

## **SECTION 3**

# **REMEDIES FOR DISCRIMINATION**

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All relief under Title VII, the Rehabilitation Act and the ADEA flows from the simple premise that a victim of discrimination should, as nearly as possible, be placed in the position he or she would have been in but for the prohibited discrimination. The premise is simple enough, but applying that premise to the almost infinite variety of personnel actions, terms, conditions and privileges of employment is not always so simple.

Understanding the possible scope of relief in a discrimination complaint is critical to both the EEO Counselor and Investigator. In the first instance, it is the Counselor who must advise the complainant on the available remedies. The complainant's decision on whether to proceed with a formal complaint may well be affected by what the complainant stands to gain, if successful. To the extent that either the Counselor or the Investigator hopes to facilitate settlement between the complainant and the agency, understanding what is at stake in the complaint is fundamental to settlement. The scope of the investigation can be impacted by the available remedies in a case. Particularly, with the passage of the Civil Rights Act of 1991, complainants may be eligible for awards of compensatory damages. If so, then the investigation will have to include documentation of any harm that the complainant has suffered as a result of the alleged discrimination.

The Commission has summarized its own position on the remedies available to complainants at 29 CFR 1614.501. The Commission has divided the relief available into three general categories:

- The relief available in all cases in which there is a finding of discrimination;
- The relief available to an applicant for employment when there is a finding of discrimination; and
- The relief available to an employee or former employee when there is a finding of discrimination.

Although the relief to victims of discrimination is based on the "make whole" concept, there is another factor that drives the relief ordered by the EEOC when there is a finding of discrimination. As a federal agency, the mission of the EEOC is not just to adjudicate federal sector discrimination cases. It has a far broader role in the private sector. In both sectors, the statutory mission of the EEOC includes promoting equal opportunity and eradicating discrimination in the workplace. To promote those goals, when the Commission enters a finding of discrimination in a federal sector case, in addition to ordering that the victim be made whole, it orders corrective relief that is aimed at preventing future violations of the law.

The prevailing complainant in an EEO case under Title VII, the Rehabilitation Act or the EPA also is entitled to an award of attorney fees and costs. Because both the standards that apply to fee awards and the procedures for awarding fees are different than the standards and procedures that apply to other forms of relief, fees and costs are discussed separately below. For a full discussion of remedies, see Hadley's *A Guide to Federal Sector Equal Employment Law and Practice* (Dewey Publications 2001).

### **I. MAKE WHOLE RELIEF**

"Make whole" relief, true to its name, is designed to make a prevailing complainant whole, *i.e.*, put the complainant in the position he or she would have been if discrimination had not occurred. Although compensatory damages are also intended to make a complainant whole, they are distinct from other traditional remedies, and are discussed separately below.

**A. Personnel Actions**

The most obvious form of relief when discrimination is found is that the agency will be required to fully rescind the personnel action it took as a result of discrimination or to take the action it failed to take as a result of discrimination. If the agency suspended or removed an employee as a result of discrimination, it will be required to rescind the suspension or removal. If the agency failed to hire or promote an employee as a result of discrimination, it will be required to hire or promote the employee.

As part of its effort to take or rescind the required personnel action, the agency must expunge all records of the adverse action or create the records necessary to reflect the required action was taken at the appropriate time. Particularly with regard to the employee's Official Personnel File and related files, the object should be to create a record that, if viewed by someone without personal knowledge of the complaint of discrimination, would not reveal that a complaint of discrimination was ever filed or that the agency was required to take corrective action as a result of that complaint. In some instances, this will require that documents be removed from the employee's files and, in other instances, this will require that documents be created and placed in the files in the proper chronological sequence. This means that documents generated to take or rescind a personnel action should not reflect the action was taken or rescinded as a result of an EEO decision.

The Commission requires that a victim of discrimination be placed in the position he or she was actually denied or a substantially equivalent position. 29 CFR 1614.501(a)(3). Although the plain language of the regulation seems to give the agency the discretion to elect which remedy to grant, in practice the Commission employs a balancing test to determine if placement in a substantially similar position is appropriate: The rights of the victim of discrimination to a particular job are weighed against the disruption to agency in giving the victim that job.

The clear preference of the Commission is resolve any doubts in favor of the victim of discrimination. As a general rule, the Commission subscribes to the view that displacement of a so-called "innocent beneficiary" of discrimination to effect a remedy for discrimination is required. The fact that the person who obtained a job as a result of discrimination is not at fault does not give that person a superior right to the job in question.

#### 1. Subsequent Promotions

It is not unusual for a complainant to believe that if he or she had been selected for the position at issue in the complaint some other promotion would have followed. The party that bears the burden of proof on claims for subsequent promotion depends on the nature of the promotion:

- If the promotion was noncompetitive, the agency bears the burden of establishing by clear and convincing evidence that the complainant would not have received the subsequent promotion even absent discrimination.
- If the promotion was competitive, the employee bears the burden of proving the likelihood that he or she would have been promoted absent the discrimination.

#### B. Back Pay

Another obvious form of make whole relief is that the employee must be compensated for any pay lost as the result of a discriminatory personnel action or the discriminatory failure of the agency to take a personnel action. The employee must be granted back pay from the effective date of the personnel action through to the date the agency actually corrects the discriminatory personnel action.

In cases where the discriminatory action resulted in the agency's failing to hire an employee or resulted in the employee's termination, the employee may be entitled to the full amount of the back pay. In cases where the complainant's employment has continued with the agency from the time of the discrimination through to the time of relief, the employee is entitled only to the difference between the pay he or she actually received and the pay he or she would have received but for the discrimination. Assume an employee making \$30,000 per year is discriminatorily denied a promotion to a position that pays \$40,000 per year. Assume further that the case takes exactly one year to resolve. The employee is not entitled to \$40,000, but only the difference between \$40,000 and \$30,000, or \$10,000.

The agency is responsible for documenting all back pay calculations so that the complainant and the Commission on review, if necessary, can determine if those calculations are correct. Failure to fully document the calculations can result in the Commission awarding full pay for the period in question.

### 1. Mitigation

The complainant has a duty to mitigate damages, but the burden of proving a failure to mitigate damages is upon the agency. 29 CFR 1614.501(d). The agency must demonstrate by a preponderance of the evidence that the complainant has not mitigated damages.

Fortunately, problems over mitigation of damages arise in only a small percentage of EEO cases. Much of the reason the issue does not arise more often, as it does before the MSPB where most removal cases are heard, is that many EEO complainants continue to be employed by the agency between the time the complaint is filed and the time it is resolved. The agency cannot accuse an employee who has continued to work in his or her position of failing to mitigate damages by not terminating employment with the agency and looking for a higher-paying job.

### 2. Overtime

A complainant is entitled to be paid for overtime that was missed as a result of discrimination. Overtime pay calculations can become quite complex, but the general rule is that the complainant is entitled to pay for the average amount of overtime worked by similarly situated employees during the period covered by the discriminatory action. The general rule does not apply in all cases, but the agency will need to justify any decrease in the basic formula and the complainant will need to justify any claim to an increase in the basic formula.

### 3. Interest

The agency is liable for interest on back pay awards where sovereign immunity has been waived. 29 CFR 1614.501(b)(1)(ii), (c)(1)(ii). Sovereign immunity has been waived for most federal agencies.

Interest is computed based on the net back pay and not the gross back pay. Taxes are deducted prior to the calculation of interest. It is the Secretary of Treasury overpayment rate under 26 USC 6621(a) and the Federal Judgment Interest rate that applies in calculating interest on back pay awards. *Id.*

### C. Front Pay

Front pay is by no means a common remedy. In fact, it is rare. However, it is mentioned here because it does require some very specific evidentiary showings on the part of the complainant. As a remedy, front pay is awarded only in cases where it is impossible to return the employee to the work environment.

Front pay can be awarded in three circumstances:

- 1) There is no position available for the complainant;
- 2) Where the working relationship between the parties would be antagonistic or hostile; or
- 3) Where the employer has demonstrated long-term resistance to antidiscrimination efforts.

Front pay may not be awarded where the employee cannot return to work as the result of medical conditions. In order to qualify for an award of front pay, the complainant must be ready, willing and able to work.