

# THE EEO COUNSELORS' AND INVESTIGATORS' MANUAL

*By Ernest C. Hadley, Eleanor Laws, and Michael Corum*

## TABLE OF CONTENTS

---

### INTRODUCTION TO DISCRIMINATION LAW AND PROCEDURE

#### SECTION 1 - THE EEO STATUTES AND PROCESS

- I. INTRODUCTION
- II. STATUTES ENFORCED BY EEOC
  - A. Title VII of the 1964 Civil Rights Act
    - 1. Civil Rights Act of 1991; Compensatory Damages
  - B. Rehabilitation Act of 1973
    - 1. Americans with Disabilities Act
    - 2. Civil Rights Act of 1991
  - C. Age Discrimination in Employment Act
    - 1. Exhaustion of Administrative Remedies
    - 2. Older Workers' Benefits Protection Act
  - D. Equal Pay Act
    - 1. Exhaustion of Administrative Remedies
- III. THE EEO ADMINISTRATIVE PROCESS
  - A. Agency EEO Programs
  - B. Precomplaint Counseling
    - 1. Alternative Dispute Resolution
  - C. Notice of Final Interview
    - 1. EEO Counselor's Report
  - D. Formal Complaint
    - 1. Acknowledgment of Complaints
  - E. Dismissal of Complaints
    - 1. Partial Dismissals
  - F. Agency Offers of Resolution
  - G. New Complaints after Counseling
    - 1. Amendment of Complaints
    - 2. Consolidation of Complaints
  - H. Investigation of Complaints
    - 1. Report of Investigation
    - 2. Notice of Hearing Rights
  - I. EEO Hearings
    - 1. Complaint File

- 2. Discovery
    - 3. Hearing Decisions
      - a. Dismissal Decisions
      - b. Summary Judgment
      - c. Decision after Hearing
  - J. Final Agency Action
    - 1. No Hearing Requested
      - a. Dismissal Decisions
    - 2. Hearing Requested
  - K. EEOC Appeals
    - 1. Agency Appeals
      - a. Interim Relief
    - 2. Complainant Appeals
    - 3. EEOC Appeal Standards
    - 4. Requests for Reconsideration
- IV. EEOC CLASS COMPLAINT PROCESS
  - A. Class Certification Requirements
    - 1. Numerosity
    - 2. Commonality and Typicality
    - 3. Adequacy of Representation
  - B. Precomplaint Counseling
    - 1. Exception to Counseling
  - C. Formal Complaint
  - D. Agency Processing
  - E. Processing by EEOC Administrative Judge
    - 1. Notification of Class Members
    - 2. Development of the Record
    - 3. Resolution of Complaints
    - 4. Hearings
    - 5. Recommended Decisions
  - F. Final Agency Decisions
    - 1. Individual Relief
  - G. EEOC Appeals
- V. CIVIL ACTIONS

## **SECTION 2 - THEORIES OF DISCRIMINATION**

- I. INTENTIONAL DISCRIMINATION
  - A. Methods of Proof
    - 1. Circumstantial Evidence
    - 2. Direct Evidence
      - a. Liability vs. Relief
      - b. Direct Evidence Rules
    - 3. After-Acquired Evidence Defense
  - B. EEOC's Intentional Discrimination Model
- II. DISPARATE OR ADVERSE IMPACT DISCRIMINATION

- A. Method of Proof
- III. REASONABLE ACCOMMODATION DISCRIMINATION
  - A. Disability Discrimination
    - 1. Method of Proof
    - 2. Individual with Disability
      - a. Impairment
      - b. Major Life Activities
      - c. Substantial Limitation
      - d. Substantial Limitation in Working
    - 3. Qualified Individual with Disability
      - a. Essential Functions
      - b. Position in Question
    - 4. Request for Accommodation
      - a. Written Procedures
    - 5. Reasonable Accommodation
    - 6. Undue Hardship
  - B. EEOC's Reasonable Accommodation Model
  - C. Religious Accommodation
- IV. HOSTILE ENVIRONMENT DISCRIMINATION
  - A. Methods of Proof
    - 1. Tangible Employment Actions
      - a. Definition of Employment Action
    - 2. Hostile Environment Harassment
      - a. Establishing Hostile Environment Claim
      - b. Liability for Harassment
- V. REPRISAL
  - A. Methods of Proof
    - 1. Protected Activity
      - a. Participation Clause
      - b. Opposition Clause
    - 2. Adverse Action Requirement
    - 3. Causal Connection
  - B. EEOC's Retaliation Model

### **SECTION 3 - REMEDIES FOR DISCRIMINATION**

- I. MAKE WHOLE RELIEF
  - A. Personnel Actions
    - 1. Subsequent Promotions
  - B. Back Pay
    - 1. Mitigation
    - 2. Overtime
    - 3. Interest
  - C. Front Pay
  - D. Benefits
    - 1. Leave

- 2. Health Care
- II. COMPENSATORY DAMAGES
  - A. Pecuniary Damages
  - B. Nonpecuniary Damages
    - 1. Taxes
- III. RETIREMENT ISSUES
- IV. ATTORNEY FEES
  - A. Eligibility
  - B. Method of Calculation

## **EEO COUNSELORS' MANUAL**

### **SECTION 1 - THE EEO COUNSELOR'S ROLE**

- I. RESPONSIBILITIES OF THE EEO COUNSELOR
  - A. Giving Information about the Process
  - B. Collecting Information about the Complaint
  - C. Defining the Claims
  - D. Conducting a Limited Factfinding
  - E. Trying to Resolve the Case
  - F. Issuing the Notice of Final Interview
  - G. Submitting the Counselor's Report
- II. WHAT THE COUNSELOR SHOULD NOT DO
  - A. Judge or Evaluate the Case
  - B. Recommend Options to the Complainant
  - C. Investigate the Case

### **SECTION 2 - THE INITIAL INTERVIEW**

- I. COUNSELOR CONTACT
  - A. Administrative Details: When, Where and How
    - 1. Official Time
    - 2. Location of the Interview
      - a. Anonymity
    - 3. Right to Representation
    - 4. Preparing for the Interview
- II. FORMAT FOR INITIAL INTERVIEW
  - A. Explaining the Purpose
    - 1. Waiver of Anonymity
  - B. Explaining the Process; Giving Notices
  - C. Getting the Complainant's Version of Events
  - D. Getting Down the Details
  - E. Determining the Claims Presented
  - F. Identifying the Basis of Discrimination
    - 1. Basis Not within EEO Purview

- G. Discovering What the Complainant Wants
- H. Identifying Witnesses and Documents
- I. Schedule the Next Appointment

### **SECTION 3 - IDENTIFYING, DEFINING THE CLAIMS**

- I. DEFINITION OF "CLAIM"
  - A. Definition of "Issues"
  - B. Definition of "Evidence"
  - C. Significance for the Counselor
- II. IDENTIFYING THE CLAIMS
  - A. Components of a Claim
    - 1. Allegation by the Complainant
    - 2. Personal Harm
      - a. Hostile Environment
      - b. Reprisal
    - 3. Agency Action
    - 4. Protected Status or Activity
  - B. Articulating the Claim
    - 1. Stating the Claim Precisely
    - 2. Stating the Claim Concisely
    - 3. Incorporating the Legal Theory
- III. REVIEW OF CLAIMS WITH COMPLAINANT

### **SECTION 4 - FACTFINDING DURING COUNSELING**

- I. PURPOSES OF FACTFINDING
  - A. Qualifying Information
  - B. Resolution Information
- II. EEOC FACTFINDING GUIDANCE
- III. SOURCES OF INFORMATION
  - A. Documents
    - 1. Privacy Act
    - 2. Classified Information
  - B. Witnesses
    - 1. Confidentiality
    - 2. Documenting Interviews

### **SECTION 5 - RESOLUTION OF COMPLAINTS**

- I. DEFINING RESOLUTION
  - A. Why Resolution is Important
  - B. Requirements of Settlement
- II. STRATEGIES FOR OBTAINING RESOLUTION
- III. TECHNIQUES FOR RESOLUTION
  - A. Joint Meetings with the Parties

- B. Separate Meetings with the Parties
- C. Telephone Communications
- D. The Mediation Model
- IV. DRAFTING RESOLUTION AGREEMENTS
  - A. Basic Rules of Draftsmanship
  - B. Form of Agreement
  - C. Specific Terms of Agreement
    - 1. Withdrawal of Complaints
    - 2. Personnel Actions
      - a. Back Pay
      - b. Personnel Records
      - c. Benefits
    - 3. Retirement Issues
      - a. Disability Retirement
      - b. Regular Retirement
  - D. Future Complaints
  - E. Specific Resolution Clauses
    - 1. Nonreprisal Clauses
    - 2. "Zipper" or Integration Clauses
    - 3. Confidentiality Clauses
    - 4. Compensatory Damage Clauses
    - 5. Attorney Fees
  - F. Authority to Settle
  - G. Older Workers Benefits Protection Act

## **SECTION 6 - INTERVIEWING TECHNIQUES**

- I. PLANNING THE INTERVIEW
  - A. Arranging the Interview
  - B. Representation for Witnesses
- II. STARTING THE INTERVIEW
  - A. Opening Statement
    - 1. Fact Witnesses
    - 2. Responding Management Officials
- III. THE INTERVIEW
  - A. Framing Questions
  - B. Focusing the Interview
- IV. CONCLUDING THE INTERVIEW
- V. DEALING WITH REPRESENTATIVES

## **SECTION 7 - MSPB APPEALS AND GRIEVANCES**

- I. NEGOTIATED GRIEVANCE PROCEDURE
  - A. EEOC Review
- II. MSPB APPEALS
  - A. MSPB Jurisdiction

- 1. Constructive Removals
    - 2. Cases Not Within MSPB Jurisdiction
  - B. Election of Rights
  - C. Mixed Case Procedures
    - 1. Mixed Case Complaints
    - 2. Mixed Case Appeals
  - D. EEOC Review
  - E. Civil Actions
- III. OTHER PROCESSES
  - A. Administrative Grievance Procedures
  - B. Federal Labor Relations Authority
  - C. Office of Special Counsel
  - D. Office of Personnel Management
  - E. Office of Workers' Compensation Programs

## **SECTION 8 - THE EEO COUNSELOR'S REPORT**

- I. PURPOSE OF REPORT
- II. PRINCIPLES OF REPORT WRITING
- III. ELEMENTS OF THE REPORT
  - A. Qualifying Information
  - B. Resolution Efforts
- IV. SAMPLE COUNSELOR'S REPORT

## **EEO INVESTIGATORS' MANUAL**

### **SECTION 1 - THE EEO INVESTIGATOR'S ROLE**

- I. RESPONSIBILITIES OF THE EEO INVESTIGATOR
  - A. Developing the Factual Record
    - 1. Factual Record vs. Legal Conclusion
    - 2. Importance of Factual Record
    - 3. Scope of Factual Record
  - B. Noting Sanctionable Conduct
  - C. Developing Record on Other Claims
  - D. Facilitating Resolution
  - E. Prepare Report of Investigation
- II. TIME LIMITS FOR INVESTIGATION
  - A. Redacting Classified Information
  - B. Amendments or Consolidation
- III. WHAT INVESTIGATOR DOES NOT DO
  - A. Act as a Mediator
  - B. Recommend Findings or Conclusions

### **SECTION 2 - INVESTIGATIVE PRINCIPLES**

- I. OBJECTIVITY OF INVESTIGATION
  - A. Complaints by EEO Office Employees
  - B. Complaints by Other Employees
    - 1. RMO Has No EEO Responsibilities
    - 2. RMO has EEO Responsibilities
      - a. Improper Processing
      - b. Other Cases
- II. THOROUGHNESS OF INVESTIGATION
  - A. Relevant Evidence
    - 1. Inadequate Investigations
      - a. Failure to Interview Witnesses
      - b. Relevant Documentation Not Included
    - 2. All Claims not Included
  - B. Balancing the Record
- III. COOPERATION WITH INVESTIGATORS
  - A. Scheduling the Interview
  - B. Cooperation by Investigators
    - 1. Representation
    - 2. Official Time
  - C. Cooperation by Agency Witnesses
  - D. Cooperation by Complainant
  - E. Cooperation by Third Parties

### **SECTION 3-EVIDENTIARY ISSUES**

- I. CHARACTERISTICS OF EVIDENCE
  - A. Relevancy
  - B. Materiality
  - C. Reliability
- II. EVIDENCE RELATED TO REMEDIES
  - A. Compensatory Damages
    - 1. Pecuniary Damages
      - a. Mitigation
    - 2. Nonpecuniary Damages
      - a. Medical Evidence
    - 3. Evidence of Causation
  - B. Reasonable Accommodation Cases

### **SECTION 4-SCOPE OF INVESTIGATION**

- I. DEFINING THE CLAIMS
  - A. The Investigation Plan
  - B. Review for Fragmentation
- II. DISTINGUISHING CLAIMS AND EVIDENCE
  - A. New Evidence
  - B. Background Evidence

- C. Continuing Violations
- III. CLAIMS RAISED DURING INVESTIGATION
  - A. Amendments
    - 1. Adding Basis of Discrimination
    - 2. Investigation Timeframes
  - B. New Claims
    - 1. Consolidation of Complaints
  - C. Examples of Evidence and New Claims

## **SECTION 5-COLLECTING EVIDENCE**

- I. GENERAL SOURCES OF EVIDENCE
  - A. Intentional Discrimination
    - 1. Circumstantial Evidence
      - a. Witnesses
      - b. Documents
    - 2. Direct Evidence
    - 3. EEOC's Intentional Discrimination Analysis
  - B. Reprisal
  - C. Discrimination Based on Harassment
    - 1. Hostile Environment Harassment
      - a. Witnesses
      - b. Documentation
    - 2. Tangible Employment Actions
      - a. Witnesses
      - b. Documentation
  - D. Reasonable Accommodation
    - 1. Witnesses
    - 2. Documentation
  - E. Religious Accommodation

## **SECTION 6 - INVESTIGATIVE TECHNIQUES**

- I. INDIVIDUAL INTERVIEWS
  - A. Interviewing the Witness
  - B. Memorializing the Interview
- II. FACTFINDING CONFERENCES
- III. REQUESTS FOR INFORMATION
  - A. Affidavits
  - B. Interrogatories
  - C. Requests for Documents
- IV. REPRESENTATION
  - A. Complainant's Representative
  - B. Agency Representative
  - C. The Union

## **SECTION 7 - REPORT OF INVESTIGATION**

- I. PURPOSE OF ROI
- II. CONTENTS OF REPORT
  - A. Investigative Summary
  - B. Style of Summary
  - C. Contents of Summary
  - D. What Not to Include
- III. FORMAT OF REPORT

## **APPENDIX**

- I. 29 CFR PART 1614
- II. EEOC MANAGEMENT DIRECTIVE 110
  - A. CHAPTER 2—PRECOMPLAINT PROCESSING
  - B. CHAPTER 6—DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS
  - C. MD-110, APPENDIX A: EEO COUNSELING TECHNIQUES
  - D. MD-110, APPENDIX B: EEO COUNSELOR CHECKLIST