Drafting Final Agency Actions

EEO Final Agency Actions

EEOC Regulations require an agency to take a final action on all EEO complaints of discrimination.

29 C.F.R. § 1614.110

Purpose of the Final Agency Action

The final agency decision informs the complainant of:

- The outcome of the claim of discrimination;
- The right to appeal the decision to the EEOC or file a civil action in federal district court;
- The name of the proper defendant; and
- The applicable time limitations.

Basic Elements of the FAD

The final agency decision should include:

- ✓ Names of the parties and case number;
- ✓ A statement of the claim(s);
- ✓ The procedural history;
- ✓ A statement of facts;
- ✓ Legal analysis;
- ✓ Statement of conclusions and relief;
- ✓ Notice of appeal rights; and
- ✓ A dated signature block and certificate of service.

Statement of the Claim

The FAD should clearly and specifically identify the issues and bases raised in the complaint.

Points to Remember

The complainant's claim should not be fragmented, or broken up during EEO complaint processing. Fragmenting a claim compromises the complainant's ability to present an integrated and coherent claim of discrimination.

EEO Management Directive 110, 5(III) (November 9, 1999).

An Example

Susan indicated that her time card was held up because she was a few minutes late, her leave request was denied, a co-worker told a “dumb blonde” joke, she was given a discussion for looking at a catalogue, she was reprimanded for improperly doing her job, she was told to do another employee’s work, she was contacted at home after she called in to report her absence, and she was told to provide a release from her doctor before returning to duty.

How should the writer frame Susan’s claim?

Haga v. USPS, EEOC Appeal No. 01A50404 (January 28, 2005).

Procedural History

The FAD should explain how the case reached the stage where a decision is being issued, or, in other words, how the claim got where it is now.

Statement of the Facts

The statement of the facts should include all material and relevant facts needed to decide the case. In other words, the who, what, where, when, why and how of the claim.

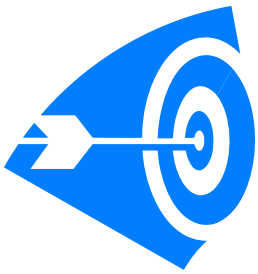
Material Evidence

Evidence is material when it relates to one or more of the claims raised in the complaint, or to an argument raised by the agency in response to the complaint.

EEOC Management Directive 110, 6(VII)(1), (November 19, 1999).

Relevant Evidence

Evidence is relevant if it tends to prove or disprove a material issue raised in the complaint.



EEOC Management Directive 110, 6(VII)(2), (November 19, 1999).

Example

Laura filed a formal complaint alleging discrimination when the agency failed to appoint her to be the closeout Logistics Manager of the Earthquake Service Center. The agency introduced evidence regarding complainant's inability to amicably interact with co-workers. Was this evidence relevant?

Williams v. Federal Emergency Management Agency, EEOC Appeal No. 01A23026 (April 1, 2003).

Legal Analysis

This section should explain the legal and/or factual basis for the decision in a manner which the complainant is able to understand.

Statement of Conclusions

The FAD should state the outcome of the case. This section will give the case closure.

Remedies

The FAD should include a brief statement concerning relief. The agency must provide a remedy when discrimination is found. This can include monetary awards and/or non-monetary awards.

29 C.F.R. § 1614.501.

Monetary Awards

Monetary awards can include such things as:

- Back pay;
- Compensatory damages;
- Attorney's fees; and
- Costs.

Non-monetary Awards

Non-monetary awards, or equitable relief, include such items as:

- Placement into a position, promotion, or reinstatement;
- Benefits, such as insurance, leave, and seniority status;
- Reasonable accommodation;
- Training, both for the complainant or managers;
- Expungement of records, or letters of reference;
- Correction of discriminatory policies; and
- Posting notice of the finding(s) of discrimination.

Statement of Rights

This section will inform the complainant of his or her appeal rights, and the time frames for filing an appeal with the EEOC, MSPB, and/or a U.S. District Court, as applicable.

29 C.F.R. § § 1614.302(d)(3), 402, 407

Final Actions for Dismissals

The EEOC Regulations provide for the dismissal of a complaint on one or more procedural grounds before complainant requests an administrative hearing.

29 C.F.R. § 1614.107(a).

A Point to Remember

The dismissal of a claim cannot be based on the ultimate merits of the allegation.

Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997).

An Example

Kathy, who suffers from an allergic reaction to toxins, filed a formal complaint of disability discrimination, stating that the agency denied her request to move to another building and assign her to another position as a reasonable accommodation. The agency believes that Kathy's condition does not rise to the level of a disability under the Rehabilitation Act.

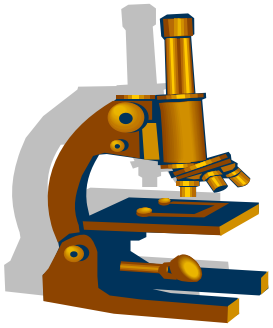
Can Kathy's complaint be dismissed for failure to state a claim?

King v. Department of the Navy, EEOC Appeal No. 01A40422 (March 17, 2004).

Critique of a Sample FAD: Dismissal

Good points about the FAD

What could the writer have done differently?



A Point to Remember

Always include evidence in the case file to support the findings in the final decision.

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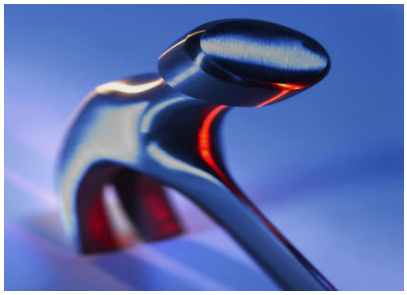
Final Actions on the Merits

The final decision must address the ultimate issue of whether complainant was subjected to discrimination as alleged.



First Element of the Three Part Analysis

In analyzing a claim of discrimination, the final decision should first address whether the complainant has established a *prima facie* case.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

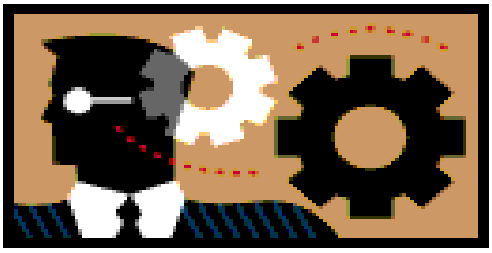
An Example

Ted, a black employee, claimed that he was discriminated against on the basis of his race when he was terminated from his position due to attendance problems. Ted noted that a white co-worker, Sam, had worse attendance than he did, yet was allowed to stay at the agency. Did Ted establish a *prima facie* case?

Jackson v. USPS, EEOC Appeal No. 01A14001 (January 6, 2003).

Second Element

The final decision should then determine whether the agency has articulated a legitimate, nondiscriminatory reason for the action cited.



Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

An Example

After finding that Sam established a *prima facie* case of national origin (Hispanic) discrimination, the agency noted that, nevertheless, there was no evidence that Sam's non-selection was discriminatory.

Is this sufficient?

Garcia v. Department of Homeland Security, EEOC Appeal No. 01A32050 (January 7, 2005).

Another Example

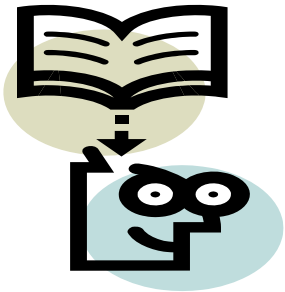
Fred selected Stan instead of John for a Police Officer position. Fred asserted that Stan was the top candidate based upon his experience in law enforcement.

Did Fred articulate a legitimate, nondiscriminatory reason?

Shaw v. Department of Veterans Affairs, EEOC Appeal No. 01A23850 (November 6, 2003).

The Third Element

Finally, the decision must address whether the complainant has shown that the stated reason for the action was really a pretext for prohibited discrimination.



St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

An Example

Fred selected Stan instead of John for a Police Officer position. Fred asserted that Stan was the top candidate based on his experience in law enforcement. John's application showed that he had been employed as a Police Officer for nearly 30 years, including 8 years with the agency, while Stan worked as a Law Enforcement Supervisor for 17 years. Did John show pretext?

Shaw v. Department of Veterans Affairs, EEOC Appeal No. 01A23850 (November 6, 2003).

Critique of a Merits Decision

Good points about the FAD.

What could the writer have done better?

Final Actions Following an AJ's Decision

An agency must issue a final order within 40 days of receiving the hearing record and decision of the AJ. The final order must either fully implement or not implement the AJ's decision.

29 C.F.R. § 1614.110(a).

What Should This Include?

A final order following an AJ's decision should include:

- A statement of the claim and bases raised;
- The procedural history, including hearing information;
- A statement of implementation, that is, whether the agency is or is not fully implementing the AJ's decision;
- A statement of relief; and
- The notice of appeal rights.

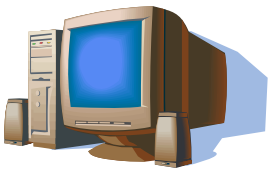
Some Final Tips

When drafting a final agency decision:

- Use clear, plain, and specific language;
- Include all material facts and claims in the legal analysis;
- Cite to evidence in the record to support the decision;
- Date the decision; and
- Tie the law cited to the specific facts of the case.

Additional Information

For more information about writing a final agency action, check the EEOC's Management Directive MD-110 found on the Commission's website at www.eeoc.gov.



Sample Final Agency Action #2

Department of Governmental Affairs
Office of Employment Discrimination Complaint Adjudication
Washington DC

Sue Henry,
Complainant,

v. Case Number: 2005-5006A

Bob Smith,
Secretary,
Department of Governmental Affairs,

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FINAL AGENCY DECISION

INTRODUCTION

In a formal EEO complaint dated September 14, 2003, the complainant alleged that officials at the agency's Headquarters discriminated against her as referenced below. The agency accepted the complaint in its entirety, and conducted an appropriate investigation.

At the conclusion of the investigation, complainant was notified, in writing, of the right to request either a hearing and decision by an EEOC administrative judge, or an immediate final decision by the agency without a hearing. The complainant initially requested a hearing before an administrative judge, but subsequently withdrew her request. Accordingly, the complaint was remanded to the agency for an immediate final decision based on the investigative report. The file was received from the AJ on October 25, 2003.

ISSUE PRESENTED

Whether complainant was discriminated against on the bases of her race (Asian) and sex (female) when, on or about July 2, 2002, she was not selected for the position of Temporary Lead File Clerk.

BACKGROUND

Twelve persons were employed as File Clerks in the File Room of the agency's Headquarters. Documentary evidence contained in the administrative complaint file included a list of seniority based on service computation dates which showed that another employee (Comparative 1; black, male) was first in seniority. The complainant was third

in seniority. A third employee (Comparative 2; white, female) was ninth in seniority, and a fourth employee (Comparative 3; white, male) was twelfth in seniority.

Following the retirement of the Lead File Clerk (black, male) in June 2002, management officials decided not to immediately fill the position on a permanent basis. Management determined that nearly 142 feet of records that had not been filed since 1998 needed to be filed. An agency audit recommended that Comparative 3 be detailed to the position based on his experience purging and maintaining files. On July 1, 2002, Comparative 3 was non-competitively detailed to the Lead File Clerk position.

On July 25, 2002, the Acting Chief Information Officer (Responsible Official; RO; white, female) determined that other file room personnel should be given the opportunity to rotate through the temporary position. She sent an e-mail communication to the file room staff asking them to inform her by July 26, 2002, whether they wanted to be detailed to the Lead File Clerk position. Comparative 1 and Comparative 2 were the first to respond to the offer, followed by complainant. RO directed Comparative 3 to train Comparatives 1 and 2 and complainant in the duties of the position. RO informed complainant that she would be the last of the three to rotate through the position.

According to RO, management intended for Comparatives 1 and 2 and complainant to each serve one month in the position. However, in August 2002, a new Chief Information Officer was appointed, and decided to announce the Lead File Clerk vacancy. At the time of the EEO investigation, complainant had not served in a rotation to the position.

Complainant, a GS-4 File Clerk, alleged that she was discriminated against on the bases of her race (Asian) and sex (female) when she was not appointed to the Lead File Clerk position. Complainant stated that she served as Acting Lead File Clerk in June 2002, immediately following the retirement of the individual who formerly held the position, and that she had been filling in for the Lead File Clerk since 1997. Complainant alleged that management's detail of Comparative 3 to the position violated the collective bargaining agreement, because details were to be based on seniority. Complainant stated that she should have been the first one detailed, but that RO did not want minority employees in leadership positions.

One of complainant's co-workers (C1; white, male) testified on complainant's behalf. C1 stated that he believed complainant had been discriminated against as alleged.

RO stated that she detailed Comparative 3 to serve in the position because he had 24 years of military experience as a supervisor of a unit responsible for filing and maintaining charts. She also stated that she did not refer to the collective bargaining agreement when she made the detail assignments, and detailed Comparative 3 before complainant because she was not aware of the union contract provisions. She denied that race and sex were factors in the decision.

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Comparative 3 stated that he was detailed into the position for approximately two months, and trained Comparatives 1 and 2 and complainant on how to prepare loose leaf files, sort items that needed to be filed, and purge records. He noted that the only reason he could think of for RO not wanting to detail complainant into the position was that she was on light duty at the time which would have prevented her from performing some of the duties.

The Human Resources Liaison Manager (RO2; black, female) stated that she referred RO to the collective bargaining agreement when she became aware of the detail.

ANALYSIS AND FINDINGS

The law prohibiting discrimination based on race and sex is Title VII of the Civil Rights Act of 1964, as amended, Section 701 et seq., 42 U.S.C. 2000e et seq. (Title VII). Federal sector equal employment opportunity regulations are set out in 29 C.F.R. Part 1614.

Generally, the adjudication of a complaint of discrimination alleging disparate treatment under Title VII follows a three-step analysis. First, the burden is on the complainant to establish a prima facie case of discrimination by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This means that the complainant must present a body of evidence such that, were it not rebutted, the trier of fact could conclude that unlawful discrimination did occur. *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977).

Second, if the complainant meets the burden of presenting a prima facie case, then management has a burden of production to articulate a legitimate, nondiscriminatory reason for its actions. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). If management meets this burden of production, the presumption of discrimination raised by the prima facie case is rebutted and drops out of the case. *Id.*

Third, in order to prevail, the complainant must show, by a preponderance of the evidence, that management's stated reason for the action is a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The complainant may show pretext by evidence that a discriminatory reason more likely than not motivated management; that management's articulated reasons are unworthy of belief; that management has a policy or practice disfavoring the complainant's protected class; that management has discriminated against the complainant in the past; or that management has traditionally reacted improperly to legitimate civil rights activities. *Id.*

The elements of a *prima facie* case are determined by the factual circumstances of the case and the bases of discrimination alleged. *McDonnell Douglas, supra.* Here, the complainant alleged disparate treatment based on her race and sex with respect to the selection for a temporary Lead File Clerk position. In order to establish a prima facie case of disparate treatment, complainant must show that she was a member of a protected class, and was treated differently than others outside of her protected class. *Furnco*

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Construction Corp. v. Waters, 438 U.S. 567 (1978). In order for comparative employees to be considered similarly situated, all relevant aspects of the complainant's employment situation must be nearly identical to those of the comparatives. *O'Neal v. USPS*, EEOC Request No. 05910490 (July 23, 1991). Even in cases when there are no similarly situated employees, a complainant may be able to establish a prima facie case by showing a casual relationship between membership in the protected class and the adverse action. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996).

In the present case, the complainant has established a *prima facie* case of sex and race discrimination. She is a member of those protected groups. Further, despite her seniority under the union contract, she was not among the first of the file room employees to rotate into the temporary Lead File Clerk position. Finally, a white male employee with less seniority was detailed to the position, and, therefore, was treated more favorably.

As indicated above, management must rebut a *prima facie* case by articulating a legitimate, nondiscriminatory reason for its actions. This burden has been met by RO, who stated that she initially detailed Comparative 3 because of his experience, and that when she learned of the requirements of the union contract, she immediately offered all file room clerks the opportunity for the assignment. RO noted that Comparatives 1 and 2 responded to her e-mail before complainant. Comparative 3 explained that Comparatives 1 and 2 and complainant were all trained for the assignment together.

Complainant has failed to show by a preponderance of the evidence that the reasons articulated by management are a pretext for race and/or sex discrimination. None of the evidence in the record supports complainant's allegations of discrimination, and one cannot infer from the statements of complainant, and C1 that RO intentionally discriminated against complainant. Indeed, the evidence of record indicates that RO detailed Comparative 3 to be the first to rotate through the position because of his experience outside of the agency managing files. Comparative 3 stated that, despite having less seniority than complainant, he had more experience performing the duties of the position, because of his years of experience performing and supervising the performance of these duties. Also, he thought that complainant would not want to be detailed to the position because she was on light duty at the time. Finally, RO specifically denied discriminating against complainant.

Additionally, complainant has failed to show that management's decision to detail Comparative 3 to the position, and to next rotate Comparatives 1 and 2 before complainant was made under circumstances from which one could infer that it was more likely than not based on a discriminatory motive. It is not a function of the EEO process to restrain management's employment decisions or to substitute another judgment for that of the deciding official. It is not the place of a trier of fact to second guess management's personnel decisions absent a demonstrably discriminatory motive. *Loeb v. Textron, Inc.*, 600 F2d 1003 (1st Cir. 1979).

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CONCLUSION

For the foregoing reasons, the Agency finds that the complainant has failed to establish by a preponderance of the evidence that she was discriminated against with regard to the claims raised in her complaint.

STATEMENT OF RIGHT TO FILE AN APPEAL

Within 30 days of the receipt of this final decision, the complainant has the right to appeal to the Equal Employment Opportunity Commission, Office of Federal Operations, PO Box 19848, Washington DC 20036. If an appeal is filed, EEOC form 573 should be used. A copy of EEOC Form 573 is attached.

A copy of the appeal to the EEOC must also be sent to the agency's Office of General Counsel.

Statements or briefs in support of the appeal must be submitted to the EEOC within 30 calendar days of the filing of an appeal. A copy of any such statement or brief must also be sent to the agency's Office of General Counsel.

If the complainant filed an appeal with the Commission beyond the above-noted time limit, the complainant should provide the Commission with an explanation as to why the appeal should be accepted despite its untimeliness. If the complainant cannot explain why timeliness should be excused, the Commission may dismiss the appeal as untimely.

STATEMENT OF RIGHT TO FILE A CIVIL ACTION

The complainant also has the right to file a civil action in an appropriate United States District Court. The complainant may file a civil action: within 90 days of receipt of this final decision if no appeal to the EEOC has been filed: or within 90 days after receipt of the EEOC's final decision on appeal; or after 180 days from the date of filing an appeal with the EEOC if there has been no final decision by the Commission.

The complainant must name the person who is the official head of the agency as the defendant. Agency means the national organization, and not just the local office, facility, or unit in which the complainant works. The complainant must name Bob Smith as the defendant. The complainant must also state the official title of the agency head. The

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official title of the agency head is Secretary of Governmental Affairs. Failure to provide the name or official title of the agency head may result in dismissal of the case.

FOR THE DEPARTMENT:

(signature)
November 2, 2004 Bob Winslet, Director
Office of Employment Complaints Adjudication

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