

# **Overview of the EEO Process and Best Practices to Avoid Successful EEO Claims**

Zack Fischer and Maria Schmit  
Office of the General Counsel

Civil Rights, Labor and Employment Law Division  
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# OGC, Civil Rights, Labor and Employment Law Division (CRLELD): Structure

- CRLELD – Risk Management Section:
  - Advice to OASCR and Agency CR Directors on processing of informal EEO complaints
  - Guidance on EEO matters prior to a request for hearing
  - Advice to Agency management officials on civil rights issues, reasonable accommodation requests
  - Policy matters for both employment discrimination and program civil rights
  - Advice on labor and employee relations, human resources, personnel matters and veterans' issues
- CRLELD – Litigation Section:
  - Defend the Secretary in employment discrimination cases (after request for a hearing) and program discrimination litigation; MSPB, FLRA, Office of Special Counsel
  - Both administrative and Federal court litigation

# Objectives

- Today's training will help you:
  - Understand of the Federal Sector EEO complaint process; and
  - Learn some best management practices that will minimize complaints and put you in the best position to defend the Agency from EEO complaints or other complaints.

# The EEO Process is Every Employee's Right

- You cannot PREVENT an employee or applicant from filing an employment discrimination or personnel complaint.
- Every employee and applicant has the right to utilize the federal sector equal employment opportunity (EEO) process.
- You CAN adhere to best management practices that may minimize EEO complaints and will put you in the best position to defend yourself from EEO complaints

# **Discrimination Prohibited by the Laws Enforced by the EEOC**

- Race
- Color
- Religion (anti-discrimination and accommodation)
- National Origin
- Sex (including pregnancy, sexual orientation and gender identity)
- Age (40 and over)
- Disability (anti-discrimination and accommodation)
- Genetic Information
- Equal Pay/Compensation
- Sexual Harassment
- Harassment
- Retaliation

# Protected Bases: EEOC/USDA Adjudication

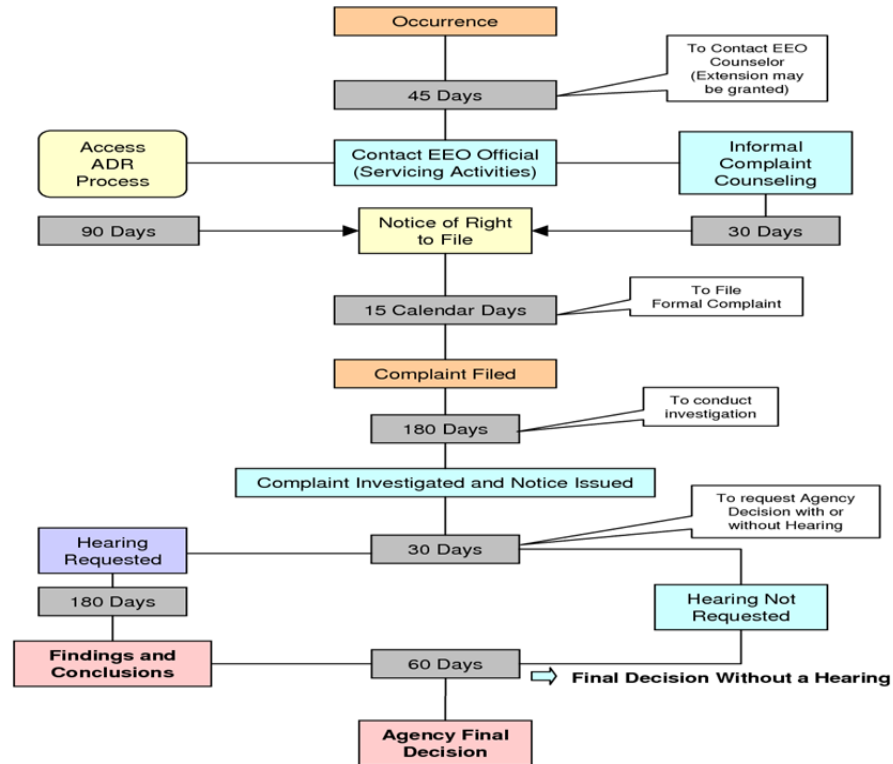
Equal Employment Opportunity Commission	USDA
<p>Race</p> <p>Color</p> <p>Religion (anti-discrimination and accommodation)</p> <p>National Origin</p> <p>Sex (including pregnancy, sexual orientation and gender identity)</p> <p>Age (40 and over)</p> <p>Disability (anti-discrimination and accommodation)</p> <p>Equal Pay/Compensation</p> <p>Genetic Information</p> <p>Harassment</p> <p>Sexual Harassment</p> <p>Retaliation</p>	<p>Political beliefs/affiliation</p> <p>Public Assistance Income</p> <p>Familial/Parental Status</p> <p>Marital Status</p>

# Discrimination

- Discrimination is prohibited in:
  - Hiring, firing
  - Compensation, assignment, or classification
  - Transfer or promotion
  - Job advertisements
  - Pay, benefits, leave
  - Recruitment
  - Terms and conditions of employment
- Discriminatory practices prohibited also include:
  - Harassment on protected bases
  - Retaliation for EEO protected activity.

# Brief Overview of EEO Process

## Federal Sector EEO Complaint Process



\* Complainant has 30 days to file appeal with Commission from agency decision dismissing complaint or deciding complaint on merits.

\* Complainant can file civil action within 90 days of agency decision or commission decision on appeal, or within 180 calendar days after filing complaint or appeal.



# The EEO Process

- Stages of Equal Employment Opportunity (EEO) Process:
  1. Pre-complaint/Informal (Counseling or ADR)
  2. Filing of formal complaint
  3. Acceptance or dismissal
  4. Investigation
  5. Hearing (optional) or Final Agency Decision (FAD)
  6. Appeal to EEOC or District Court

# Filing an Informal EEO Complaint

- Every employee and applicant has the absolute right to use the Federal sector EEO process.
- Generally, federal employees or applicants must seek EEO counseling within 45 days of when they knew or should have known of the alleged discriminatory event, or if the claim involves a personnel action, within 45 days of the effective date of the action. The first step is to contact an EEO Counselor at the agency where they work or where they applied for a job.

# Initiating an EEO Complaint

- Employees or applicants can initiate an EEO complaint by contacting the Civil Rights and Conflict Management Office (CRCMO). CRCMO conducts EEO Counseling and processes Informal Complaints for OCFO. For more information visit their webpage at [Civil Rights and Conflict Management Office \(CRCMO\)](https://inside.nfc.usda.gov/CRCMO/contact.php) (<https://inside.nfc.usda.gov/CRCMO/contact.php>)

# Counseling or ADR

- The EEO Counselor will give the aggrieved person the option of participating in either EEO Counseling or in an alternative dispute resolution (ADR) program, unless the Agency has determined that a particular case is inappropriate for ADR.

# Time Frames

- The Agency's pre-complaint processing is designed around the time frames in the Equal Employment Opportunity Commission (EEOC) regulations. 29 CFR 1614.105.
- Counseling should be completed within 30 days of the date the aggrieved person (AP) contacted the EEO office to request counseling. However, AP may agree to extend the counseling period for an additional 60 days.
- If the AP elects ADR, the pre-complaint processing period is ninety (90) days.
- If the dispute is not resolved in this time frame, the AP must be advised of the right to file a formal complaint.

# EEO Counseling

- If the aggrieved person (AP) elects counseling, the Counselor will:
  - Advise the AP about the EEO complaint process.
  - Conduct a limited inquiry for the purposes of determining jurisdictional questions, and obtaining enough information concerning the claim(s) and basis(es) to allow the agency to identify the legal claim raised if the individual files a formal complaint.
  - Seek resolution. If the dispute is resolved in counseling, the EEO Counselor will document the resolution.
  - If the dispute is not resolved, advise the AP of their right to file a formal discrimination complaint.
  - Prepare a Counselor's Report.

# Alternative Dispute Resolution (ADR)

- EEOC requires agencies to establish or make available an alternative dispute resolution (ADR) program.
- USDA Departmental Regulation 4710-001 establishes USDA's Alternative Dispute Resolution Program that requires agencies to offer ADR at the informal stage, with some exceptions, but the agency chooses the method of ADR
- ADR includes mediation, early neutral evaluation, fact-finding, facilitation, settlement conference.

# Mediation

- Mediation is the most popular form of ADR.
- A neutral third party assists the parties to see if they can reach a voluntary, mutually agreeable resolution.
- Parties have the opportunity to discuss the issues, clear up misunderstandings, and find areas of agreement.
- Mediator does not impose a decision on the parties.
- Resolving Official is a person designated by the Agency with the authority to make, change, accept and approve proposals for resolution during an ADR session.
- The Resolving Official binds the agency by signing a Settlement Agreement, if an agreement is reached. It does not have to be signed at the mediation.
- No waiver of rights if not resolved



# Filing of Formal Complaint

- Formal Complaint
  - If the complaint is not resolved during Counseling or through ADR, the Counselor will issue the aggrieved person a Notice of the Right to File (NRF) a Formal Complaint.
  - The individual must file a formal complaint within 15 days of receipt of the NRF;
  - The formal complaint set forth claims and basis(es);
  - Starts the running of 180-day clock for investigation.

# Acceptance or Dismissal

- OASCR determines if:
  - Complaint is timely
  - States a claim; i.e., does person allege personal injury?
  - Alleges proper basis(es)?
- If accepted, claims defined for investigation.

# Investigation

- Agency has 180 days to conduct investigation. Additional time allowed if claims are amended or with complainant's consent.
- Employees and supervisors must cooperate with the investigator.
- Employees entitled to official time to prepare and present a complaint or respond to inquiries involved in processing complaint.
  - “reasonable amount of official time” depends on each complaint
  - Ultimate authority for determining official time rests with Agency.

# More on the Investigation

- Investigator will:
  - Take statements, under oath, from
    - Complainant
    - Responsible Management Official(s)
    - Other relevant witnesses
  - Collect relevant documents
  - Conduct follow-up investigation, as necessary

# Affidavits

**Your Affidavit, taken by the investigator, is often the first – and possibly ONLY – opportunity to tell your side of the story. Ensure that your statement is completely accurate and thorough.**

- Provide the complete, factual basis for your supervisory actions
- Avoid conclusory responses
- Avoid speculation
- Provide any supporting documents, including your own contemporaneous notes, to support the factual basis for your supervisory actions.

# **Complainant's Option: Hearing or FAD**

- When the investigation is finished, the agency will issue a notice giving the Complainant two choices: either request a hearing before an EEOC Administrative Judge or ask the agency to issue a Final Agency Decision (FAD) as to whether discrimination occurred.
- Complainant has 30 days from receipt to make an election.

# Final Agency Decision

- If the Complainant asks the Agency to issue a FAD, OASCR will issue a written decision on a complaint of discrimination and issue findings based on the claims raised. If discrimination is found, OASCR will issue a remedy.
- If the Complainant asks the agency to issue a FAD and no discrimination is found, or if the Complainant disagrees with some part of the decision, the Complainant can appeal the decision to EEOC or challenge it in Federal District Court.

# Complainant's Option to Request a Hearing Before EEOC

- After investigation, Complainant can request hearing before the EEOC
- If a hearing is requested, EEOC takes jurisdiction and assigns the case to an Administrative Judge
- At any point past 180 days after the alleged discrimination, Complainant can give EEOC a Notice of Intent to Sue in civil court (if the agency has not issued a decision and no appeal has been filed).
- If no hearing is requested, OASCR will issue a Final Agency Decision



# Hearing Stage

- Litigation Hold
- Discovery
  - Production of Documents
  - Interrogatories
  - Deposition
- Motion for Summary Judgment
- Hearing before Administrative Judge
  - Witnesses testify under oath
  - Subject to cross-examination
- Administrative Judge issues decision

# Final Agency Action

After the EEOC Administrative Judge renders a decision:

- Agency can
  - Fully implement; or
  - Decline to implement and appeal to EEOC (rare)
  
- Complainant can
  - Accept the Administrative Judge's decision;
  - Appeal to EEOC; or
  - Go to U.S. District Court

# More on the EEO Process

- Official Time Uses
  - Employees are entitled to a reasonable amount of official time to prepare administrative EEO complaints, and to respond to requests for information. Work with your civil rights office to make the determination on official time.
- Duty to Cooperate
- Confidentiality

# **Cooperation is Required in the EEO Process**

**Do I have to cooperate?**

Yes, per EEOC regulation 29 CFR 1614.108(c) and USDA Departmental Regulation 4070-735-00, Employee Responsibility and Conduct (2007), you must cooperate.

# With Whom May I Discuss a Pending EEO Complaint?

- These matters are confidential. Therefore, you should not be discussing your affidavit or anything about the case with other witnesses or potential witnesses.
- There is no need to discuss the fact that an employee filed an EEO complaint with any other employees besides Agency Civil Rights staff or others who have a need to know, e.g., Investigator, or Agency litigators.
- Not discussing EEO complaints also protects managers from involvement in complaints of reprisal.
- Direct any questions to the Agency Civil Rights staff and/or OGC CRLELD.

# BEST PRACTICES

- Open Communication
- Honest, Accurate, Timely Appraisals
- Discipline Appropriately
- Document Your Actions
- Be Consistent in the Selection Process
- Respond Promptly to Reasonable Accommodation Requests
- Respond Immediately to Allegations of Harassment
- Understand the Federal Law of Retaliation
- Do Not Take EEO Complaints Personally
- Do Not Engage with Employees Through Social Media

# Best Practices: Communication

- **Open Communication:** Communicate with staff regularly and openly
  - Many EEO complaints are based on nothing other than a **breakdown in communication** that has reached a boiling point
  - Create an environment of respect and open communication
  - Apply common sense and good management practice

*“Good leaders inspire people to have confidence in them. Great leaders inspire people to have confidence in themselves.” (Unknown)*

# Best Practices: Appraisals

- **Provide Honest, Accurate and Timely Appraisals:**
  - Employees should know how you view their work **contemporaneously**
  - Gives an employee the ability to make course corrections
  - Gives you a record of working to seek improvement
  - Feedback to employees should occur beyond required mid-year and yearly evaluations
  - Make sure performance elements and position descriptions match the current expectations for the positions and the actual functions of the jobs



# Best Practices: Address Conduct and Performance Issues Early

- Address conduct and performance issues early
- Make sure you have addressed performance issues with the employee and fully documented performance issues leading to an unacceptable rating or demonstration opportunity/PIP.
- Make sure you have fully documented conduct issues leading to disciplinary action. Work with Employee Relations.
- Do not take any actions without a contemporaneous and detailed record to support the actions

# Best Practices: Discipline

- **Discipline Appropriately:**
  - Always be fair and accurate
  - Be consistent with all subordinates
  - Seek advice from Human Resources/Labor and Employee Relations
  - Ensure that the language you use in describing employee misconduct is clear, concise, and – above all – accurate
  - For disciplinary actions, make sure you can provide support for the *Douglas* factors (prior disciplinary history, mitigating factors, etc.)

# Best Practices: Documentation

- **Document, Document, Document:**
  - Do not take any actions without a contemporaneous and detailed record to support the actions
  - Make sure documentation is signed and dated
  - Leave a record for your successors
  - Memos to yourself are excellent tools

# Best Practices: Selection Process

- **Be Consistent and Fair in the Selection Process:**
  - If interviewing, ensure consistent interview questions
  - Ensure interview questions are tailored to position description
  - Ensure, consistent procedures during selection process
  - Do not ask questions based upon protected categories
  - Managers and panel members should take, and keep, contemporaneous records of interviews during selection process
  - There should not be anything in anyone's notes that cannot be shared
  - Do not destroy interview notes – keep in their native format

# Best Practices: Reasonable Accommodation Requests

- Respond promptly to Reasonable Accommodation (RA) requests.
- Engage in the interactive process (IP)
- Consult OCFO RA Coordinators.
- Maintain confidentiality.
- Liability can arise from failure to engage in the IP.
- Do not need to have intent to discriminate to be found liable.
- Remember --
  - Do not always have to accommodate
  - Do not always have to give accommodation of choice
  - But must always engage in the IP

# Best Practices: Harassment Allegations

- Respond to allegations of harassment promptly:
- Report any incident of harassing conduct witnessed or otherwise brought to your attention to your OCFO Anti-Harassment Coordinator (AHC).
- Take immediate interim action, if appropriate, to prevent or mitigate harassing conduct during an inquiry or investigation into the allegations.
- Know your resources – Take AH Training, review [USDA DR 4200-003, Anti-Harassment Program \(4/18/23\)](#), and consult OCFO AHC, ER, and/or CR, as appropriate.
- Remind workforce of anti-harassment policies and program.
- Follow-up with employee to ensure behavior has stopped.

# Best Practices: Understand Retaliation

- Retaliation is treating someone differently or adversely because they:
  - Participated in protected activity by:
    - Contacting EEO counselor;
    - Filing an EEO complaint;
    - Requesting a reasonable accommodation;
    - Being named as a witness in someone else's complaint;
    - Representing a complainant;
  - Opposed a discriminatory practice or policy

# Best Practices: More About Retaliation

- Retaliation survives an underlying claim of discrimination **that may lack merit**
- Retaliation carries a lower threshold for adverse actions – “likely to deter a charging party”
- Liability can extend past the actual employment – job references
- Comments by supervisors that are likely to chill employees from engaging in EEO activity are often considered by the EEOC to be violations of the law against retaliation for EEO activity.



# Best Practices: Avoiding Retaliation

- **Know How to Avoid a Successful Retaliation Claim:**
  - Ensure your reason for action was correct and did not change as a result of the prior EEO activity
  - Ensure you treated the employee the same (no better or worse) as you would treat all other employees in the same situation
  - Ensure you follow established procedures to implement adverse action
  - Ensure that you document your reasoning
  - Do not discuss fact that an employee filed an EEO complaint with any other employees.
    - Protects managers from involvement in complaints of retaliation
    - One of the elements of a retaliation claim is that management knew of the prior complaint or protected activity

# Best Practices: Avoiding Retaliation (cont'd)

- **Avoid Common Retaliation Pitfalls:**
  - Do not over-scrutinize an employee just because he filed an EEO complaint
  - Show no preference for other methods of resolving workplace issues
  - Classic mistake – *“I wish you would have come to me instead of filing this EEO claim;” “Your filing an EEO complaint hurt my feelings”*
  - It is okay to offer “open door policy” but do not ask employees to use it **instead of** EEO process
    - Another ex. “Let’s try to sit down and work this out ourselves”
  - Show respect for the EEO process
  - Supervisors: Do not try to “settle” a complaint on your own.

# Reacting to EEO Complaints

- **Do Not Take EEO Complaints Personally**
  - There are many reasons why an employee may file an EEO complaint
  - Employees have the absolute right to use the EEO process
  - Do not treat a complaint as frivolous no matter how right you think that you are
  - Do not take unwarranted action against employees.
  - Avoid venting your frustrations and reactions on your colleagues in the workplace.
  - Do not disclose to others that do not have a need to know that an employee filed a complaint.

# Best Practices: Social Media

- **Do Not Engage with Employees or Investigate Applicants Through Social Media**
  - Do not use social media sites to search for information on employees or applicants without consultation with OGC
  - Best not to be “friends” or “follow” your staff on any social media platform
  - Search of information not included in hiring packet but available on social media may subject hiring manager to claims of discrimination, even if not relied upon
  - Problems with reliability of information on social media and on the internet in general
    - Is it the right person?
    - Is there an explanation of which the hiring official is not aware?

# Civil Rights and Conflict Management Office Contact Information

- If you have questions or would like more information about EEO Policies, Procedures or Processes, please visit Civil Rights and Conflict Management Office (CRCMO) website at [Civil Rights and Conflict Management Office \(CRCMO\)](https://inside.nfc.usda.gov/CRCMO/contact.php) (<https://inside.nfc.usda.gov/CRCMO/contact.php>) or email: [SM.OCFO.CRCMO@usda.gov](mailto:SM.OCFO.CRCMO@usda.gov)

# OCFO RA Coordinator Contact Information

The Lead Reasonable Accommodation Coordinator (RAC) for OCFO is:

- Julieanna Walker, SPHR, MSOM
- Chief, Employee and Labor Relations
- National Finance Center
- Office of the Chief Finance Officer (OCFO)
- Reasonable Accommodations Coordinator
- Email: [Julieanna.walker@usda.gov](mailto:Julieanna.walker@usda.gov)
- Phone: 504-226-3726

# OCFO Anti-Harassment Coordinator (AHC) Contact Information

The OCFO Anti-Harassment Coordinator (AHC) for OCFO is:

- Julieanna Walker, SPHR, MSOM
- Chief, Employee and Labor Relations
- National Finance Center
- Office of the Chief Finance Officer (OCFO)
- Reasonable Accommodations Coordinator
- Email: [Julieanna.walker@usda.gov](mailto:Julieanna.walker@usda.gov)
- Phone: 504-226-3726

# Contact OGC

- Steven Brammer, Associate General Counsel for Civil Rights, Labor & Employment Law Division
- 202-720-4375; [steven.brammer@ogc.usda.gov](mailto:steven.brammer@ogc.usda.gov)
  
- Vacant, Civil Rights, Labor & Employment Law -- Litigation Section
  
- Emily Tasman, Assistant General Counsel, Civil Rights, Labor & Employment Law – Risk Management Division  
202-720-6056; [emily.tasman@ogc.usda.gov](mailto:emily.tasman@ogc.usda.gov)