facie Case

- 1) Membership in protected group
- 2) Complainant treated differently from similarly situated employees not in protected group

OR

In the absence of comparative evidence, is there other evidence which indicates that the agency's actions may have been motivated by discrimination?

OR

Is there direct evidence that shows discriminatory intent

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**MODEL FOR ANALYSIS –  
DISPARATE TREATMENT**

• REBUTTAL

What did the agency say was the reason for its treatment of complainant and the compared employees/applicants? How did the agency respond to other evidence, if any, of discrimination?

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**MODEL FOR ANALYSIS –  
DISPARATE TREATMENT**

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for its treatment of complainant is a pretext for discrimination?

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**HOW SHOULD A PARTY RESPOND TO DISCOVERY?**

MD-110, Chap. 7, Hearings, Section D(2) sets out permitted responses to discovery requests

- Compliance with request
- Written objection to request or motion for protective order
- Written agreement/stipulation obviating the request
- Request for extension of time

Party must respond within 30 calendar days from receipt of request

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**HOW DOES PARTY ENFORCE RIGHT TO DISCOVERY WHEN OTHER PARTY DOES NOT PROPERLY RESPOND?**

Motions to Compel

- Within 20 calendar days after receipt of a deficient response or after the response to the discovery is due, whichever first occurs
- Attach the discovery requests and responses
- Identify which items remain in dispute
- State the issues and bases in the case and why discovery sought is relevant and material to claims
- Attach a declaration stating moving party has made good faith effort to resolve the discovery dispute

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**MOST COMMON ISSUES FOR MOVING PARTY IN DISCOVERY DISPUTE**

A. Definitions and Instructions  
If overbroad, will not be enforced

B. Medical records  
Moving party must show both that medical records sought are relevant to issues in case, and that their confidentiality will be protected

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**MOST COMMON ISSUES FOR MOVING PARTY IN DISCOVERY DISPUTE**

Medical Records (cont).

- 1) Medical records should be limited to those relevant to the disability at issue in Rehab Act cases
- 2) Mere fact that complainant seeks "garden variety" compensatory damages does not authorize discovery into his/her medical history

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**COMPARATIVE EVIDENCE**

- What evidence is appropriate comparative evidence of disparate treatment depends on the issue
- Other EEO complaints

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**MOST COMMON ISSUES FOR OPPOSING PARTY IN DISCOVERY DISPUTE**

- Objections
  - Burden on Objecting Party
  - Objections at Deposition
  - Privacy Act
  - Burdensomeness
  - Overbreadth
  - Vagueness

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**MOST COMMON ISSUES FOR  
OPPOSING PARTY IN DISCOVERY  
DISPUTE**

- Incomplete responses
  - Good faith search
  - Response by reference to documents
- Claims of privilege
  - Privilege log
  - *In camera* inspections

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**SPECIAL DISCOVERY ISSUES**

**A. Electronic Discovery**

Electronically stored information (ESI) includes:

- E-mails
- Spreadsheets
- Word processing documents
- Databases
- Voicemail
- Instant messages
- Hard Drives
- Other types of electronic data

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**SPECIAL DISCOVERY ISSUES**

**B. Discovery of Sexual History/Behavior**

In sexual harassment cases, FRE 412 generally prohibits discovery of an employee's "sexual predisposition" or "other sexual behavior" and states that such evidence is inadmissible, unless the employer presents very unusual arguments why the evidence relating to the alleged victim's mode of dress, speech, or life-style, sexual activities or thoughts, should be considered by the fact-finder.

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