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EXCEL 2012

Counseling Skills I and II

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Supervisory Administrative Judge
EEOC Cleveland Field Office

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Anne's EEO Journey

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Meet Anne

Anne, who is 55 years old, works for the Department of the Army as an IT Specialist, GS-11, performing database management functions.

She has been in the job for 5 years.



Anne Applies for a Promotion

In May 2010, Anne applies for the position of IT Specialist (Lead), GS-12.

She is placed on the Best Qualified List, and interviewed for the position.

Anne's Interview

During the interview, Fred, the Director of Information Technology and Anne's third-level supervisor, describes the duties and responsibilities of the Lead Specialist position. He asks how Anne sees her experience, particularly her supervisory experience, fitting those requirements.

After the interview, the Director mentions up-coming management courses being offered at the agency which Anne may want to explore. He also notes that there is a seminar scheduled on planning for retirement.



The Bad News

Anne is notified, at the end of May, that she was not selected for the position in favor of Steve, who is 33 years old.



Anne Fights Back

June 3, 2010, Anne contacts an EEO Counselor about the nonselection. She subsequently files a formal complaint alleging that she was subjected to age and gender discrimination.

As a remedy, she asks for placement in the job, back pay, and \$300,000 in compensatory damages.



Where's the Beef?

How would you characterize Anne's claim?



Disparate Treatment

Anne's complaint presents the issue of whether the agency subjected her to disparate treatment on the bases of her age and gender.

EEOC Regulation 29 C.F.R. § 1614.101.

Disparate Treatment Standards: A Game of Serve and Volley

The Supreme Court stated, in *McDonnell Douglas Corp. v. Green*, that in order to establish a case of disparate treatment discrimination, a complainant must first make a basic *prima facie* case by presenting enough evidence to raise an inference of discrimination. (That's the "serve.")

The agency must then respond to (rebut) the *prima facie* case by articulating legitimate, nondiscriminatory reasons for its action. (That's the "volley.")

If the agency does so, the complainant must show, by a preponderance of the evidence, that the agency's reasons are a pretext for discrimination. (This is a tough return shot to make!)

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

The Basic Prima Facie Case

In order to establish a *prima facie* case of discrimination, Anne must first demonstrate that:

- She is a member of a protected class;
- She applied and was qualified for the position;
- She was not selected for the position and
- Someone outside of her protected groups was selected for the position. (younger and or male)

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996).

Does Anne Have a Case?

Is Anne a member of a protected class?

Yes, by virtue of her gender (female) and age (over 40).

Was she treated differently than others outside of her protected class?

Yes, she was not selected in favor of a younger male.



The Agency's Volley

When asked by the EEO Investigator, Fred stated that he chose Steve because he was the best qualified candidate for the position. He also noted that he was looking for a candidate with a "fresh perspective on how to motivate the team."

Did the agency articulate a legitimate, nondiscriminatory reason for Anne's nonselection?

The Agency Misses

What if Fred had stated only that Steve was "better suited for the position" than Anne?



Fullman v. USPS, EEOC Appeal No. 01A31036 (March 18, 2004).

Anne's Return

How might Anne establish that the agency's stated reason for her nonselection was really a pretext for age or gender discrimination?



Anne's Very Bad Year Continues

In the months following her nonselection and complaint, Anne experiences a run of bad luck.

On June 28, 2010, Anne receives a mid-year performance review. Her supervisor, Sam, notes a number of deficiencies, including poor performance on one project, and difficulty dealing with co-workers and management officials.

Anne has never had any performance problems in the past, and Sam did not cite any specific examples of instances in which co-workers or managers complained about interactions with her.

The Leave Request

On July 7, Anne submits a request for annual leave for her usual summer vacation in August. Sam denies her request, citing staffing issues. He says that too many other employees have already scheduled leave for the period Anne was requesting.



The Project

In mid-July, Anne's Branch is assigned a high profile project. Anne is not assigned to work on the project.

When asked, Sam states that they need someone with experience dealing with high-level officials in other Departments, and who is a "team player."



Other Incidents

Anne attends a staff meeting on July 19, during which Sara, the Branch Chief and Anne's second-level supervisor, comments on the low morale in the Branch, and states that employees should follow the chain-of-command when addressing problems.

Anne later goes to see Sam, and overhears him talking to Sara about a proposal she had made for database enhancements. Sara comments that they need to be careful about criticizing Anne because "she will complain."

Anne Stays the Course

On July 28 Anne stops by the EEO Office to talk to the Counselor who was assigned to her previous case. She mentions the recent incidents, and states that she believes she is being retaliated against.



29 C.F.R. § § 1614.106(d) & 1614.606.

A Basic Case of Retaliation

Anne may establish a *prima facie* case of reprisal by showing that:

- She engaged in protected activity;
- The agency was aware of the protected activity;
- Subsequently, she was subjected to adverse treatment by the agency; and
- A connection exists between the protected activity and the adverse treatment.

Hochstadt v. Worcester Foundation for Experimental Biology, 425 F.Supp 318 (D.Mass), aff'd, 545 F.2d 222 (1st Cir. 1976); Coffman v. Department of Veterans Affairs, EEOC Request No. 05960473 (November 20, 1997).

Point to Remember

In cases of retaliation, adverse treatment need not qualify as an "ultimate employment action," or affect a term, condition, or privilege of employment. Adverse treatment will be found when an action is based on retaliatory motive and is **reasonably likely to deter protected EEO activity**.



"Chilling Effect"

Does Anne Have a Basic Case of Retaliation?

Has Anne engaged in protected activity?
She filed a complaint.

Was the agency aware of the activity?
Sam and Sara both knew she filed.

Was there adverse treatment?
Incidents plus comments of managers.

Was there a connection between the adverse treatment and the protected activity?
Short period of time between the two.

What If?

What if the only adverse treatment Anne experienced was an increased scrutiny of her work by Sam after she filed her complaint, including keeping a careful eye on her time and attendance, and giving her less favorable assignments as compared to the other IT Specialists?

Would she be able to establish a *prima facie* case of retaliation?

Anthony v. Department of the Interior, EEOC Appeal No. 01A20111 (March 10, 2004).

Steve Re-enters the Picture

August 2, Anne is also assigned to a project for which Steve is serving as the Lead Analyst. During the project, Steve will be giving Anne assignments and directing her day-to-day work activities.

Steve approaches Anne and suggests that they have lunch together to talk about the project. Steve tells Anne that he would like to get to know her better. Steve says that, since she has been with the agency for several years, he believes that she can fill him in on the "office gossip."

Anne agrees to go to lunch with Steve on August 4, believing that Steve's invitation is purely professional.

Lunch Discussion

During lunch, Steve initially discusses the project, and asks for Anne's view of the office culture.

While discussing certain co-workers, Steve comments that he believes two employees in the Branch are dating.

Steve notes that he has previously dated women at work, all of whom were older than he was. Steve asks whether Anne is seeing anyone.



Lunchtime Postscript

After lunch, when leaving the restaurant, Steve reaches behind Anne, putting his arm around her, to pull out her chair. Steve also puts his hand on Anne's arm as they are walking out of the door.

Additional Encounters

A few days later, August 8, Steve again asks Anne to lunch, but she declines.

On August 10, Steve comments that the blouse Anne is wearing is pretty, and states that he once bought a similar one for an ex-girlfriend.

Steve also asks Anne to go out for drinks after work on August 12 with some of his friends, an offer which she refuses.



The Final Straw

The following week, on August 16, Steve comes to Anne's office with a memorandum he has written for the project and asks her to review it. Steve stands behind Anne's chair to look at the memo with her, and rests his hands on her shoulders. Anne quickly makes a few comments about the memo, hoping that Steve will leave her office. Instead, Steve massages her shoulders, and tells her that he is really glad she was assigned to the project. Steve also tells Anne that if they spend more "quality time" together, he will recommend her for an award at the end of the project.

Anne tells Steve to take his hands off of her, and rushes from the room.

Anne Seeks Help

After she collects herself, Anne goes to see Sara, the Branch Chief, and tells her that she believes she is being harassed by Steve. At Anne's request, Sara removes her from the project, and initiates an internal agency investigation of the harassment allegations. The Investigator takes statements from both Steve and Anne, but determines on August 23 that there is no corroborating evidence for the harassment allegations.

Anne also telephones the EEO Office to relate the incidents to the Counselor.



Sexual Harassment

A violation of Title VII may be based on either of two types of sexual harassment:

- harassment that results in the employer taking a tangible employment action against the employee; or
- harassment that, while not resulting in the taking of a tangible employment action, creates a hostile work environment.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).



Basic Case: Sexual Harassment

In order to establish a claim of sexual harassment, Anne must show that she:

- belongs to a statutorily protected class;
- was subjected to unwelcome conduct related to his or her gender, including sexual advances, requests for favors, or other verbal or physical conduct of a sexual nature;
- the harassment was based on sex;
- the harassment had the purpose or effect of unreasonably interfering with work performance and/or creating an intimidating, hostile or offensive working environment; and
- there is a basis for imputing liability to the employer.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

Anne's Case

Has Anne shown a basic case of sexual harassment?

Does she belong to a protected class?
Yes, by virtue of her gender.

Was she subjected to unwelcome conduct, or other conduct of a sexual nature? Comments by Steve and his conduct, including touching.

Was the harassment based on sex?

Did the harassment have the purpose or effect of unreasonably interfering with Anne's performance and/or create a hostile environment?

Is there a basis for imputing liability to the agency?
Steve was the Lead IT Specialist.

Agency's Liability: Supervisors

Employers are subject to vicarious liability for unlawful harassment by supervisors.

If the harassment does not result in a tangible employment action, an employer may avoid liability by establishing an affirmative defense that includes:

- the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and
- the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or otherwise avoid harm.

Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999).

Who is a Supervisor?

An individual qualifies as an employee's "supervisor" if:

- the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
- the individual has authority to direct the employee's daily work activities.

Is Steve a Supervisor?

Would Steve be considered Anne's Supervisor?

He is a Team Leader.

Steve gave Anne assignments, and was directing her day-to-day work activities.



Is the Agency Liable for Steve's Conduct?

Did the agency exercise reasonable care to prevent and promptly correct the harassing behavior?

Removed Anne from the project at her request, and initiated investigation.

Did the agency have an anti-harassment policy and procedures in place?

Were employees and supervisors trained in the anti-harassment policy and procedures?

Did Anne unreasonably fail to take advantage of preventative or corrective opportunities provided by the agency or otherwise avoid harm?

Anne reported Steve's conduct to Sara and to the EEO Counselor.

Agency's Liability: Co-workers

An agency is liable for harassment by a co-worker or non-employee if it knew of the harassment and failed to take immediate and appropriate corrective action.



Policy Guidance on Current Issues of Sexual Harassment,
No. 915.050 (March 19, 1990); Owens v.
Department of Transportation, EEOC Request No. 05940824
(September 5, 1996).

Co-worker Harassment

Suppose Steve had not been in a supervisory position over Anne?

- Did harassment occur?
- Is the agency liable?

What If?

Co-worker Steve aggressively gropes Anne on several occasions. In addition, he mentions that he has a permit to carry a concealed weapon, which he keeps locked in his car.

Anne, being fearful of Steve, does not report the harassment. One year later, a female co-worker files an EEO complaint against Steve for sexual harassment and names Anne as a witness. When Anne is contacted by the Counselor, she relates her experience with Steve, and indicates that she also wishes to pursue a claim.

Diggs v. Department of the Army, EEOC Appeal No. 01A12480 (January 9, 2003).

The Plot Thickens

In August 2010, Anne begins to experience a stress-related condition. She becomes fearful whenever a man approaches, particularly if he comes up behind her. Aside from going to work, Anne does not leave her house, and stops interacting with her family and friends. She experiences nightmares and insomnia nearly every night.

Anne is diagnosed with depression, and Post Traumatic Stress Disorder. Anne's psychiatrist determines that her condition is related to her stressful working conditions. The doctor recommends that she attend therapy sessions once each week, and work at home as much as possible to reduce her exposure to stressors in the workplace.

Request for Time Off

On August 26 Anne asks Sam for four hours of leave without pay each week to attend her therapy sessions. She also asks to be allowed to work from home two days each week.

Sam asks for documentation regarding her condition. Anne provides a note from her doctor which includes the diagnosis and therapy recommendation. Sam denies Anne's request on August 31, stating that she has not provided sufficient information.



The Reasonable Accommodation Analysis

An agency is required to make a reasonable accommodation of a known physical or mental limitation of an otherwise qualified individual with a disability unless to do so would cause an undue hardship.

An employee must show a connection between the disabling condition and the requested accommodation.

29 C.F.R. § 1630.9; Wiggins v. USPS, EEOC Appeal No. 01953715 (April 22, 1997).

The Basic Case: Disability

- In order to establish a *prima facie* case of disability discrimination for failure to reasonably accommodate, Anne must show that she is a qualified individual with a disability.

29 C.F.R. § § 1630.2(g) & 1630.2(m).

Individual With a Disability

An individual with a disability is one who:

- has an impairment which substantially limits one or more major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment.

29 C.F.R. § 1630.2(g).

Major Life Activities

Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working and major bodily functions.



29 C.F.R. § 1630.2(i).

Is Anne a Qualified Individual with a Disability?

What is the major life activity?

Interacting with others, sleeping, concentrating.

Is she substantially limited?

Not interacting with family and friends. Does not leave her house except to go to work. Nightly sleep disturbances. Diagnosed with depression and PTSD.

Is she qualified?

Can she do the job with or without reasonable accommodation?

Sam's Request for Medical Documentation

Was Sam's request for medical documentation justified?

When an individual requests reasonable accommodation, an employer may ask for reasonable documentation about the disability and the individual's limitations.



Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (October 17, 2002).

Anne's Requested Accommodations

Were the accommodations Anne requested reasonable?

- LWOP
- Telework



U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

Undue Hardship

To establish undue hardship, the agency must show that the specific accommodation would cause significant difficulty or expense. This takes into account the financial realities of the employer, but is not limited to financial difficulty. Undue hardship refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

Do the accommodations that Anne requested create an undue hardship?

Appendix to 29 C.F.R. § 1630.2(p).

EEO Counselor Skills

Part II

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1

Counselor Reports

The **Critical Tool**
in
Resolving
and
Processing
Federal EEO Complaints

2

The EEO Counselor's Report is Legally Important

To determine:

- Timeliness of the initial contact with an EEO Official and timeliness of the filing of a formal complaint
- Possible acceptance of an untimely complaint
- When an aggrieved had a "reasonable suspicion" of discrimination

3

The EEO Counselor's Report is Legally Important (cont'd)

- To determine the issue(s) actually raised in counseling
- To determine whether the complainant evidenced an intent to file a complaint

4

The EEO Counselor's Report is Legally Important (cont'd)

- To analyze the allegations raised in the formal complaint
- To provide a complete record

5

The EEO Counselor's Report is Legally Important (cont'd)

- To provide pertinent facts in the case
- To provide accurate information to the complainant
- To provide claims of compensatory damages

6

The Effective Counselor's Report

In accordance with Chapter 2, MD-110, one of the critical responsibilities of the EEO Counselor is to "Prepare a report significant to determine that required counseling actions have been taken and resolve any jurisdictional questions that may arise."

7

Jurisdictional Questions?

- Failure to state a claim, stating a pending or already decided claim
- Timeliness, or matter not like or related to counseled matters
- Claim pending or decided by U.S. District Court, in which complainant a party
- Claim raised in another formal forum
- Claim that is moot or preliminary notice
- Complainant cannot be located

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Jurisdictional Questions? (cont'd)

- Complainant's failure to respond to informational request(s) or failure to otherwise proceed with complaint process
- Spin-off complaint (regarding process)
- Abuse of process
 - Numerous filings
 - Claims similar or identical to resolved matters
 - Evidence of circumventing other administrative processes

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The Effective Counselor's Report

The EEO counselor's report is the central document in the formal complaint file, depended upon by the:

- Agency EEO Officer
- Investigator
- EEOC Office of Federal Operations
- EEOC Administrative Judge, and
- In the event of in civil action.

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The Effective Counselor's Report (cont'd)

Following **traditional** counseling, at a minimum the counselor's report **must** contain:

- A precise description of the claim(s) and basis(es) identified by the complainant (the WHO, WHAT, WHEN, WHERE and WHY)
- Pertinent documents reviewed/gathered
- Specific information concerning the timeliness of counselor contact
- If timeliness is a factor, complainant's explanation for delay of counselor contact
- An indication as to whether an attempt to resolve the complaint was made.

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The Effective Counselor's Report (cont'd)

Where an election of **ADR** terminated counseling, the counselor's report **must** include:

- A precise description of the claim(s) and basis(es) identified by the complainant
- Pertinent documents reviewed/gathered
- Specific information concerning the timeliness of counselor contact
- If timeliness is a factor, complainant's explanation for the delay of counselor contact,
- A statement that ADR was elected and the parties did not reach resolution.

NOTE: ADR discussions are confidential. Offers and statements made by parties cannot be used against either party if resolution attempts fail.

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The Effective Counselor's Report (cont'd)

Required Elements

Informational elements required by the EEOC in the counselor's report, as described in Appendix G of MD-110, are:

1. The name, employment status, telephone and address information, and representational status of the complainant.
2. Chronology of counseling.
3. The basis(es) of discrimination.
4. Description of the claims presented to the Counselor.
5. The remedy requested by the complainant.
6. The Counselor's checklist of rights and responsibilities.
7. A summary of the supporting allegations.

The Effective Counselor's Report (cont'd)

Required Elements for Resolution Attempts

1. Persons contacted.
2. Documents reviewed.
3. Summary of resolution efforts.
4. ADR process notification.

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Contributors to an Ineffective and Inadequate Report

- Lack of specificity
- Disorganized material
- Inclusion of irrelevant material
- Failure to identify information sources
- Inclusion of confidential material
- Inclusion of **Counselor opinions**
- Answering the wrong questions
- Failure to identify resolution attempts
- Recommendations and comments on the merits of the case
- Failure to identify date(s) of the act(s) or action(s) at issue

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HELPFUL RESOURCES

- EEOC MD-110
 - Appendix A (Counseling Techniques)
 - Appendix B (EEO Counselor Checklist)
 - Appendix L (Examples of models for establishing a prima facie case of discrimination)
 - Appendix G (Required Elements of the Counselor’s Report)
- Your Agency EEO Guidelines
- Your agency Collective Bargaining Agreement, if applicable
- Your agency Human Resources Guidelines
- www.eeoc.gov
- www.osc.gov
- www.mspb.gov
- www.flra.gov

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COUNSELOR'S AIDS

APPENDICES

SAMPLE OUTLINE

EEO COUNSELOR REPORT

PART I: BACKGROUND OF AGGRIEVED PERSON

NAME: _____

JOB TITLE/ SERIES/GRADE: _____

PLACE OF EMPLOYMENT: _____

WORK PHONE: _____ HOME PHONE: _____

HOME ADDRESS: _____

E-MAIL ADDRESS: _____

FAX NUMBER: _____

PART II: CHRONOLOGY OF EEO COUNSELING:

DATE OF ALLEGED DISCRIMINATORY EVENT: _____

45TH DAY AFTER EVENT: _____

REASON FOR DELAYED CONTACT BEYOND 45 DAYS, IF APPLICABLE:

DATE OF INITIAL CONTACT WITH EEO OFFICIAL: _____

DATE OF PRE-COMPLAINT INTAKE INTERVIEW: _____

DATE OF INITIAL INTERVIEW WITH EEO COUNSELOR: _____

30TH DAY AFTER PRE-COMPLAINT INTAKE INTERVIEW: _____

DATE OF EXTENSION OF COUNSELING: _____

DATE OF FINAL INTERVIEW: _____

DATE COUNSELOR REPORT SUBMITTED: _____

PART III: ORGANIZATION WHERE ALLEGED DISCRIMINATION OCCURRED *(Complete address including office symbol)*

Part IV: RESPONDING MANAGEMENT OFFICIAL(S) INFORMATION *(Include name, agency, title, grade, series, work address, phone number, comparison basis information.)*

PART V: BASIS(ES) FOR ALLEGED DISCRIMINATION:

- (1) Race (Specify) _____
- (2) Color (Specify) _____
- (3) Religion (Specify) _____
- (4) Sex (Specify) _____
- (5) National Origin (Specify) _____
- (6) Age (Specify) _____
- (7) Mental Disability (Specify) _____
- (8) Physical Disability (Specify) _____

- (9) Reprisal (Identify earlier event and/or opposed practice, give date) _____
(10) GINA _____

PART VI: ALLEGATION OF DISCRIMINATION (Specify who, what, where, and when)

Part VII: REQUESTED RELIEF:

Part VIII: RIGHTS AND RESPONSIBILITIES

The aggrieved was provided with the aggrieved person's rights and responsibilities notice and was specifically advised of the following.

- ___ The basis(es) for filing pre-complaint, formal complaint, and/or class complaint, and of right to file a formal complaint of discrimination.
- ___ The pre-complaint, formal and/or class complaint process.
- ___ The 45-day calendar requirement from effective date of personnel action or of the date of the matter alleged to be discriminatory.
- ___ The role of the EEO counselor, including that the counselor is not an advocate for either the aggrieved person or the agency and acts strictly as a neutral.
- ___ The activity's Alternate Dispute Resolution (ADR) Program and right to elect either ADR (if offered) or traditional EEO counseling.
- ___ The right to remain anonymous during the pre-complaint process.
- ___ The right to representation throughout the complaint process.
- ___ Responsibility of the aggrieved to notify the EEO office in writing of any change in address and/or phone number.
- ___ Responsibility of the aggrieved to notify the EEO office in writing of non-attorney or attorney representation, including address and phone number.
- ___ The possible election requirement between a negotiated grievance procedure, MSPB procedure and the EEO complaint process.
- ___ The election options in age and wage-based discrimination complaints.

PART IX: ELECTION OF REPRESENTATION

_____ Attorney _____ Non-Attorney _____ No Representative

Name of Representative:

Address:

Telephone Number: _____

FAX: _____

E-Mail _____

PART X: ALTERNATIVE DISPUTE RESOLUTION (ADR)

_____ Aggrieved wishes to participate in ADR if offered _____
(Signature of Aggrieved)

Result of ADR (If elected and offered):

_____ ADR was successful. Negotiated settlement agreement signed on _____

_____ ADR was not successful. The aggrieved was issued a Notice of Right to File a Formal Complaint of Discrimination on _____, and notified of requirement to file a formal complaint within 15 calendar days after receipt of Notice of Right to File. The aggrieved was provided a Formal Complaint of Discrimination Form.

PART XI

_____ Aggrieved elects Traditional Counseling _____
(Signature of Aggrieved)

Name of assigned EEO counselor _____

Date EEO counselor assigned _____

_____ Election to remain anonymous (Initial)

_____ Election to waive right to remain anonymous (Initial)

_____ Declined to pursue matter in the EEO Complaint Process. _____
(Signature of Aggrieved)

PART XII: SUMMARY OF INTERVIEW WITH AGGRIEVED PARTY *(Include all matters giving rise to this complaint.)*

PART XIII: SUMMARY OF INTERVIEW(S) WITH RESPONDING MANAGEMENT OFFICIAL(S) *(List all witness data here. Number sequentially and include name, title, organization, phone number, and relevant basis(es) information.)*

PART XIV: SUMMARY OF INTERVIEW(S) WITH OTHER WITNESS(es) *(List all witness data here. Number sequentially and include name, title, organization, phone number, and relevant basis(es) information.)*

PART XV: DOCUMENTS REVIEWED *(list)*

Identify significant information from reviewed documents:

PART XVI: OUTCOME OF PRE-COMPLAINT INQUIRY:

SUMMARY OF PRE-COMPLAINT RESOLUTION ATTEMPT

- Resolution obtained. Copy of signed negotiated settlement agreement dated _____, attached.
- Resolution through counseling not attained. Final interview conducted on _____
- Issued written Notice of Right to File a Formal Complaint of Discrimination on _____. Aggrieved person verbally informed of the scope of counselor's inquiry and the reason(s) articulated by management for its action(s). Aggrieved person advised of right to file a formal complaint within 15 calendar days of receipt of the written Notice of Right to File a Formal Complaint of Discrimination; the right to representation during the formal complaint process; the obligation to advise the EEO office of an election to have representation or of any change of residence; and the right to participate in ADR during the formal process if offered. A copy of the Formal Complaint Form was provided.
- ADR terminated/unsuccessful. Aggrieved person verbally advised on _____ of right to file a formal complaint within 15 calendar days of receipt of the written Notice of Right to File a Formal Complaint of Discrimination; the right to representation during the formal complaint process; the obligation to advise the EEO office of an election to have representation or of any change of residence; and the right to participate in ADR during the formal process if offered. Written notice of Right to File a Formal Complaint of Discrimination was issued _____. A copy of the Formal Complaint Form was provided.

Printed Name of EEO Counselor

Signature of EEO Counselor

Date Submitted to EEO Officer: _____

Attachments:

- Extension of counseling (if applicable)
- Copies of reviewed documents
- Rights and Responsibilities Notice
- Signed Settlement Agreement (If Applicable)
- Notice of Right to File Formal Complaint (If Applicable)

OFFICE of EQUAL EMPLOYMENT OPPORTUNITY
EEO COUNSELOR CHECKLIST

You have contacted an EEO Counselor regarding an allegation of discrimination. You have certain rights and responsibilities in the informal EEO process. These rights and responsibilities include:

- a. The right to anonymity.
- b. The right to representation throughout the complaint process including the counseling stage. The EEO counselor is not an advocate for either the aggrieved person or the agency but acts strictly as a neutral in the EEO process.
- c. The right to choose between the agency's alternative dispute resolution (ADR) process or EEO counseling, where the agency agrees to offer ADR in the particular case, and information about each procedure.
- d. The possible election requirement between a negotiated grievance procedure and the EEO complaint procedure.
- e. The election requirement in the event that the claim at issue is appealable to the Merit Systems Protection Board (MSPB), i.e., the dispute is a mixed case.
- f. The requirement that the aggrieved person file a complaint within 15 calendar days of receipt of the Counselor's notice of right to file a formal complaint in the event s/he wishes to file a formal complaint at the conclusion of counseling or ADR.
- g. The right to file a notice of intent to sue when age is alleged as a basis for discrimination and of the right to file a lawsuit under the ADEA instead of an administrative complaint of age discrimination, pursuant to § 1614.201(a).
- h. The right to go directly to a court of competent jurisdiction on claims of sex-based wage discrimination under the Equal Pay Act even though such claims are also cognizable under Title VII.
- i. The right to request a hearing before an EEOC Administrative Judge except in a mixed case after 180 calendar days from the filing of a formal complaint or after completion of the investigation, whichever comes first.
- j. The right to an immediate final decision after an investigation by the agency in accordance with § 1614.108(f).
- k. The right to go to U.S. District Court 180 calendar days after filing a formal complaint or 180 days after filing an appeal.

EEO COUNSELOR CHECKLIST - continued

l. The duty to mitigate damages, e.g., that interim earnings or amounts that could be earned by the individual with reasonable diligence generally must be deducted from an award of back pay.

m. The duty to keep the agency and EEOC informed of his/her current mailing address and to serve copies of appeal papers on the agency.

n. Where counseling is selected, the right to receive in writing within 30 calendar days of the first counseling contact (unless the aggrieved person agrees in writing to an extension) a notice terminating counseling and informing the aggrieved of:

(1) the right to file a formal individual or class complaint within 15 calendar days of receipt of the notice,

(2) the appropriate official with whom to file a formal complaint, and

(3) the complainant's duty to immediately inform the agency if the complainant retains counsel or a representative. Any extension of the counseling period may not exceed an additional sixty (60) calendar days.

o. Where the aggrieved person agrees to participate in an established ADR program, the written notice terminating the counseling period will be issued upon completion of the dispute resolution process or within ninety (90) calendar days of the first contact with the EEO Counselor, whichever is earlier.

p. That only those claims raised at the counseling stage or claims that are like or related to those that were raised may be the subject of a formal complaint, and how to amend a complaint after it has been filed.

q. The identity and address of the EEOC field office to which a request for a hearing must be sent in the event that the aggrieved person files a formal complaint and requests a hearing pursuant to § 1614.108(g).

r. The name and address of the agency official to whom the aggrieved person must send a copy of the request for a hearing. The EEO Counselor should advise the aggrieved person of his/her duty to certify to the Administrative Judge that s/he provided the agency with a copy of a request for a hearing.

s. The time frames in the complaint process.

t. The class complaint procedures and the responsibilities of a class agent, if the aggrieved person informs the EEO Counselor that s/he wishes to file a class complaint.

EEO COUNSELOR CHECKLIST - continued

u. That rejection of an agency's offer of resolution made pursuant to § 1614.109(c) may result in the limitation of the agency's payment of attorney's fees or costs.

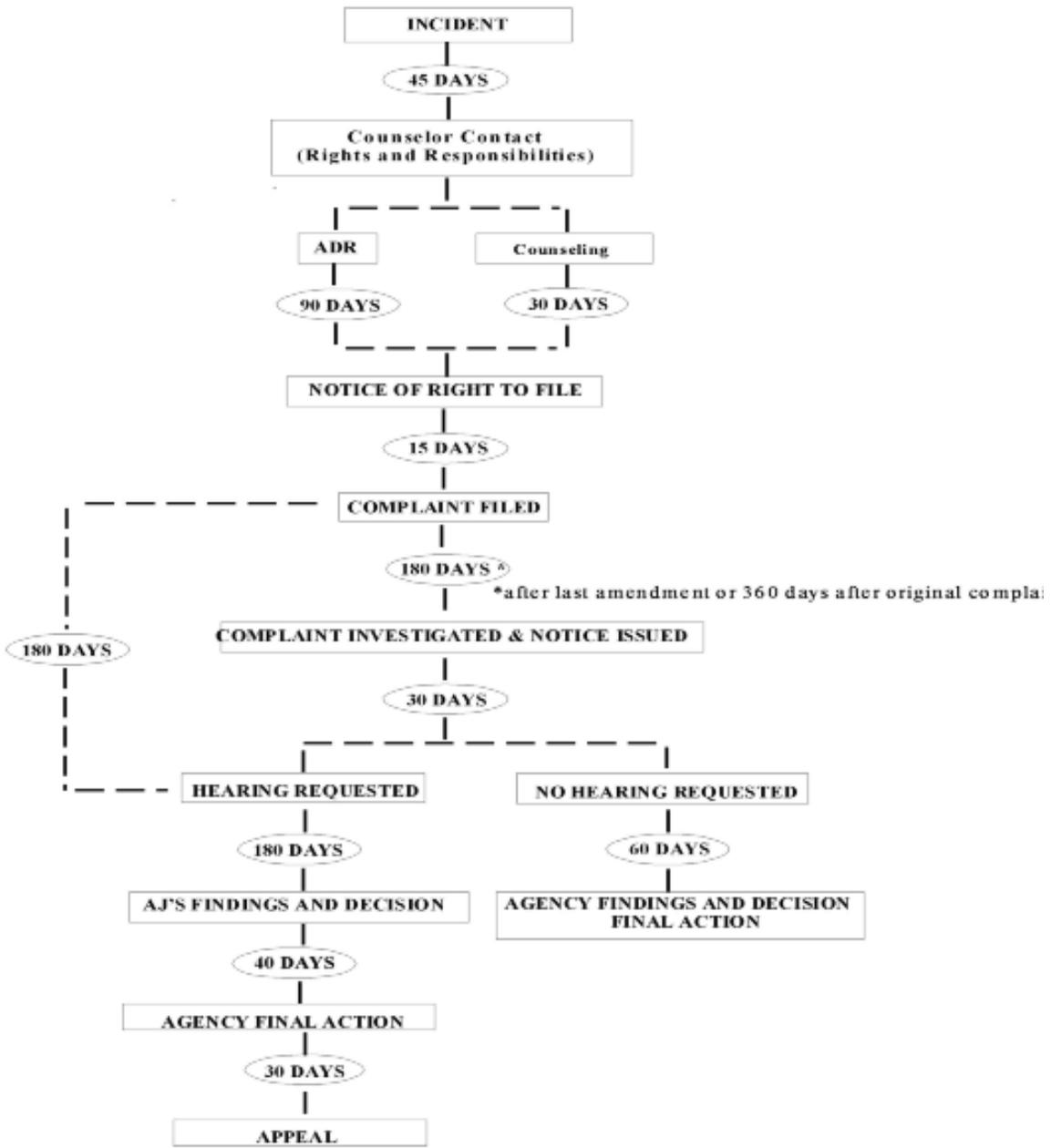
v. That the agency must consolidate two or more complaints filed by the same complainant after appropriate notice to the complainant. § 1614.606. The EEO Counselor should advise the complainant that when a complaint has been consolidated with one or more earlier complaints, the agency shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days of the filing of the first complaint and that the complainant may request a hearing before an EEOC Administrative Judge at any time after 180 days of the filing of the first complaint.

You must acknowledge receipt of this notice of your Rights and Responsibilities:

Signature of Aggrieved Individual Date Notice Received

Please direct any questions to the EEO Counselor you have contacted or to ***, Director of the Office of Equal Employment Opportunity at ****.**

**FEDERAL SECTOR COMPLAINTS PROCESS
29 C.F.R. PART 1614**



* Complainant may file in Civil Court 180 calendar days from filing a complaint with the agency .

(Sample)

Notice to EEO Complainant Seeking Compensatory Damages

I. Introduction

A review of your employment discrimination complaint indicates that you are, or may be, seeking compensatory damages as part of the relief you are requesting, or may be entitled to, should you prevail in your complaint. Compensatory damages are awarded to repay a complaining party for losses or suffering experienced due to the alleged discriminatory act or conduct, if there is a finding of discrimination. In order to allow the agency to evaluate the merits of your claim, you are required to provide substantiating evidence of both pecuniary and nonpecuniary damages, as explained below. In addition, the Equal Employment Opportunity Commission (EEOC) requires that the agency inform you of certain matters relating to your damagers claim.

II. Substantiating a claim for damages

A. Past and Future Pecuniary Compensatory Damages:

1. Past pecuniary losses are monetary expenses incurred as a result of an employer's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable expenses. You should provide documentary evidence of these expenses, such as paid bills, cancelled checks, or receipts.
2. Future pecuniary losses are monetary expenses that are likely to occur after resolution of a complaint, such as the projected cost of physical and/or psychiatric therapy that extends into the future. Statements from appropriate health care professionals are recognized as proper substantiation of such claims.

B. Non-pecuniary Compensatory Damages: Non-pecuniary compensatory damages are monetary compensation for your intangible injuries experienced as a result of an employer's unlawful discriminatory action. Consistent with the guidance from the EEOC, you are advised as follows in regard to claiming and substantiating non-pecuniary damages:

1. You should submit objective evidence, such as statements concerning your emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health and any other intangible losses that you believe you incurred as a result of the alleged discriminatory conduct.

2. You may submit statements from others, including family members, friends, health care providers, other counselors (including clergy) addressing, for example, your outward manifestations, or physical consequences, of emotional distress. Such manifestations may include sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown.

3. Objective evidence, in addition to statements from yourself and others, may include documents indicating expenses, if any, for your medical treatment, counseling, etc., that are related to the injury allegedly caused by the discrimination you have claimed.

III. Information you should know about claims for compensatory damages:

Whether you are claiming pecuniary damages, non-pecuniary damages, or both, please note the following additional requirements:

- A. You must establish a causal connection, or nexus, between the alleged discriminatory action and any resulting physical, emotional or other harm you claim has occurred.

- B. You have the duty to mitigate your damages and may not recover damages for any harm that you could have avoided, or minimized, with reasonable effort.

- C. The EEOC requires that you be advised that your request for compensatory damages may permit the agency to seek personal and sensitive information

from you in order to determine whether the injury you claim is linked solely, partially, or not at all to the alleged discriminatory conduct.

Please provide the requested documentation to this office within _____ calendar days (15 to 30 calendar days – can vary with circumstances) of your receipt of this notice. If you are unable to comply with this deadline, please request an extension in writing.

EEO Officer Signature Block*

***Notes:**

This notice should be sent in a letter, in accordance with Agency guidelines. It is customarily sent with the complaint acceptance notice, if the complaint at all suggests a compensatory damage claim, or later if a claim arises between the filing of the formal complaint and the case's assignment to an EEOC Administrative Judge.

If the complainant has secured an attorney for a representative, this notice would be sent to the attorney, changing "you" and "your" to "your client", as appropriate.

Send the notice by Certified Mail, return receipt requested.

The EEO Officer should immediately provide any responsive documentation received to the Agency Counsel.

Additional Resources

GENERAL

U.S. Equal Employment Opportunity Commission (EEOC) -
<http://www.eeoc.gov/>

U.S. Department of Justice – <http://www.doj.gov>

29 Code of Federal Regulations Part 1614 -
http://www.access.gpo.gov/nara/cfr/waisidx_09/29cfr1614_09.html
<http://www.eeoc.gov/federal/1614final.html>

Management Directive 110
<http://www.eeoc.gov/federal/directives/md110.cfm>

Laws covered by MD-715 Title VII of the Civil Rights Act of 1964-
<http://www.eeoc.gov/laws/statutes/titlevii.cfm>
<http://www.eeoc.gov/policy/vii.html>

Instructions to Federal Agencies for Equal Employment Opportunity
Management Directive 715 (EEO MD-715) -
<http://www.eeoc.gov/federal/directives/md715instruct.cfm>

The Digest of Equal Employment Opportunity Law
<http://www.eeoc.gov/federal/digest/index.cfm>

Commission Federal Sector decisions are available on the EEOC web site at
<http://www.eeoc.gov/federal/decisions.cfm>

Prohibited Personnel Practices - <http://www.osc.gov/ppp.htm>

DISABILITY

Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate
the Provision of Reasonable Accommodation (10/20/00) -
<http://www.eeoc.gov/policy/guidance.html>

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under
the Americans with Disabilities Act –
<http://www.eeoc.gov/policy/docs/accommodation.html>

Additional Resources

DISABILITY – cont.

EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans With Disabilities Act (7/27/00)

<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>

<http://www.eeoc.gov/docs/guidance%1einquiries.html>

Sections 501 and 505 of the Rehabilitation Act of 1973-

<http://www.eeoc.gov/laws/statutes/rehab.cfm> <http://www.eeoc.gov/policy/rehab.html>

Applying MD-715 to Improve Participation of Employees with Targeted Disabilities <http://www.eeoc.gov/federal/directives/md715pwttd.cfm>

Q&A: Promoting Employment of Individuals with Disabilities in the Federal Workforce

<http://www.eeoc.gov/federal/qanda-employment-with-disabilities.cfm>

EEOC Fact Sheet on Work At Home/Telework as a Reasonable Accommodation (2/3/03) <http://www.eeoc.gov/facts/telework.html>

EEOC Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures (10/31/01)

<http://www.eeoc.gov/facts/evacuation.html>

EEOC Enforcement Guidance on the Application of the ADA to the Contingent Workers Placed By Temporary Agencies and Other Staffing Firms (12/22/00)

<http://www.eeoc.gov/policy/docs/guidance-genetic.html>

EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities (2/25/97)

<http://www.eeoc.gov/policy/docs/psych.html> <http://www.eeoc.gov/docs/psych.html>

EEOC Enforcement Guidance: Workers' Compensation and the ADA (9/3/96)

<http://www.eeoc.gov/policy/docs/workcomp.html>

<http://www.eeoc.gov/docs/workcomp.html>

Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (11/95)

<http://www.eeoc.gov/policy/docs/fmlaada.html>

<http://www.eeoc.gov/docs/fmlaada.html>

Additional Resources

DISABILITY – cont.

Compliance Manual Section 902: Definition of the Term Disability (3/14/95)

<http://www.eeoc.gov/policy/docs/902cm.html> <http://www.eeoc.gov/docs/902cm.html>

Questions and Answers about Diabetes in the Workplace and the Americans with Disabilities Act (10/29/03)

<http://www.eeoc.gov/facts/diabetes.html>

EEOC Fact Sheet on Job Applicants and the American with Disabilities Act (10/7/03)

<http://www.eeoc.gov/facts/jobapplicant.html>

ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations (10/10/95)

<http://www.eeoc.gov/policy/docs/preemp.html>

Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force (01/08)

<http://www.eeoc.gov/federal/reports/pwtd.html>

The Americans with Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities

<http://www.eeoc.gov/facts/performance-conduct.html>

VETERANS WITH SERVICE-CONNECTED DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT (ADA): A GUIDE FOR EMPLOYERS

<http://www.eeoc.gov/facts/veterans-disabilities-employers.html>

Final Rule: Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended (Federal Register Notice, March 25, 2011) [PDF]

<http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as>

Questions and Answers: Notice of Final Rulemaking for the ADA Amendments Act of 2008

http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm

Additional Resources

GENETICS

EEOC Policy Guidance on Executive Order 13145: To Prohibit Discrimination in Federal Employment Based on Genetic Information (7/26/00)

<http://www.eeoc.gov/policy/docs/guidance-genetic.html>

<http://www.eeoc.gov/guidance%1egenetic.html>

Final Rule: Regulations under the Genetic Information Nondiscrimination Act of 2008 (Federal Register Notice, March 2, 2009) [PDF]

<http://edocket.access.gpo.gov/2010/2010-28011.htm>

Questions and Answers: Background Information for EEOC Notice of Final Rulemaking On Title II of the Genetic Information Nondiscrimination Act of 2008 http://www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm

HARASSMENT

Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors <http://www.eeoc.gov/policy/docs/harassment.html>

NATIONAL ORIGIN

Enforcement Guidance: National Origin Discrimination

<http://www.eeoc.gov/policy/docs/national-origin.html>

RACE

Compliance Manual Section 15: Race and Color Discrimination –

<http://www.eeoc.gov/policy/docs/race-color.pdf>

Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions

http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Additional Resources

RELIGION

Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Aug. 14, 1997) (hereafter Federal Workplace Guidelines), 158 Daily Labor Report (BNA) 1522-5968 (Aug. 15, 1997) available at <http://clinton2.nara.gov/WH/New/html/19970819-3275.html>

RETALIATION

Compliance Manual Section 8: Retaliation - <http://www.eeoc.gov/policy/docs/retal.pdf>

SEX

Addressing Sexual Orientation Discrimination in Federal Civilian Employment <http://www.opm.gov/er/address2/guide01.htm>

Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation http://www.eeoc.gov/facts/fs-orientation_parent_marital_political.html

Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities <http://www.eeoc.gov/policy/docs/caregiving.html>

NOTES

